CHAPTER XIII

Migration Based on Refugee Deals Across the World: Comparisons with the EU-Turkey Deal

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Abstract

Refugee deals are increasingly prevalent as states attempt to transfer their obligations under the Refugee Convention. The EU-Turkey deal, originally in the form of the Statement, is the most discussed deal within the European states, however, it is not the only deal considering the status of the refugees. This study aims to examine various refugee deals and compare them with the EU-Turkey deal. The comparative elements are based on the Michigan Guidelines on Protection Elsewhere, which defines basic pre-conditions for compliance with state´s obligations under the Refugee Convention within the arrangements with third states. Therefore, this study discusses the legal nature of selected refugee deals, their compliance with the international refugee law and human rights law, and the necessity for safeguards. The analysis reveals that each arrangement is different. Although all refugee deals aim to strengthen the border security of states and prevent human-trafficking, they have different objectives for transferring asylum seekers, different modus operandi, and impacts on human (and refugee) rights of the asylum seekers. A significant finding is that each asylum case should be assessed individually to ensure that the rights of particular person guaranteed by particular states are not infringed.

Keywords: human rights, migration, Refugee Convention, refugee deal, safeguards, third state

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1. Introduction

The EU-Turkey refugee deal was adopted as the EU-Turkey statement. The form of this deal differs from similar arrangements across other regions of the world, such as North and South American and Oceania. Accordingly, to clarify and reflect the fact that the terminology is not legally correct, this article uses the term "refugee deal" to refer to arrangements regarding the responsibilities of State Parties of the UN Convention Relating to the Status of Refugees (1951) (the Refugee Convention).[1]

The EU-Turkey deal was not the first and only refugee deal. European States have had opportunities to be inspired by other refugee deals in addressing their international obligations. Along these lines, the European Union had a chance to learn from previous refugee deals and their ineffectiveness, as well as violations of asylum law and the rights of asylum seekers or humans as such. In particular, participants in future deals should take note of the negative legal implications that such agreements have already had for human rights.

Refugee deals (i.e. offshore asylum policies or cooperative asylum arrangements) play a huge role in border control regimes in several states. Notably, outsourcing asylum to a third country has become a global trend since the 9/11 terrorist attacks; specifically, this strategy has been used to achieve greater border control and security. Outsourcing states provide funding for asylum systems and border control, including for the transit or diversion of asylum seekers by third countries. For example, the EU has provided funding to countries such as Albania, Libya, Niger, Tunisia, and Turkey to help them work with asylum seekers before they reach Europe. Similarly, the United Kingdom (UK) is planning to provide funding to Rwanda to support the transfer of migrants arriving in the UK by boat.

Despite their intended purpose, as highlighted by the United Nations High Commissioner for Refugees (UNHCR),[2] refugee deals that involve transferring asylum seekers to third countries can exacerbate issues of human trafficking and various forms of exploitation. The UNHCR therefore provides alternatives to such transfers, including resettlement programmes, family reunification measures, and humanitarian visas. There are also serious concerns regarding breaches of international legal obligations related to the principle of non-refoulement. Specifically, such breaches may occur when a State Party bound to the Refugee Convention sends a refugee with a well-founded fear of persecution back to their country of origin or to another State in which the refugee may be unsafe. In most cases, asylum seekers are not able to secure regular, safe transportation to a potential country of asylum, especially the UK.[3] Moreover, transferred asylum seekers have no access to effective judicial pro-

1 United Nations High Commissioner for Refugees (UNHCR) (2010) 'Convention and Protocol Relating to the Status of Refugees' UNHCR. December [Online]. Available at: https://www.unhcr.org/media/convention-and-protocol-relating-status-refugees (Accessed: 30 November 2023).

2 *UN Expert Urges UK to Halt Transfer of Asylum Seekers to Rwanda*, 2022.

3 Morrison, 2022.

tection and due process. In 2021, the UNHCR stated in its Annex to the UNHCR Note on the Externalization of International Protection[4] that policies and practices for the externalisation of international protection to avoid responsibility or to shift burdens are contrary to the Refugee Convention and principles of international cooperation and solidarity. Such policies include unilateral or cooperative measures to intercept or prevent the arrival of asylum seekers and the processing of asylum claims in or by a third State without adequate safeguards that shift the burden of international protection to other States.

Whether we are talking about externalizing, offshoring, outsourcing, or regionalizing asylum and migration management or cooperative asylum arrangements that shift the responsibility of asylum, we are always talking about some form of refugee deal. In Europe, the topic of migration is primarily of a political nature. Notably, the topic of migration is often misused or even abused by States even if they are barely affected by the so-called 'migration crisis'.

From a legal point of view, we need to differentiate between refugee law and migration law. Although both areas of law deal with state border crossings, they are not the same. The rules of migration and refugee law are only connected when the migrant is in the position of a refugee (per the conditions established in the Refugee Convention) and is crossing the borders of a particular State in order to seek protection. The rules of refugee law are not applicable when the migrant does not qualify as a refugee. Therefore, the rules of refugee law and migration law need to be distinguished. Refugee and asylum law aim to protect human rights and humanity in general; meanwhile, migration law aims to protect the security and economy of the State.[5] The validity of refugee law for a particular migration case is determined based on which category of "foreigner" the person in question falls into.[6] Regarding this terminology, we must differentiate between the terms "migrant" and "refugee", which refer to two distinct statuses of person from the point of view of refugee and asylum law. A "migrant" is a broad status applicable to persons seeking better living conditions abroad; meanwhile, a "refugee" is a status applicable to persons seeking international protection against persecution in their countries of origin. In the case of the massive influx of migrants to European states, this difference in terminology often did not apply given a lack of border controls (for better or worse in terms of the protection of the refugees).[7] It is appropriate here to make clear that the UNHCR's mandate situates the status of "refugee" as covering not only persons with a well-founded fear of persecution on certain grounds, but also other large groups of persons without the protection of their country of origin. An essential element in this delineation of refugee status is the crossing of international borders to flee conflicts; human rights violations; breaches of international humanitarian law; or

4 UNHCR, 2021, p. 1–3.
5 Scheu, 2016, p. 21.
6 Scheu, 2016, p. 25.
7 Scheu, 2016, pp. 26–27.

serious harm based on political, social, or economic reasons and changes in one's home country.[8]

Any offshoring asylum arrangement mainly impacts migration based on existing refugee policies—border States are not able to determine whether incoming persons are refugees or economic migrants without further examining their status on these terms. One of the prerequisites for permitting the transfer of refugees to a third country is the fulfilment of the elements of effective protection.[9] According to the UNHCR,[10] effective protection is especially important in the context of the secondary movements of refugees and asylum seekers. The blanket designation of a state as safe may lead to a situation in which the individual circumstances of an asylum seeker's position make her/his country unsafe for her/him. Such persons have no obligation under international law to seek international protection at the first effective opportunity, but also have no right to choose which country will examine their claim for international protection (e.g. asylum).

In applying any measure to transfer refugees to a third country, a State should be aware of its obligations according to international law and the specific circumstances of the case at hand. Regarding the assessment of effective protection for transferred persons in a third country, the UNHCR[11] recommends the evaluation of several elements as critical factors in relation to the third country, including (not exhaustively) whether: a) there is any risk that the transferred person will be subjected to torture or cruel, inhuman, or degrading treatment or punishment; b) there is respect for fundamental human rights following applicable international standards; c) there is any risk that the third country would send the transferred person to another country without effective protection; d) the third state has explicitly agreed to readmit the transferred person as an asylum seeker or a refugee; e) the actual practice of the third country is in compliance with the international refugee instrument and basic human rights instruments, with particular attention to its compliance with the Refugee Convention (regardless of whether the third country is a State Party to the Refugee Convention); and f) the third country grants the person access to fair and efficient procedures for the determination of refugee status. In general, if refugees enjoy the fundamental human rights common for citizens and foreigners, these rights are generally assured, due process of law is acknowledged, and measures of appeal and judicial review permit examination of the merits and legality of administrative decisions, the country is recognised as providing sufficient protection to refugees.[12]

The measures for transferring refugees to a third country are based on other concepts of protection. To ensure the implementation of such international legal obligations, academics gathered at the Colloquium on Challenges in International Refugee

8 Goodwin-Gill and McAdam, 2011, p. 49.
9 Foster, 2007, p. 224.
10 UNHCR, 2003.
11 Ibid.
12 Goodwin-Gill and McAdam, 2011, p. 393.

Law in 2007 and prepared the Michigan Guidelines on Protection Elsewhere.[13] The guidelines refer to situations in which a State acts on the basis that the protection needs of a refugee should be considered or addressed somewhere other than in the territory of the State where the refugee has sought, or intends to seek, protection. It reflects the minimum requirements imposed by international law within the implementation of the protection elsewhere policies, particularly those related to the possibility of the implementation of the protection elsewhere practices (legitimacy), respect for refugee rights, and safeguards.

The purpose of this chapter is to comparatively analyse refugee deals from different parts of the world, such as Europe, America, and Australia in light of these requirements. Ultimately, this chapter aims to identify the elements of protection elsewhere policies. The article is divided into four sections. The first section outlines examples of refugee deals from different parts of the world and their legal natures. The second section examines the safe third country concept and compliance with refugee rights based on the Refugee Convention (especially the principle of non-refoulement). The third section discusses safeguards from the view of particular refugee deals. The fourth section deals with the failure of solidary between States and the possibilities related to future refugee deals.

2. Refugee deals

In recent decades, many State Parties to the Refugee Convention adopted various measures to fight smuggling and human trafficking; however, in practice, they did so to discourage persons from seeking protection as refugees in developed countries. Although such measures differ (e.g. from visa requirements to deportation chains), their purpose is the same: to prevent persons from accessing the opportunity to be granted protection in the territory of the State in which they are seeking protection (in relation to all refugees or certain categories) based on a transfer to a third country in which the person will find protection.[14]

This phenomenon related to refugee deals is not new. At the beginning of the 20th century, Palestine—under American and British mandates—used visa restrictions, naval interceptions, island detention centres, and other practices to block the arrivals of Jews fleeing Europe, which continued throughout the atrocities of World War II. Meanwhile, countries such as the Dominican Republic and Ecuador welcomed Jewish refugees to gain political and economic support. Earlier, during World

13 *Colloquium on Challenges in International Refugee Law: The Michigan Guidelines on Protection Elsewhere*, 2007, pp. 207–221; para. 11 et seq.

14 Foster, 2007, p. 224.

War I, Armenians, Greeks, and Russians sought protection as refugees through the Nansen Office and Intergovernmental Committee of Refugees.[15]

Today, refugee deals are referred to as "cooperative asylum arrangements". In this context, the responsibility for asylum shifts from the State in which the refugee seeks protection mostly to developing countries. Although these arrangements differ, they all externalise the basic functions of border control in relation to asylum processing and protection[16] to a third country.

2.1. The EU-Turkey deal

In the EU legal system, the Dublin III Regulation is the main legal tool used to determine which country is responsible for making decisions about asylum applications.[17] Such determinations should be based on the following criteria (in hierarchical order): family considerations, the recent possession of a visa or residence permit in a Member State, and whether the applicant has entered the EU irregularly or regularly.[18] During the massive influx of migrants, the Dublin III Regulation placed the responsibility for asylum applications on EU Member States based on the criterion of the first entry; this placed huge pressure on States such as Greece, Italy, Slovenia, and Hungary. The asylum systems of these countries were overburdened and contested, giving rise to reforms across the whole Common European Asylum System based on the principle of solidarity and the fair sharing of the responsibility for examining asylum applications.[19] This is the subject of this part of the chapter.

In response to massive migration flows from countries in the Middle East, Asia, and Africa, which peaked in 2015, EU Member States started to look for solutions to the high numbers of migrants coming to Europe day after day. These high rates of incoming migrants were due to issues such as armed conflict in Syria; drought across the Middle East; imbalances in security in Pakistan and Afghanistan; the persecution of Rohingya people in Myanmar; war, conflicts, and uninhabitable conditions in central African states (Sahel); and very low living standards in these countries. Additionally, asylum seekers were also coming to Europe from the countries of their first asylum, such as Turkey or Jordan, which had the highest numbers of asylum seekers.[20] The main issue was that the high number of incoming migrants could not be processed by the relatively low number of migration office staff in EU Member States, especially these on the outer side of the Schengen borders.

15 Morris, 2023.
16 Tan, 2022.
17 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 (recast), OJ L 180, 29.6.2013, pp. 31–59.
18 European Commission, 2020.
19 Ibid.
20 Banulescu–Bogdan and Fratzke, 2015.

In 2015, the EU-Turkey deal, in the form of the EU-Turkey statement, was adopted.[21] The statement was published in the form of a press release on the European Council website, which clarifies the commitments of both parties. Turkey's main commitment was the readmission of every irregular migrant from Greece based on the rules of international and EU law (especially the prohibition of collective expulsion and the principle of non-refoulement), which was based on the main goal of ending the suffering of migrants and maintaining public order. Greece's commitment was to ensure that every migrant arriving to Greece would be duly registered and that Greek authorities would individually process every asylum application. If migrants did not apply for asylum or their applications were unfounded or inadmissible, they would be returned to Turkey at the cost of the EU. The EU-Turkey deal established that for every Syrian migrant returned from Greece to Turkey another Syrian would be resettled from Turkey to the EU based on the UN Vulnerability criteria.[22] Therefore, the EU-Turkey deal did not apply to every irregular migrant, but only Syrian refugees.

The EU-Turkey deal had very limited positive consequences. Notably, although migrants' incomes declined immediately following the adoption of the EU-Turkey deal, this trend did not last a long time. Specifically, statistics[23] show that the numbers of migrants coming to European countries have increased annually, including after the adoption of the EU-Turkey deal. The EU-Turkey deal also led to the partial closing of Turkey's borders with European countries, which positively impacted the workload of asylum systems in Greece and Italy.[24] However, the change in migration routes put more pressure on the asylum systems of Spain and France. Broadly, the EU-Turkey deal mainly changed migration routes, leading to routes that were much more dangerous than those that stretched through Turkey.[25]

The EU-Turkey deal has been the subject of much discussion. It was originally announced as a non-binding statement—a political agreement between the members of the European Council, the heads of States or governments of the Member States, and Turkey. The legal obligations of each party were not considered. (The legal review was part of the judicial review by the European Court of Justice ("ECJ"), which is detailed below in the discussion of safeguards).

2.2. The US-Canada deal

In December 2002, the United States and Canada adopted a bilateral agreement for cooperation in the examination of refugee status claims from nationals of third countries (the "US-Canada deal")[26] as part of the Smart Border Action Plan. This

21 European Council, 2016.
22 See, UNHCR, 2016, p. 7–26.
23 Eurostat, 2023.
24 European Commission, 2018, p. 30.
25 European Council, 2023; Frontex, 2023.
26 Government of Canada, 2002.

deal was designed to enhance the States' sharing of responsibility for refugee status claims. As Macklin[27] stated, the deal has two components. First, the readmission component, which establishes that the country of last presence shall accept the return of an asylum seeker from the receiving country, the refugee determination, which maintains that the Party that ultimately admits the asylum seeker shall also adjudicate the refugee claim. This Party should also prevent chain refoulement or the refugee in orbit problem, in which the claimant moves from one country to another until she/he returns to her/his country of origin without a refugee determination process.

According to the aim of the document, we can compare the US-Canada deal to the Dublin Regulation in EU law. The purpose of the US-Canada deal is to ensure that refugee claimants can access a refugee status determination system. Responsibility for determining the refugee status claim rests on the receiving country rather than the country of last presence. The receiving country determines that the refugee claimant a) has in its territory at least one family member with refugee or lawful status, b) has in its territory at least one family member aged at least 18 years old with a pending and eligible claim for refugee status, c) is an unaccompanied minor, or d) arrived to its territory with valid visa or other admission document or without being required to obtain a visa by only the receiving country. Just after the final determination of refugee status, the country of last presence may be required to accept the return of the refugee status claimant (Art. 4 of the US-Canada deal). Notably, the purpose of the Dublin Regulation is to ensure access to the asylum procedures and the examination of the application by a clearly determined EU Member State depending on the age of the claimant, legal presence of her/his relatives in EU Member States, family unification, possession of a valid residence document of visa, or irregular crossing of the EU Member State's border. The difference between these agreements is in the legal nature of the US-Canada deal, which is an international treaty governed by the rule of the international law, especially the Vienna Convention on the Law of Treaties.

2.3. The UK-Rwanda deal

In April 2022, the UK's Home Office[28] announced the signing of the Migration and Economic Development Partnership with Rwanda.[29] For the provision of an asylum partnership arrangement, a memorandum of understanding between the UK and Rwanda[30] was adopted in April 2022. With this memorandum, the UK sought to

27 Macklin, 2003, p. 3.

28 Home Office and The Rt Hon Priti Patel MP, 2022.

29 Home Office, 2023b.

30 Memorandum of Understanding between the government of the United Kingdom of Great Britain and Northern Ireland and the government of the Republic of Rwanda for the provision of an asylum partnership arrangement (13 April 2022). Home Office; updated by the Addendum to the Memorandum of Understanding from 6 April 2023. Home Office, 2023a.

officially tackle illegal migration and break the business model of people-smuggling gangs. The goal of the UK-Rwanda deal was to relocate asylum-seekers arriving to the UK to Rwanda, where their asylum claims would be processed. This relocation strategy would mainly be applied when the applicant in question would be considered inadmissible to the asylum system because she/he passed through or has a connection with the safe country.[31] In such a case, the applicant's claim for international protection would be rejected and the applicant would be given the option to stay in Rwanda or return to her/his country of origin. The UK-Rwanda refugee deal is a part of the New Plan for Immigration in the United Kingdom. This plan was introduced in response to the collapse of the UK's asylum system under the pressure of high numbers of irregular migrants to the UK. According to the UK government, the purpose of the deal is to fight irregular migration to the UK, including smuggling via small boats across the Channel, and to help those in the need of the protection. As a State Party to the Refugee Convention and other major human rights conventions, Rwanda has already been providing help to refugees, mainly from Burundi and the Democratic Republic of Congo.[32]

The UK-Rwanda deal is interesting from the legal point of view. Specifically, it is notable that is a "memorandum of understanding" rather than a treaty. Further, the memorandum (as well as its Addendum) explicitly states near the end of its introduction that it is not binding at the level of international law. However, the memorandum contains obligations for both its Parties (point 16). According to Goddard,[33] this deal may have been designed as a memorandum of understanding because this style of agreement does not have to be presented to Parliament prior to being ratified.

However, the memorandum of understanding was the subject of a review by the International Agreements Committee of the House of Lords[34] published in October 2022. In the view of the Committee, this memorandum of understanding may breach Art. 31(1) of the Refugee Convention, which precludes penalisation for the irregular crossing of borders; Art. 33 of the Refugee Convention, which regulates the non-refoulement principle; and Art. 3 of the European Convention on Human Rights (ECHR), which covers the right to be free from torture, inhuman, or degrading treatment. Moreover, the Committee pointed out that Rwanda is not a State Party of the ECHR. Because the memorandum of understanding is non-legally binding, its commitments are not subject to judicial review, and it does not open onto dispute resolutions involving outside entities, neither individuals nor the Parties to the arrangement can ensure the rights of those affected are protected once they have been transferred to Rwanda. Further, as suggested above, because the agreement takes the form of a

31 Williams, 2022.
32 Home Office, 2022.
33 Goddard, 2023.
34 House of Lords, 2022.

memorandum of understanding, Parliament did not have an opportunity to consider the agreement's compatibility with the UK's obligations under international law.

The memorandum may have been inspired by the EU-Turkey deal, which was also adopted in a form that prevents it from being subject to a review from the legal point of view by the affected individuals. While State actions based on refugee deals may be contested by individuals, refugee deals themselves cannot. Notably, the actions of the European Court of the Human Rights (ECtHR) were decisive in the implementation of both the EU-Turkey and UK-Rwanda deal. The deals may also be differentiated in terms of judicial review—the ECJ dismissed claims for the annulment of the EU-Turkey deal without any deeper consideration of its compatibility with EU and international law, while the UK Supreme Court considered the legal aspects of the UK-Rwanda deal and legal obligations of the UK (for more details on this matter, see the below discussion on safeguards).

2.4. The Australia-Nauru deal

The history of the Australian government's policy on offshore processing may be traced to the Pacific Solution policy. This policy was based on the Tampa Affair, during which the Australian government blocked the MV Tampa, a Norwegian freighter, from entering Australia after it had rescued 433 asylum seekers at sea. The asylum seekers were taken on board Australian naval vessels and transferred to Nauru for detention and processing in offshore centres.[35] Nauru is not the only country to which asylum seekers have been transferred; Australia also has such arrangements with the Manus Island in Papua New Guinea and Christmas Island. Generally, Australia automatically sends asylum seekers arriving by boat to Nauru or Manus Island, where they await the determination of their refugee status. Primarily, these asylum seeks come from the Middle East or South Asia. If their processing is successful, the migrants receive refugee visas and basic resettlement support to live and work on the islands.

Given that Australia's arrangement with Nauru remains in effect, this part discusses the Australia-Nauru deal adopted in August 2012 in the form of a memorandum of understanding. The purpose of this deal was to establish the transfer of asylum seekers who had arrived in Australia by sea without valid visas to Nauru to await the assessment of their asylum claims in accordance with Nauru's legislation. If the asylum seekers were recognised as refugees, they could settle in Australia. As of July 2013, Australia announced that any asylum seeker who arrived by sea without authorisation would not be settled in Australia even if she/he was eventually determined to be a refugee. Therefore, in August 2013, Australia and Nauru signed another memorandum of understanding[36] under which Nauru committed to allowing individuals in need of international protection to settle within its territory. This

35 Baker, 2019.
36 Republic of Nauru and the Commonwealth of Australia, 2013.

memorandum contains obligations for Nauru in relation to non-refoulement, mainly to allow for the assessment of refugee status or to permit it to be made.[37] However, in 2021, a new memorandum of understanding[38] was signed between Australia and Nauru for an unlimited period of time.[39] Although the arrangement with Papua New Guinea ended in 2021, there are more than one hundred people left without permanent residency or citizenship, and Nauru is expected to continue to host refugees in the future. According to Refugee Council,[40] on October 2023, there were still 2 people on Nauru from previous transfers and 11 people detained in the regional processing centre after being transferred in September.

With this memorandum of understanding, Australia transferred its responsibilities based on the Refugee Convention to Nauru. The UNHCR[41] points out that an arrangement agreed upon by two Contracting States to the Refugee Convention does not extinguish the legal responsibility of the transferring State (Australia) for the protection of asylum seekers affected by the arrangements. Accordingly, Australia and Nauru have shared and joint responsibility to ensure the compatibility of the treatment of all transferred asylum seekers with obligations under international law, especially the Refugee Convention.

Meanwhile, this arrangement also has a huge impact also on host communities in Nauru. The Nauruan government received more than USD 3 billion from Australia between 2001 and 2022. Further, industries responsible for the asylum procedures and the resettlement of the refugees in Nauru have provided employment for many local residents. To further improve local conditions, Australia has also supported development in Nauru by constructing a new hospital, school, courthouse, and road system.[42] The Australia-Nauru refugee deal is therefore a good example of how refugee deals can help local communities in the receiving state.

3. Third Countries' Relations to the Refugee Convention

The relation of a third country to the Refugee Convention is crucial. The Michigan Guidelines state that the protection elsewhere policies are compatible with the Refugee Convention as long as they ensure that refugees enjoy the rights guaranteed by the Convention in the receiving State. Such a State does not have to be a Party of the Refugee Convention; however, a so-called "sending" (or "offshoring")

37 UNHCR, 2015, p. 1.
38 Republic of Nauru and the Government of Australia, 2021, pp. 1–5.
39 Doherty, 2021.
40 Refugee Council of Australia, 2023.
41 UNHCR, 2015, p. 2.
42 Morris, 2023.

state has to make an empirical assessment that refugees will enjoy the rights based on the Refugee Convention.

As Foster[43] pointed out, one problem may be the obligation of the State Parties of the Refugee Convention *to cooperate with the UNHCR* to facilitate its duty to supervise the application of the provisions of the Refugee Convention. If a State transfers a refugee to a third country as non-State Party of the Refugee Convention, it breaches its cooperation obligation in relation to the UNHCR and has no authority to supervise the positions of the refugees in such a third country. Moreover, the State Parties of the Refugee Convention are obligated to submit to the jurisdiction of the International Court of Justice in relation to any dispute between parties to the Convention, which cannot be transferred to a third country that is not a State Party of the Convention. Therefore, a third country receiving refugees from a sending State has to be a Party of the Convention to fulfil the international obligations of the sending State.

The Refugee Convention covers several refugee rights, such as non-discrimination (Art. 3), religion (Art. 4), movable and immovable property (Art. 13), artistic rights and industrial property (Art. 14), the right of association (Art. 15), access to the courts (Art. 16), rationing (Art. 20), education (Art. 22), administrative assistance (Art. 25), freedom of movement (Art. 26), identity papers (Art. 27), fiscal charges (Art. 29), non-penalisation for illegal entry or presence (Art. 31(1)), freedom form constraints on movement unless shown to be necessary and justifiable (Art. 31(2)), protection against refoulement (Art. 33), and consideration for naturalisation (Art. 34). However, in order to consider the ability of a State to transfer refugees in accordance with the protection elsewhere policy, the sending State must ensure that the third State (as receiving State under the Refugee Convention) respect the right of the refugee not to be removed or expelled to a country where their life or freedom would be threatened on account of her/his race, religion, nationality, membership in a particular social group, or political opinion (*principle of non-refoulement*)".

The determination of refugee status does not make a person a refugee; the State Party to the Refugee Convention only confirms the status already held by a person who meets the requirements of refugee status. Refugees are entitled to the rights guaranteed by the Refugee Convention—not only Art. 33 (non-refoulement), but also other rights—as soon as they are under the jurisdiction of the State Party or present within its territory. If the state party wants to transfer its protective responsibilities under the Refugee Convention to another state, it needs to make sure that every right is respected in that country—not just the right of protection against the risk of refoulement.[44] Along these lines, the UK-Rwanda deal has been criticised by the UK Supreme Court.[45] The Supreme Court of Israel has already ruled that Rwanda has

43 Foster, 2007, p. 241.
44 Hathaway and Foster, 2014, pp. 40–41.
45 United Kingdom: Supreme Court, 2023.

not respected the right to settle of those who were transferred to its territory per the Rwanda-Israel deal and who were at risk of refoulement.[46]

The preamble of the Refugee Convention expressly states the commitments of State Parties to assure refugees the widest possible exercise of fundamental rights and freedoms, with a clear catalogue of their rights. Therefore, Hathaway and Foster[47] are of the opinion that it would surely be antithetical to the Convention's very essence to read it as allowing a State Party to forcibly expel a refugee to a State known not to deliver those rights. Moreover, within the concept of effective protection, the obligation of non-refoulement is not the only one. As the High Court of Australia[48] observed, the transferred refugee may have none of the other rights which Australia (the contracting State) is bound to accord to persons found to be refugees… Thus when the (State) Act speaks of country that provides protection…it refers to provision of protection of all the kinds which parties to the Refugee Convention and Protocol are bound to provide to such persons. Those protections include, but are not limited to, protection against refoulement.

The reasoning behind such measures related to the transferring of refugees to third country is based on the fact that Refugee Convention does not provide the positive right to be granted asylum. The protection mechanism of the Refugee Convention depends on the principle of non-refoulement,[49] but it does not explicitly obligate a State to grant asylum or another form of protection on its territory. The Refugee Convention also only covers very limited exceptions to the principle of non-refoulement. Art. 33 (2) states that the benefit of non-refoulement may not be claimed by a refugee who constitutes a danger to a) the security of the country in which he is on the reasonable grounds or b) the community of that country based on the conviction by a final judgment of a particularly serious crime. Such an exemption should be applied with the greatest caution and with consideration for the circumstances of the case.[50]

Notably, during the 1970s, a consensus at a Nansen Symposium affirmed the notion of non-rejection at the frontier within the principles of non-refoulement and a general recognition of the principle of provisional admission as a minimum requirement.[51] However, this is not in the content of the final version of the Refugee Convention. Foster[52] underlines that a State should pay special attention to *indirect refoulement*, the possibility that the third State—while itself a safe third country—may in fact return the refugee to the country of origin where the well-founded fear of persecution exists. This can be also the case when the third country is a State Party

46 Ibid.
47 Ibid, p. 49.
48 See: Hathaway and Foster, 2014, p. 43; High Court of Australia: *Plaintiff M70/2011 v Minister for Immigration and Citizenship*, point 119.
49 Art. 33 of the Refugee Convention.
50 UNHCR, 1977.
51 Goodwin-Gill and McAdam, 2011, p. 364.
52 Foster, 2007, p. 244.

of the Refugee Convention but with a more restrictive approach to interpretation or procedure based on geographical or other limitations to the application of the Refugee Convention (e.g. Turkey). In order to avoid the risk of indirect refoulement, the sending state applying the protection elsewhere policy must ensure that any refugee to be transferred to the third country will have the right to enter that State and apply for protection under the Refugee Convention.[53]

In light of the statement of the UNHCR office in the introductory note, the Convention and Protocol are status- and rights-based instruments built on numerous fundamental principles—mainly, the principles of non-discrimination,[54] non-penalisation,[55] and non-refoulement.[56] In Duarte's opinion,[57] all these principles were violated by the EU-Turkey deal. Specifically, a) this deal was designated mainly in relation to Syrian refugees, which constitutes discrimination based on the country of origin, and while all refugees were to be returned by the EU to Turkey, only Syrians could benefit from EU protection through resettlement;[58] b) in Greece and Italy, as well as Turkey, concentrated refugees in facilities and camps experienced inhuman conditions, including the militarisation of these areas and according penalties, as well as border "pushbacks";[59] and c) reports suggest that forced returns[60] occurred, that Turkey and Greece did not allow refugees to apply for asylum (the asylum procedure is crucial for distinguishing between an irregular migrant and asylum seeker), and that Turkey sent refugees, including unaccompanied children and pregnant women, back to Syria, where armed conflict was ongoing.[61]

Because Turkey is not an EU we cannot presume that it will apply and guarantee rights in compliance with EU law. Even the European Commission[62] expressed the need for changes to provisions within Greek and Turkish domestic legislation according to procedural safeguards, as inconsistencies in the States' domestic legislation had been established before the EU-Turkey deal. This shows that the EU representatives had to be aware of Turkey's struggles with the protection regime for migrants and refugees. The conclusion that Turkey cannot be considered a third safe country is also based on the fact that it still applies[63] relevant geographical limitations related to the Refugee Convention based on which it has no obligations

53 Foster, 2007, p. 250.
54 Art. 3 of the Refugee Convention.
55 Art. 31 of the Refugee Convention.
56 Art. 33 of the Refugee Convention.
57 Duarte, 2020, pp. 279 et seq.
58 Hathaway, 2016b.
59 Smith, 2023; Greece's pushback of migrants on boats is also subject to judicial review by the European Court of Human Rights. See, for example, Cossé, 2022.
60 Poon, 2016, p. 1196.
61 See, for example, Hardman, 2022.
62 Communication from the Commission to the European Parliament, the European Council and the Council: Next operational steps in EU-Turkey cooperation in the field of migration (Brussels, 16.3.2016, COM (2016)166), p. 3.
63 Hathaway, 2016b.

to non-European refugees. Meanwhile, Turkey adopted the EU-inspired Law on Foreigners and International Protection[64] in 2013, which brought a new legal framework for asylum to Turkey and introduced obligations for Turkey in relation to all persons in need of international protection.

Along these lines, Turkey provides several types of protection. First, it provides permanent protection through refugee status for applicants coming from Europe based on the Refugee Convention and its geographical limitation in Turkey (Art. 61). Second, it provides two forms of international protection for non-Europeans;[65] namely: a conditional refugee status for persons under direct personal threat (until the completion of the refugee status determination process, see Art. 62) and subsidiary protection for persons coming to Turkey from countries where a general situation of violence prevails (Art. 63). Art. 91 regulates "temporary protection" for foreigners forced to leave their countries and unable to return, who arrived at or crossed Turkey's borders in masses to seek urgent and temporary protection, and whose international protection requests cannot be individually assessed. Specific conditions for temporary protection are governed by Turkey's temporary protection regulation,[66] according to which Syrian refugees who have arrived at or crossed Turkey's borders as part of the mass influx or individually after 28 April 2011 may enjoy only temporary protection (Art. 1). Notably, individual applications for international protection are not processed during the implementation of temporary protection; this means that applicants coming from non-European states cannot gain refugee status.[67]

In 2018, the Directorate General of Migration Management took on responsibility for determining status and registering applicants for international protections, replacing the UNHCR. In 2021, the Directorate transformed into the Presidency of Migration Management.[68] According to the fulfilment of Turkey's obligations under the Refugee Convention, Turkey and the UNHCR concluded a Host Country Agreement, which entered into force in 2018.[69]

Regarding the process of identifying effective protection elements, we need to examine the status of the third country. Designating a third country as a safe first country of asylum or a safe third country authorises a person claiming refugee status to be sent to such a country either en route to her/his final destination or as her/his final destination.[70] One of the clearest legal definitions of a safe third country is found in the asylum procedures directive.[71] Art. 35 defines the safe first country

64 Turkey, 2013.
65 Heck and Hess, 2017, p. 43.
66 UNHCR, 2014, Interim provisions, provisional art.1.
67 Heck and Hess, 2017, p. 41.
68 *Country Report: Introduction to the Asylum Context in Türkiye*, 2023.
69 UNHCR, 2018, p. 2.
70 Hathaway, 2016a, p. 295.
71 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), OJ L 180, 29.6.2013, pp. 60–95.

of asylum as the country in which the person has already been recognised as a refugee or otherwise enjoys sufficient protection. Further, Art. 38 defines the safe third country as the country in which the competent authorities are satisfied that a person seeking international protection will be treated in accordance with the following five principles: 1) no threats to life and liberty on account of race, religion, nationality, membership of particular social group, or political opinion; 2) no risk of serious harm; 3) respect for the principle of non-refoulement in accordance with the Refugee Convention; 4) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman, or degrading treatment as laid down in international law; and 5) it is possible to request refugee status within the scope of protection conferred by the Refugee Convention.

In any case, in negotiating the EU-Turkey deal, the EU assumed Turkey to be a safe third country. Tunaboylu and Alpes[72] point to the conditions of the EU-Turkey deal according to which an asylum seeker should be returned from Greece to Turkey: a) she/he does not apply for asylum or withdraws her/his application, b) she/he chooses an assisted return, c) her/his application for asylum is assessed negatively, and d) she/he is inadmissible according to the formal conditions in Greece. For Member States to declare an asylum application inadmissible, they first must examine whether Turkey may be considered a safe first country of asylum or a safe third country; otherwise, the application would be rejected without consideration of its substance. Based on the conditions of the EU-Turkey deal, the asylum applications submitted by a person arriving through Turkey may be declared inadmissible and rejected if such a person already enjoys protection in Turkey as the first country of asylum and if such a person was able to apply for protection in Turkey as a safe third country. Both these concepts are applicable for non-Turkish nationals. The concept of the safe third country is crucial for the purposes of the EU-Turkey deal and the return of non-Turkish nationals, while the concept of the safe country of origin is decisive in the case of Turkish nationals' return to Turkey from Europe.[73]

Although Turkey is working on its asylum system in light of EU law, its applicability and execution remain questionable. Humanitarian organisations[74] are pointing out reports of forced deportations covered by forcibly signed documents for voluntary returns to home countries, detentions without access to lawyers, denial of access to phones or their confiscation, and very poor conditions at detention centres, according to which Greece stopped the deportation[75] of some Syrian refugees to Turkey with the reasoning that it is not a safe country.

In relation to the US-Canada deal, both the United States and Canada are considered safe third countries. Both States are Parties only to the universal definition

72 Tunaboylu and Alpes, 2017.

73 For a deeper examination see, Elbert, 2023, p. 100 et seq.

74 *Turkey 'Safe Country' Sham Revealed as Dozens of Afghans Forcibly Returned Hours after EU Refugee Deal*, 2016.

75 Gkliati, 2017, pp. 217–219.

of the refugee based on the Refugee Convention. While the national legislation of the United States generally aligns with the Convention, the United States' practices differently situate asylum seekers and refugees. The status of a refugee may be granted to a person located on the territory of another State, with a US official making a selection according to quotas and humanitarian needs. The status of asylum may be granted to a person who applies for protection in the United States or at a border. While the status of a refugee may not be withdrawn, the status of asylum may be withdrawn when the situation in the applicant's country of origin improves.[76]

Hathaway[77] points to the EU's implementation of the concept of the "super safe third country", known as an institute which allows refugees to be sent with no risk assessment to states bound by the Refugee Convention and the ECHR, which judges whether States are observing their provisions and using formal asylum procedures. Moreover, in Australia, refugee claims are not addressed based on whether the person seeking protection can be sent to another State to which she/he will be admitted with no chance of being persecuted based on the Refugee Convention and no real chance of refoulement to her/his country of origin.[78] In this case, the principle of non-refoulement is not even considered in relation to the cases of the refoulement of the transferred refugee by the so-called "receiving State" to the other country or the country of origin. It also does not require the accession of the asylum applicant to a refugee status determination procedure in the receiving country, which does not have to be the State through which the applicant came to Australia.[79]

Nauru has been a State Party to the Refugee Convention and its Protocol since 28 June 2011. In accordance with this accession, Nauru adopted the Refugees Convention Act, which established and governs a national legal framework for refugee status determination and complementary protection within Nauru's legislation. It also established an independent merit review tribunal, which enables individuals to access judicial review. The Secretary for justice and border control is responsible for determination procedures and makes decisions on the basis of recommendations by Refugee Status Determination Officers.[80] Based on Nauru's asylum seekers act and immigration regulations, asylum seekers are provided with regional processing centre visas for a maximum of three months and have to remain in the areas defined by visas or service providers. On basis of the UNHCR's findings,[81] asylum seekers are practically deprived of their liberty in closed places of detention and are not individually assessed. This procedure is contrary to the principle of non-penalisation under the Refugee Convention. In regional processing centres, children are also detained; this is also contrary to the Convention on the Rights of the Child, to which Nauru is a State Party. When an asylum seeker is determined to be a refugee, she/he is granted

76 Honusková, 2011, p. 149.
77 Hathaway, 2016a, p. 295.
78 Ibid.
79 Ibid.
80 UNHCR, 2015, p. 2.
81 Ibid.

a temporary settlement visa to remain in Nauru for up to five years, but does not have access to all the rights based on the Refugee Convention. Further, per the 2013 memorandum of understanding, the asylum seeker is not granted the possibility of settling in Australia and is therefore exposed to being transferred to a third country (e.g. Cambodia, New Zealand).[82] However, due to gross violations of human rights in detention centres in Nauru, Australia's example demonstrates that externalising asylum and migration management has huge human costs and may lead to rights violations.[83]

4. Safeguards

The State Parties of the Refugee Convention have been trying to minimise their protective responsibilities in accordance with their obligations for refugees. The transfer of refugees to a third country may lead to a denial of the right to independent judicial review or the possibility of obtaining refugee status. As every State has its own legislation and refugee status determination procedure, every externalisation of a State's obligations according to the Refugee Convention should occur under a specific examination of the possible legal reviews of such deals and determination procedures in the third (receiving) country.

As Foster[84] pointed out, the country in which a person seeks refugee protection has the *primary responsibility for considering the claim* and the burden of proving that it would be safe to transfer responsibility to a third country. The sending State is responsible for ensuring that such a transfer is carried out in accordance with its obligations under the Refugee Convention and other human rights instruments. Additionally, there must be a *sufficient opportunity for the review of the transfer decision or appeal* to ensure the refugee can challenge the validity of the transfer decision before an *independent and impartial judicial body established by law before the decision* is enforceable. The right to an effective remedy is crucial for the enforcement of the refugee rights.

The basic precondition for the effective remedy is a formal arrangement between the sending and receiving States, which takes the form of a written agreement covering their obligations. Foster[85] recommends that the best practice for the implementation of the protection elsewhere policy involves a written agreement that obligates the receiving State a) to respect the status of the refugee according to Art. 1 of the Convention; b) to provide transferred refugees rights guaranteed by

82 Ibid, pp. 6, 8.
83 Laganà, 2018, p. 3.
84 Foster, 2007, p. 281.
85 Foster, 2007, pp. 283–284.

the Refugee Convention; c) to ensure the ability of transferred refugees to notify the UNHCR of any alleged breach of the responsibilities of the receiving state; d) to grant the UNHCR the right to be present in its territory and to enjoy access to transferred refugees in order to monitor the compliance of the receiving state with its responsibilities; and e) to abide by the procedure for the settlement of any dispute regarding the interpretation or implementation of the agreement. Based on formal or informal arrangements between the sending and receiving States, the obligations of the sending State outlined in the Refugee Convention do not end.[86] The sending State remains obligated to monitor the practice of the receiving State, including its respect for refugee rights in its treatment of transferred refugees.

The Michigan Guidelines points out the obligations of the sending State when the receiving State fails to ensure that the transferred refugee receives the benefits outlined in the Refugee Convention. In such a case, the sending State's original obligation to the refugee is no longer met by transferring the responsibility for protection to the receiving State; the sending State should ensure the return and readmission of the refugee to its territory and ensure the respect of her/his rights according the Refugee Convention (points 12–14 of the Guidelines).

In the case of the EU-Turkey deal, the whole instrument was the subject of judicial review—first by the General Court of the European Union[87] (General Court) and then by the ECJ[88]—based on claims of rights violations related to the actions of the EU Member States and EU institutions in accordance with the EU-Turkey deal. The General Court examined the legal form of the EU-Turkey deal based on the application of a Pakistani national, who fled Pakistan based on his fear of persecution and serious harm to this person according to assassination attempts designed to prevent him—as an only son—from inheriting his parents' property. On 19 March 2016, he entered Greece by boat from Turkey. In April 2016, he submitted an application for asylum to the Greek authorities to avoid having to return to Turkey and being expelled back to Pakistan. The applicant asked the General Court to annul the agreement between the European Council and Turkey. In response, the European Council explained that the EU-Turkey statement was only the result of an international dialogue between the Member States and Turkey and had not been intended to produce legally binding effects in light of the Vienna Convention on the Law of Treaties. The statement was simply a political agreement between the members of

86 As the ECHR stated in its decision TI v United Kingdom (appl. no. 43844/98):
…The Court finds that the indirect removal in this case to an intermediary country, which is also a Contracting State, does not affect the responsibility of the United Kingdom to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention'.

87 Order of the General Court of the European Union of 28 February 2017 (*NF vs. European Council* (T-192/16, EU:T:2017:128), *NG vs. European Council* (T-193/16, EU:T:2017:129) and *NM vs. European Council* (T-257/16, EU:T:2017:130)).

88 Order of the Court of 12 September, *NF and Others vs. European Council*, Joint cases C-208/17 P to C-210/17 P (ECLI:EU:C:2018:705).

the European Council, the heads or governments of Member States, the president of the European Council, and the president of the Commission.

On the basis of Art. 263 of the TFEU, which gives the Court the power to review the legality of an act by an EU institution and order its annulment, the General Court stated that the Court does not have the power to review the legality of the acts of national internal bodies or the heads of EU Member States or governments and consequently has no power to review the legality of the international agreement concluded by the EU Member States; accordingly, it dismissed the action.[89] One may argue that the Court did not take into account that the European Commission itself presented the EU-Turkey deal (statement) as an "EU-Turkey agreement" on its website[90] as well as the fact that under international law the formal designation of the instrument is not decisive, but the content of the instrument and intent of the parties. Moreover, the EU-Turkey deal contained the commitments of every party. Consequently, the applicant sought the annulment of the General Court's order. He claimed to set aside the order under appeal and to refer the case back to the General Court for adjudication with a direction for it to accept jurisdiction. However, the appeal only contained general, vague, and confused statements and assertions regarding the breach of the EU law principles and did not contain specific indications of the points of the appealed decision and legal arguments in support of the annulment. Based on the failed conditions for the admissibility of the appeal, the ECJ dismissed the appeal as manifestly inadmissible. For the appeal to be admissible, it would have had to precisely indicate its contested elements and the legal arguments that specifically supported it.

Idriz, Leino-Sandberg, and Wyatt[91] point out that the EU-Turkey deal is part of a broader EU-Turkey cooperation initiative based on the EU-Turkey Readmission Agreement,[92] which forms the legal basis for the EU's exclusive competence to cooperate with Turkey in the field of readmission. Consequently, the EU-Turkey deal must be considered part of the implementation of the EU-Turkey Readmission Agreement. Based on Art. 3 (2) of the TFEU, once the EU had exercised its competence, Member States were not allowed to conclude any agreement in that particular area or take any action leading to acts with legal effects. However, the EU-Turkey deal and the commitments of Turkey, Greece, and EU institutions are absolutely doing so.

The US-Canada deal is based on the general rule that refugee claimants must apply for international protection in the country (i.e. the United States or Canada) they enter after leaving their country of origin. This rule is an integral part of national Canadian law. Under Sec. 101(1)(e) of the Immigration and Refugee Protection Act (IRPA),[93] refugee status claims are ineligible for consideration in Canada if the

89 For a full examination of the orders, see Elbert, 2023, p. 94.
90 European Commission, 2016.
91 Idriz, 2017, p. 4; Leino-Sandberg and Wyatt, 2018.
92 Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation, OJ L 134, 7.5.2014, pp. 3–27.
93 Immigration and Refugee Protection Act (S.C. 2001, c. 27), 2001.

claimant came directly or indirectly to Canada from a country designated by the Immigration and Refugee Protection Regulations (IRPR)[94] as a safe third country (e.g. according to Sec. 159.3 of the IRPR, the United States). Such a designation depends on the country's compliance with the criteria for aligning with the principle of non-refoulement. In this case, if the claimant came from such a designated country, their refugee status claims would be ineligible for consideration in Canada.

This rule was reviewed by a newer judgment; namely, the Supreme Court of Canada's decision of *Canadian Council for Refugees v. Canada* (Citizenship and Immigration), 2023 SCC 17 of 16 June 2023, no. 39749.[95] The appellants were refugee claimants who had arrived in Canada in 2017 from the United States. The legal bases of their claims were fears of gender-based persecution and sexual violence committed by gangs and oppression in their countries of origin. However, because they had arrived at land ports of entry from the United States, they were eligible to claim refugee protection in Canada. The applicants challenged the validity of the Sec. 159, 3 of the IRPR. In their view, the designation of the United States as a safe third country violated the Charter of Rights and Freedoms.[96] Their first argument was based on the violation of Sec. 7 of the Charter of Rights and Freedoms according to returns of refugees to the United States without further consideration of whether this respects their rights under international law, especially in relation to the principle of non-refoulement and detention. The second argument was based on the violation of Sec. 15 according to the fact that women facing gender-based persecution are often denied refugee status in the United States and face the risk of refoulement.

As the decisions of the Federal Court and Federal Court of Appeal were not in line with opinions of the applicants, the case was brought to the Supreme Court of Canada. Although the Supreme Court dismissed the appeal for the claim regarding Sec. 7 and returned the appellant's claim about Sec. 15 to the Federal Court for determination, Justice Kasirer considered the contested violation of Sec. 7 of the Charter. In his opinion, the designation of the United States as a safe third country did not breach Sec. 7 of the Charter. He was aware that refugee claimants in the United States faced the risk of detention and was also aware of some of the conditions of detention. However, the legislation outlines how Canada may consider refugee status claims when being found ineligible under the scheme would threaten an applicant's liberty or security. These parts of the legislation are called "safety valves". Based on humanitarian and compassionate or public policy grounds, safety valves may exempt a claimant from being forced to return (e.g. Art. 6 of the US-Canada Agreement states that either Party may at its own discretion examine any refugee status claim made to that Party where it determines that it is in its public interest to do so). Administrative decision-makers determine the appropriate deployment of these safety

94 Immigration and Refugee Protection Regulations (SOR/2002-227), 2002.
95 Supreme Court of Canada, 2023a.
96 Part 1: Canadian Charter of Rights and Freedoms, Constitution Act, 1982.

valves on an individual basis while the legislation itself remains valid.[97] Ultimately, this case shows that the US-Canada deal was adopted in the form of an international agreement according to the Vienna Convention on the Law of Treaties and has been implemented in Canadian legislation to ensure its proper execution.

In contrast, the UK-Rwanda deal was presented by the UK representatives as non-legally binding instrument according to the rules of national, not international, law. Based on the UK-Rwanda deal, an applicant with an inadmissible asylum claim will be removed to Rwanda where her/his asylum claim will be processed. The admissibility of asylum applications is based on whether the applicant passed through a safe third country before making an onward journey to the UK—if this is the case, the applicable is inadmissible. If the application for asylum is successful in Rwanda, the applicant will not be able to return to the UK; however, she/he may settle in Rwanda as a refugee. If her/his application for asylum is unsuccessful, the applicant will be removed from Rwanda to a country where she/he has a right to reside or to a third country.[98] To date, there have been no removals of asylum seekers to Rwanda—this is mostly a consequence of the legal reviews of the ECtHR[99] and UK High Court.[100]

The mechanisms of human rights protection can verify the compliance of the national measures adopted for the implementation of refugee deals with State obligations based on international law. For example, the UK-Rwanda deal is considered to violate international law, as the ECtHR stopped the first flight of migrants before its take off.[101] In June 2022, the ECtHR, in *N.S.K. v. the United Kingdom*, granted an urgent interim measure under Rule 39 of the Rule of Court that the applicant should not be removed to Rwanda until three weeks after the delivery of the final domestic decision in his ongoing judicial review proceedings. The ECtHR expressed concerns that asylum seekers transferred from the UK to Rwanda would not have access to fair and efficient procedures for the determination of their refugee status and that the determination of Rwanda as a safe third country was insufficient. Here, the serious risk of treatment is predicated on the fact that Rwanda, as a non-contracting party to the ECHR, is not bound by the same rules as the UK and there is an absence of any legal enforceable mechanism for the applicant's return to the UK in the case of successful merits challenge before domestic courts.[102] This ECtHR decision was criticised by UK officials as well as Ekins and the Judicial Power Project[103] as it was ruled before the decision of the UK Supreme Court without fulfilling the basic condition for the

97 Supreme Court of Canada, 2023b.
98 Goddard, 2023.
99 ECtHR: *N.S.K. v. the United Kingdom* (application no. 28774/22 of 14 June 2022, formerly *K.N. v. the United Kingdom*).
100 *AAA and others v. Secretary of State of the Home Department*, [2022] EWHC 3230 (Admin), 19 December 2022.
101 *N.S.K. v. the United Kingdom*.
102 Gower, Butchard, and McKinney, 2023, p. 40.
103 Etkins and the Judicial Power Project, 2022, p. 40.

admissibility of the application—the exhaustion of domestic legal remedies. The ECtHR has been accused of breaking the principle of subsidiarity and acting against its primary responsibility for considering the UK's compliance with relevant obligations related to rights. Moreover, the UK has no opportunity to contest the decision.

In December 2022, the High Court decided by combined judgment in cases properly considered first by the Home Office that it was lawful for the UK Government to make arrangements for relocating asylum seekers to Rwanda. Among other conclusions, the High Court confirmed that a) the Home Secretary had conducted a thorough examination before designating Rwanda as a safe third country for asylum seekers, relying on all relevant and generally available information as well as assurances about the Rwandan asylum system given in the memorandum of understanding, b) it conforms with Art 31. of the Refugee Convention to declare asylum claims inadmissible and send the person to a safe third country (it does not constitute a penalty), and c) even if the so-called "Rwanda policy" primarily affects young men from certain countries, the legitimate objective is the protection of refugees from exploitation by gangs organising small boat crossings, which does not constitute unlawful discrimination.[104]

On 15 November 2023, the UK Supreme Court found[105] that Rwanda is not a safe third country for asylum seekers as it does not have the practical ability to properly determine asylum claims. Agreeing with the Court of Appeal, the Supreme Court confirmed that there are substantial grounds for believing that the asylum seekers transferred to Rwanda would face a real risk of being returned to their home country where they could face ill-treatment, which would break the principle of non-refoulement.[106] While Rwanda maintains an open door policy for refugees fleeing conflicts in neighbouring countries, asylum claims are mainly processed by the UNHCR for resettlement to third countries as part of the emergency transport mechanism for asylum seekers from Libya. The rest of the asylum claimants are permitted to stay in Rwanda in UNHCR camps but cannot access a precise formal asylum determination process by Rwandan authorities (point 77 of the Judgment). The Supreme Court was also inspired by the Israel-Rwanda agreement from 2013, under which persons from Eritrea and Sudan who sought asylum in Israel were removed to Rwanda to have their claims processed. The Israel-Rwanda agreement explicitly stated that the deportees would enjoy human rights and freedoms, the principle of non-refoulement would be upheld, and deportees would be able to file a request for asylum. However, such transferred asylum seekers were routinely moved from Rwanda to Uganda. On this basis, the Israeli Supreme Court ruled the programme unlawful in April 2018 (points 95–97 of the Judgment).

104 Etkins and the Judicial Power Project, 2022, p. 41–42.

105 United Kingdom Supreme Court: *AAA (Syria) & Ors, R* (on the application of) v Secretary of State for the Home Department [2023] UKSC 42 (15 November 2023).

106 McDonnell, 2023.

The UK-Rwanda refugee deal is likely based on the experience of Australia, where nearly all asylum seekers have been removed to neighbouring countries to have their claims processed.[107] However, the UK-Rwanda deal compels serious reflection on the relation between the UK and Rwanda and the real reasons for this partnership—it was not so long ago that the UK expressed serious concerns about the situation in Rwanda given extrajudicial killings, enforced disappearances, and torture.[108] Such an examination is important as many other States, such as Denmark, are now considering the same policy in relation to Rwanda.[109] The UK-Rwanda deal is qualitatively distinct from other arrangements, such as the Dublin system or US-Canada deal, as it involves the transfer of persons to Rwanda, a country outside the UK's region and with lower protection standards than the UK.[110]

5. The failure of solidarity and the future of refugee deals

We are witnessing an increasing failure of State solidarity in solving global challenges related to migration. Economically developed states are closing their borders and trying to externalise issues of migration flows to other (neighbouring) states. One good example is the failed solidarity between EU Member States.

The massive exodus of (mainly) Syrian refugees from the Middle East that peaked in 2015 caused panic across the EU. Most of EU Member States were and still are afraid of the permanent and radical weakening of their culture, religion, security, and other systems as a result of refugees settling in their countries. On the other hand, Turkey—the state with the biggest numbers of incoming refugees—is affected by the very high expenses associated with hosting refugees and very limited international support. Given that these conditions are difficult to sustain politically and economically, it is no surprise that Turkey has sought to cooperate with the EU—especially in light of the potential revival of its accession to the EU and the visa liberalization process.[111]

At the end of the day, there are complaints on both sides of the deal. Turkey complains about the very slow and limited availability and distribution of EU funds,[112] even though the EU is not the only organisation helping Turkey with the migration

107 Morrison, 2022.

108 Foreign, Commonwealth & Development Office and Julian Braithwaite, 2021.

109 Ministry of Foreign Affairs and International Cooperation, Republic of Rwanda, and Ministry of Foreign Affairs of Denmark, no date, p. 1.

110 Tan, 2022. According to the reports of the Human Rights Watch, Rwanda is perpetrating the extraterritorial acts of repression against dissenting persons, including those who sought international protection. Human Rights Watch, 2023.

111 Kirişci, 2021.

112 See, for example, *Turkey Says EU Financial Offer on Migrants is 'Unacceptable',* 2015; Spicer, 2019.

crisis.[113] Others criticise the EU for its failure to liberalize visas processing for Turkish nationals as well as for Turkey's stalled accession to the EU. On the other hand, EU leaders have criticised Turkish president Recep Tayyip Erdogan for repeatedly threatening to open Turkey's borders.[114]

The EU-Turkey deal was born into a difficult situation. The different positions of EU Member States resulted in the failure of EU asylum policy reform, which was based on a system of redistributing migrants and asylum seekers across Member States. The Council of the EU adopted two relocation decisions[115] to help Italy and Greece with the massive flow of third-country nationals to their territory. These decisions established detailed rules for the relocation of up to 160 000 asylum seekers. Oppositions to such reforms were voiced by certain states in Central and Eastern Europe. For example, Slovakia and Hungary considered such decisions unlawful. However, on 6 September 2017, the ECJ ruled that their actions of the Slovakia and Hungary were inadmissible and on 2 and 3 December 2015 annulled the relocation decisions.[116] The Court pointed out that the relocation measures were crisis-management measures at the EU level designed to ensure that the fundamental right to asylum according to Art. 18 of the Charter of Fundamental Rights of the European Union would be exercised properly. The relocation mechanism was necessary and proportionate to the need to help Italy and Greece handle the consequences of the migration crisis.[117]

Despite the ECJ's ruling, some EU Member States decided not to comply with the Relocation decisions. They opted not to indicate the numbers of persons that they would accept and consequently did not support Italy and Greece by relocating applicants to their territories for the individual assessment of their applications for international protection. Consequently, in December 2017, the Commission commenced procedures against Poland, the Czech Republic, and Hungary for their failure to fulfil obligations under Art. 258 of the TFEU and claimed that their asylum policies did not comply with EU law. The case was based on the countries' policies against asylum seekers who were held in transit zones in conditions similar to detention without the possibility to claim asylum.[118]

113 For example, *10 Years On, Turkey Continues Its Support for an Ever-Growing Number of Syrian Refugees*, 2021; IOM, 2017-2024; UNHCR and UNDP, 2023.

114 Boffey, 2020; Petrequin, 2020; Timur and Nordland, 2016; *Erdogan Threatens to Open Europe Gates for Refugees*, 2019; Smith and Busby, 2020.

115 Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece, OJ L 239, 15.9.2015, p. 146–156 (no longer in force) and the Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ L 248, 24.9.2015, p. 80–94 (no longer in force).

116 Judgment of the Court of Justice of 6 September 2017: Joint cases C-643/15 and C-647/15 *Slovak Republic and Hungary vs. Council of the European Union* (ECLI:EU:C:2017:631).

117 CJEU, 2019.

118 *Hungary Asylum Policies 'Failed' to Fulfill EU Obligations*, 2020.

The ECJ decided all three cases in a joint proceeding by a judgment of 2 April 2020.[119] Firstly, the Court assessed the admissibility of the cases based upon the arguments of the EU Member States. Regarding the argument that the contested decisions are no longer valid, the Court ruled that a State's failure to fulfil its obligations is admissible if the Commission confines itself to asking the Court to declare the existence of the alleged failure; particularly when the period of the application of the contested decision definitively expired and it is no longer possible to remedy the alleged failure (paras. 57–60). The fulfilment of the resulting obligation is a question of the rule of law (para. 65) as Member States did not comply with the obligations even after the pre-litigation procedure. If the Court accepted such objections, the whole meaning of the infringement procedures and values of the EU would be ruined (para. 70). Besides the Court's assessments, the Member States' main argument that they acted in response to their concerns for their own public order and security was the most important. The Court pointed out that Member States cannot simply refer to the existence of concerns related to public order and security with the intention to derogate from their obligations without proving that it is necessary to do so. Furthermore, relocation decisions included the possibility to deny relocation if a particular applicant had a risky profile or to conduct additional security checks with the Europol or Greek and Italian authorities. Such dangers to national security or public order had to be individualised (paras. 159–161, 185). A Member State cannot ignore its obligations based on the excuse that the Relocation decisions had a malfunctioning and ineffective nature due to Italy and Greece's cooperation. The spirit of solidarity and the Relocation decisions' binding power did not allow Member States to derogate their obligations on the grounds of their own assessment of the effectiveness of the Relocation decisions' mechanisms. The practical difficulties of the implementation of the Relocation decisions should have been resolved in the spirit of cooperation and mutual trust between the Member States (para. 164). Poland, the Czech Republic, and Hungary had failed to indicate at regular intervals an appropriate number of applicants for international protection who could be relocated to their territories.[120]

The ruling of the Court was, for the most part, in agreement with the view of the General Advocate Sharpston,[121] who likewise provided her opinion that the legitimate interest in preserving social and cultural cohesion could have been effectively safeguarded by other, less restrictive measures than States' unilateral and complete refusal to fulfil their obligations under EU law (para. 227). She used the example of other Member States facing issues with these relocation obligations (Austria,

119 Judgement of the CJEU of 2 April 2020: Joined Cases C-715/17, C-718/17, and C-719/17 *European Commission vs. Republic of Poland and Others* (ECLI:EU:C:2020:257).

120 Art. 5 (2) of the Council Decision (EU) 2015/1523 and Art. 5(2) of the Council Decisions (EU 2015/1601) and subsequently Arts. 5 (4) to (11) of both decisions. For more, see CJEU – Joint Cases C 715/17, C718/17, and C719/17 *Commission v Poland*, *Hungary and the Czech Republic*. CJEU, 2020.

121 Opinion of Advocate General Sharpston delivered on 31 October 2019. *European Commission v Republic of Poland and Others*. Joint Cases C-715/17, C-718/17 and C-719/17 (ECLI:EU:C:2019:917).

Sweden) and that have applied for and obtained temporary suspensions under Relocation decisions. The General Advocate was of the opinion that the decisions of these countries respected the principle of solidarity (para. 235). She also underlined other principles; for instance, she pointed to the principle of the rule of law according to which States are obliged to comply with their own obligations (para. 241); the duty of sincere cooperation, which entitles every Member State to expect other Member States to comply with their own obligations regarding due diligence (para. 245); and the principle of solidarity, which sometimes implies the necessity of sharing burdens (para. 251).

These decisions are a good example of the opinions of some EU Member States unwilling to contribute to the resolution of the migration crisis. The main countries that are reluctant to accept and resettle refugees are the "V4": Slovakia, the Czech Republic, Poland, and Hungary. While their reasons may vary, some may be of social nature or related to a fear of the unknown, which is a natural consequence of living without any contact with different cultures and ethnicities for a long time during socialism. Despite the imperfections of the EU-Turkey deal, the ECJ's proceeding on the failure to fulfil obligations based on the Relocation decisions showed that EU institutions are indeed trying to support the equal implementation of law across Member States.

The EU-Turkey deal was negotiated with an aim to stop migration flows into the Europe and to alleviate the massive pressures on the facilities of frontline countries. Since the EU-Turkey deal did not solve the problem of the massive numbers of irregular migrants already present on the territories of EU Member States and can hardly be called a success, a new mechanism for sharing the responsibility for asylum procedures is urgently needed. This is especially true for frontline States—that is, States of entry for thousands of irregular migrants waiting for their asylum procedures to start. Today, the EU is going through the process of improving of its migration policies. The European Council is currently preparing and negotiating a new asylum procedure regulation[122] to streamline procedural arrangements and establish the rights of asylum seekers in all EU Member States.

A new regulation, if adopted, would replace the current "Dublin Regulation decisive" for States responsible for examining asylum applications. New rules would be an improvement; in particular, they would shorten the time limits. They would also yield a new solidarity mechanism based on the flexibility of EU Member States in regard to their individual contributions, including relocation, financial contributions, or alternative solidarity measures (e.g. deployment of personnel or measures for capacity building). However, no Member State would be obliged to carry out relocations. Meanwhile, financial contributions would be fixed at EUR 20 000 per relocation, which may increase. These funds would go to the common EU fund managed by the Commission to finance projects aimed at addressing the root causes

122 Council of the EU, 2023.

of migration.[123] These new rules and regulations form part of the so-called "New Pact on migration and asylum" of 23 September 2020,[124] and facilitate the creation of more sustainable migration and asylum regulations and policies based on solidarity, responsibility, and respect for human rights.

Among the changes already brought by the new pact include the successful replacement of the European Asylum Support Office by the European Union Agency for Asylum.[125] According to Art. 51 of the EUAA Foundation Regulation, the Agency shall set up a complaints mechanism to ensure the respect of fundamental rights within all of the Agency's activities, which may be considered a step towards the protection of human rights. Although the process is still ongoing, the European Council on Refugees and Exiles[126] analysed the Pact on Migration and Asylum and concluded that new procedures would be harder and longer and create more opportunities for smugglers who would be able to adapt to the new rules.

During the European Council summit of the EU interior ministers on 8 June 2023, the agreement was endorsed by 21 of the EU's 27 Member States. The agreement represents the position of the negotiations on the asylum procedure regulation and on the asylum and migration management regulation and forms the basis for the Council presidency negotiation with the European Parliament.[127] Bulgaria, Malta, Lithuania, and Slovakia abstained from voting. Only Poland and Hungary opposed the plan; however, as we have already stated, these countries have historically opposed the relocation of migrants and asylum seekers. Although the ECJ ruled in 2020 that Poland, Hungary, and the Czech Republic had violated EU law by refusing to take in refugees under a previous quota system, Prague recently voted in favour of the new pact.[128] Meanwhile, Poland still resists any ideas of shared relocations of refugees. The Polish government has criticised the adoption of a new migration agreement by a majority vote rather than through unanimity; as Grodecki stated, 'There is no solidarity without unity'. In his opinion, the forced acceptance of migrants and high penalties for refusing their entry are not a basis for solidarity.[129] However, the rules of the New Pact for migration and asylum would not change the Dublin Regulation primary rule (i.e. that the first country of arrival is responsible for the assessment of the asylum applications); accordingly, the Mediterranean nations will continue to be disproportionately burdened.[130] It appears that the agreement has a long way to go before it is accepted by every Member State and thus codified as a part of EU law.

123 Fox, 2023.
124 European Commission, 2020; European Commission, 2024.
125 *European Union Agency for Asylum*; Based on the *EUAA Foundation Regulation (EU):* Regulation (EU) 2021/2303 of the European Parliament and of the Council of 15 December 2021 on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010, OJ L 468, 30.12.2021, pp. 1–54.
126 Woollard, 2023.
127 Council of the EU, 2023.
128 Tilles, 2023.
129 Ibid.
130 *New EU Migrant Plan Abandons Refugee Quotas for 'Mandatory Solidarity'*, 2020.

6. Conclusion

As an expression of the protection elsewhere policies, each refugee deal has sought to strengthen the security of State borders and prevent human trafficking. However, in practice, refugee deals may lead to massive breaches of refugee rights. Thus, such deals raise questions about their legality, including their compliance with international law—especially the Refugee Convention—as well as questions regarding States' responsibility for wrongful acts as they try to share or escape responsibility for the protection of refugees. As the Refugee Convention does not expressly cover protection elsewhere policies, we cannot conclude that it prohibits such policies regarding the transfer of refugees to a third country. However, the Refugee Convention does oblige States to fulfil refugee protection obligations as they are responsible under international law for their actions. In any case, the sending State has to assess the compliance with the rights guaranteed by the Refugee Convention within the receiving State, monitor it, and ensure the right to legal remedy in relation to the proposed transfer before it is enforceable. As the above analysis shows, many refugee deals do not comply with international law— especially refugee law.

Regarding the compliance of refugee deals with the obligations of the sending (offshoring) State under the Refugee Convention, it is important for the State to fulfil the elements of the concept of effective protection elsewhere, the possibility of its implementation, respect for refugee rights, and safeguards for the right of legal remedy. First, the legitimacy of the refugee deal and the possibility of its implementation are based on the precondition that the refugee deal is of a right and clear legal nature. Based on the analysis, we can conclude that only the US-Canada deal has a right and clear legal nature in accordance to the rules of international law. Second, most existing refugee deals address transfers based on the precondition that a particular third country is safe for all refugees, which is not sufficient. The protection elsewhere policies should be based on the assessment of the circumstances of individual refugees and refugees should be able to challenge a transfer decision in every individual case. Based on the rules of state responsibility for wrongful acts, States need to be aware that any conduct, act, or omission amounting to a direct or indirect breach of the non-refoulement principle under the jurisdiction of the State may qualify as an internationally wrongful act that violates Art. 33 of the Refugee Convention. The example of the Australia-Nauru refugee deal shows that the regime in the third country may lead to immense human suffering, from inhuman treatment to years of indefinite detention, in spite of the fact that Nauru is a Party of the Refugee Convention according to which its own national asylum law was adopted. More important are the ways in which the receiving State applies the rules of human rights and asylum law, which must comply with the sending State's obligations.

The UN Special Rapporteur on trafficking persons, Siobhán Mullally, warned[131] that transferring asylum seekers to third countries does not prevent or combat human

131 *UN Expert Urges UK to Halt Transfer of Asylum Seekers to Rwanda,* 2022.

trafficking but instead pushes desperate people into riskier and more dangerous situations. It is important to ensure that asylum seekers have a right to a suspensive appeal and a personal interview, with detention used only as a last resort; further, protection measures should align with the best interests of the child.[132] In conclusion, we have to agree with Laganà[133] that any form of extraterritorial processing of asylum claims leads to the detention of asylum seekers and migrants in very low living conditions for indefinite periods of time with very limited or no access to judicial reviews of or appeals against the detention itself or asylum or return decisions. The presented refugee deals have led to such conditions for refugees, which are contrary to the obligations of States under international human rights law (e.g. the prohibition against torture and cruel, inhuman, or degrading treatment, the right to family life and privacy). However, refugee deals have also a huge impact on the living conditions of asylum seekers and their mental health (especially given their according inability to move beyond particular facilities). Additionally, refugee deals also impact host communities. Countries which have agreed to outsource asylum arrangements to so-called "receiving countries" are often criticised as cruel abusers of refugees seeking to benefit from related financial supports.[134]

Thirdly, the safeguards for the legal remedy need to be settled. One of the basic differences between Australia and the European States is that all European States are bound by the ECHR. In 2012, the ECtHR ruled that Italy's policy of returning asylum seekers and migrants intercepted in the Mediterranean Sea to Libya between 2008 and 2009 was illegal.[135] Therefore, European States may not stop migrant boats at sea and escort asylum seekers to a third country for processing. However, no regional judicial body can hold Australia responsible for violating international refugee law or human rights law according to the principle of non-refoulement. Attempts to avoid breaches of the ECHR currently consist of strengthening the capacity of local coast guards to pull migrants, rather than pushed back, without possibility to set foot on any European ship as European territory and therefore be non-returnable.[136]

However, as the case of the UK-Rwanda refugee deal shows, it is very important to ensure the impartiality, independence, and expertise of judicial reviews of the balance State power. The biggest legal limitation of the refugee deals—especially in the case of the EU-Turkey statement and the memorandums of understanding between the UK and Rwanda and Australia and Nauru—is that they do not allow those transferred to third countries to access a judicial review. The advantage for legal certainty within the European region is the review by the ECtHR, which power has territorial limitation only to territories of state parties.

132 UNHCR, 2023.
133 Laganà, 2018, p. 7.
134 Morris, 2023.
135 ECtHR: Case of *Hirsi Jamaa and others v. Italy* (Application no. 27765/09).
136 Laganà, 2018, p. 3.

As the refugee deals depend on the third states, every sending (offshoring) country should be aware that countries that have agreed to host offshore facilities may be under pressure from domestic public opinion and national courts to revoke those agreements.[137] Although States use refugee deals to fight irregular migration, including economic migrants, they should look for other ways to deal with irregular migration while still fulfilling their obligations in the field of the refugee law. The US's approach to work visas provides a good example of how to lower the number of economic migrants without externalising responsibility for refugees. Since 1995, 20 000 work visas have been issued to Cubans by the US and approximately 3 000 refugees have been recognised annually. During this period, the rate of irregular Cuban migrants coming to the US has dropped from more than 38 000 to a few hundred annually.[138] While this scenario may not be ideal for every State, it offers an example of a good practise.

The examined refugee deals confirm that States, especially those in the EU, did not learn from previous deals leading to the breach of human and refugee rights. Following the example of the UK-Rwanda refugee deal, the EU announced the adoption of a political agreement in form of a memorandum of understanding[139] in 2023 for a comprehensive partnership package[140] with Tunisia. While the memorandum's official purpose was to fight smugglers, it was primarily motivated by the fact that the journey from Tunisia to Italy was the main migration route for irregular migrants from the Ivory Coast, Guinea, and Egypt to Europe. Notably, Tunisia is not considered a safe third country—not only due to concerns over the decline of democracy, but also to the criminalisation of the irregular entry, stay, and exit of foreigners and arbitrary detentions of the migrants from the rest of the Africa.[141] Ultimately, no lessons have been learned by the EU. To ensure compliance with the rules of international refugee law and prevent infringements on the rights of particular persons guaranteed by particular states, it is crucial that every asylum claim is assessed individually.

137 Ibid.
138 Laganà, 2018, p. 4.
139 *Memorandum of Understanding on a Strategic and Global Partnership between the European Union and Tunisia*, 2023.
140 *The European Union and Tunisia Agreed to Work Together on a Comprehensive Partnership Package,* 2023.
141 Seibert, 2023.

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