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EU-Turkey Readmission Agreement in the wake of the Migrant Crisis: What might go wrong with it?

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Abstract

As the "EU-Turkey Statement" after the Summit between the EU and Turkey in 29 November 2015 demonstrated, EU-Turkey Readmission Agreement ("RA"), signed in 16 December 2013 and entered into force in 1 October 2014, seems to be the most important tool for cooperation between EU and Turkey, in order to cope with the migrant flow. Nonetheless, there might be some problems with the RA's full implementation. On the one hand, there might be difficulties with the *effective* implementation of the RA, due to some *political* reasons, especially considering its connection with the dialogue towards a visa free regime with Turkey, since the failure in this dialogue may directly affect the effective implementation of the RA (and *vice versa*). On the other hand, there might be complications with the *proper* implementation of the RA, because of some *legal* issues, particularly, in view of its relationship with the human rights and asylum law obligations, since, in general, the removal of a person and its enforcement with the RA should be completed without prejudice to such obligations. Against this background, this paper seeks to determine what might go wrong with the RA as regards its implementation in an effective and/or proper way, and based on these findings, offers some solutions to overcome these potential problems.

Keyword(s)

EU-Turkey Readmission Agreement, Migrant Crisis, Visa Free Regime, Human Rights, Asylum Law

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Introduction

As the “EU-Turkey Statement” after the Summit between the EU and Turkey in 29 November 2015 demonstrated,² EU-Turkey Readmission Agreement (“RA”),³ signed in 16 December 2013 and entered into force in 1 October 2014,⁴ seems to be the most important tool for cooperation between EU and Turkey, in order to cope with the migrant flow. Overall, RA determines, on the basis of reciprocity, the conditions, essentials and procedures related to the readmission or transit of nationals, third country nationals and stateless persons who are irregular migrants in relation to Turkey or EU Member States.

This paper argues that there might be problems with the *effective* and *proper* implementation of RA, due to in turn *political* and *legal* reasons. On the *effective* implementation of RA, it should be noted that besides being an instrument of its own, RA should be seen from a broader *political* context. This *political* context might pose difficulties to the *effective* implementation of RA, mainly because of three interrelated topics that has the potential to produce tensions between the parties. There is a correlation firstly between the “readmission agreement” and “visa free regime”, secondly between the readmission obligation of third country nationals (“TCN’s”) and stateless persons “in law” and “in fact” and thirdly between “expenses” and “financial assistance” related to the RA.

On the *proper* implementation of RA, it should be noted that besides being an instrument of its own, RA should be seen from a broader *legal* context. This *legal* context, comprising *inter alia* of human rights and asylum law obligations, might add complications to the *proper* implementation of RA, mainly because of two interrelated topics. There is a correlation firstly between the “readmission agreement” and “removal process”, secondly between the “ordinary readmission procedure” and departures from it, such as “accelerated readmission procedure”.

² <<http://www.consilium.europa.eu/en/press/press-releases/2015/11/29-eu-turkey-meeting-statement/>>, accessed 10 August 2016.

³ The full name is as follows: “Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation” [2014] OJ L 134/3. In general, see Nuray Ekşi, *Türkiye Avrupa Birliği Geri Kabul Antlaşması* (Beta Yayıncılık 2016); İlke Göçmen, ‘Türkiye ile Avrupa Birliği Arasındaki Geri Kabul Anlaşmasının Hukuki Yönden Analizi’ (2014) 13 Ankara Avrupa Çalışmaları Dergisi 21, 21–86.

⁴ Article 24(2) of the RA. On the approval of the RA, for the EU see [2014] OJ L 134/1, and for Turkey see Official Journal of 28 June 2014, no: 29044.

Against this background, this paper seeks to determine what might go wrong with RA as regards its implementation in an *effective* and/or *proper* way, and based on these findings, offers some solutions to overcome these potential problems. To that end, this paper is divided into three parts: First, the recent developments related to the RA, second, the issues related to the *effective* implementation of RA or *political* dimension and third, the issues related to the *proper* implementation of RA or *legal* dimension will be scrutinized.

I. The Recent Developments Related to the EU-Turkey Readmission Agreement

RA, which was signed along with the initiation of the EU-Turkey Visa Liberalisation Dialogue, became a part of two political compromises due to migration crisis, followed by a modification and improvement of RA and the process in general has been monitored by the Commission. Hence, there is a default position, position at 29 October 2015 and position at 18 March 2016, paving the way for a modification and improvement of RA, and Commission monitoring in the meantime.

The *default position* can be summarised as follows: RA was signed in 16 December 2013 and entered into force in 1 October 2014; nonetheless with two important notes. On the one hand, the obligation to readmit third-country nationals and stateless persons was to become applicable, as a rule, three years after the entry into force of the RA, *i.e.* 1 October 2017.⁵ There are two exceptions to this rule: (i) If Turkey have concluded bilateral treaties or arrangements on readmission with third countries, Turkey will readmit stateless persons and nationals from those third-countries as of 1 October 2014,⁶ (ii) existing bilateral readmission agreements between Turkey and individual Member States (for instance Greece) will continue to apply in their relevant parts, until this transitional period (three years) passes.⁷

On the other hand, RA was signed along with the initiation of the “EU-Turkey Visa liberalisation dialogue”.⁸ This dialogue, which is about removing the visa requirement for Turkish citizens travelling to the Schengen area for a short term visit, supplemented with the

⁵ Article 24(3) of the RA.

⁶ Article 24(3) of the RA.

⁷ Article 24(3) of the RA.

⁸ For the mentioning of EU-Turkey Visa liberalisation dialogue, see <http://europa.eu/rapid/press-release_STATEMENT-14-285_en.htm>, accessed 10 August 2016.

“Roadmap towards a Visa-Free Regime with Turkey”.⁹ This Roadmap sets 72 requirements to be fulfilled by Turkey, including that Turkey has to “fully and effectively implement the EU-Turkey readmission agreement *in all its provisions*”.¹⁰

Overall, *default position* was that when Turkey will implement the RA in all its provisions, *i.e.* as from 1 October 2017 and fulfil 72 requirements of the Roadmap, EU will lift the short term Schengen visa requirements for Turkish citizens.

The *position at 29 October 2015* can be summarised as follows: Due to migrant crisis, especially massive influx of Syrians, Turkey and EU Heads of State or Government met together and agreed upon an “EU-Turkey statement” in 29 October 2015;¹¹ however, shortly before that, in 15 October 2015, EU and Turkey had agreed *ad referendum* upon a “joint action plan”.¹² (i) According to this plan, which was later activated in 29 October 2015,¹³ *inter alia*, Turkey intended to: “step up cooperation and accelerate procedures in order to smoothly readmit irregular migrants ... in line with the established bilateral readmission provisions”.¹⁴ (ii) Both sides agreed that RA will become fully applicable from June 2016; in return EU will lift the short term Schengen visa requirements for Turkish citizens by October 2016, once the requirements of the Roadmap are met.¹⁵ (iii) EU proposed to expand significantly its overall financial support and committed to provide an initial 3 billion euro of additional resources, under “A Refugee Facility for Turkey” to support to Syrians under temporary protection and host communities in Turkey, as a part of “burden-sharing”.¹⁶

Overall, *position at 29 October 2015* was that when Turkey will implement the RA in all its provisions, *i.e.* as from June 2016 and fulfil 72 requirements of the Roadmap, EU will lift the short term Schengen visa requirements for Turkish citizens by October 2016. In addition to it, Turkey will revive the established bilateral readmission provisions, *i.e.* with Greece, and EU will provide an initial 3 billion euro of additional resources, *i.e.* burden-sharing.

⁹ For the text of Roadmap towards a Visa-Free Regime with Turkey, see: <http://ec.europa.eu/dgs/home-affairs/what-is-new/news/news/docs/20131216-roadmap_towards_the visa-free_regime_with_turkey_en.pdf>, accessed 10 August 2016.

¹⁰ See Roadmap towards a Visa-Free Regime with Turkey, fn. 9. (*Emphasis added.*)

¹¹ <<http://www.consilium.europa.eu/en/press/press-releases/2015/11/29-eu-turkey-meeting-statement/>>, accessed 10 August 2016.

¹² For the text, see <http://europa.eu/rapid/press-release_MEMO-15-5860_en.htm>, accessed 10 August 2016.

¹³ EU-Turkey statement of 29 October 2015, fn. 11, pt. 7.

¹⁴ Fn. 12. Compare with Article 24(3) of the RA.

¹⁵ EU-Turkey statement of 29 October 2015, fn. 11, pt. 5.

¹⁶ EU-Turkey statement of 29 October 2015, fn. 11, pt. 6.

The *position at 18 March 2016* can be summarised as follows: Due to continuing migrant crisis, Turkey and EU Heads of State or Government met together and agreed upon an “EU-Turkey statement” again in 18 March 2016;¹⁷ however, shortly before that, in 7 March 2016, the EU Heads of State or Government, after meeting with Turkey’s Prime Minister, had agreed on a statement.¹⁸ (i) “All new irregular migrants crossing from Turkey into Greek islands as from 20 March 2016 will be returned to Turkey”.¹⁹ According to the statement of 7 March 2016, this return will build on the Greece-Turkey readmission agreement and, from 1 June 2016, the RA.²⁰ (ii) “For every Syrian being returned to Turkey from Greek islands, another Syrian will be resettled from Turkey to the EU taking into account the UN Vulnerability Criteria”,²¹ which was formulated as “1:1”. (iii) EU will lift the short term Schengen visa requirements for Turkish citizens at the latest by the end of June 2016, provided that all benchmarks have been met.²² (iv) “Turkey will take any necessary measures to prevent new sea or land routes for illegal migration opening from Turkey to the EU, and will cooperate with neighbouring states as well as the EU to this effect”,²³ which referred indirectly to Bulgaria in the first place. (v) EU will “speed up the disbursement of the initially allocated 3 billion euros under the Facility for Refugees in Turkey” and “will mobilise additional funding for the Facility of an additional 3 billion euro up to the end of 2018.”²⁴

Overall, *position at 18 March 2016* was that when Turkey will revive Greece-Turkey readmission agreement as from 20 March 2016, implement the RA in all its provisions, *i.e.* as from 1 June 2016 and fulfil 72 requirements of the Roadmap, EU will lift the short term Schengen visa requirements for Turkish citizens at the latest by the end of June 2016. In addition to it, EU will resettle a Syrian for every Syrian being returned to Turkey and speed up the disbursement of an initial 3 billion euro, in addition to another 3 billion euro up to the end of 2018, *i.e.* burden-sharing, and Turkey will take steps to prevent illegal migration in general and cooperate with neighbouring states, *i.e.* Bulgaria, and the EU to this effect.

¹⁷ <<http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/>>, accessed 10 August 2016.

¹⁸ <<http://www.consilium.europa.eu/en/press/press-releases/2016/03/07-eu-turkey-meeting-statement/>>, accessed 10 August 2016.

¹⁹ EU-Turkey statement of 18 March 2016, fn 17, pt. 1.

²⁰ Statement of the EU Heads of State or Government of 7 March 2016, pt. 3(d).

²¹ EU-Turkey statement of 18 March 2016, fn 17, pt. 2.

²² EU-Turkey statement of 18 March 2016, fn 17, pt. 5.

²³ EU-Turkey statement of 18 March 2016, fn 17, pt. 3.

²⁴ EU-Turkey statement of 18 March 2016, fn 17, pt. 6.

Against this background, RA was modified and improved. Firstly, RA was modified in accordance with EU-Turkey statement of 29 October 2015 (and 18 March 2016): the Joint Readmission Committee, which has power to decide on implementing arrangements necessary for the uniform application of RA,²⁵ decided that the readmission obligation related to third country nationals and stateless persons will be applicable from 1 June 2016.²⁶ Note that this decision was to be binding following the necessary internal procedures required by the laws of the Parties.²⁷ On part of Turkey, (i) in 3 May 2016, Grand National Assembly of Turkey adopted a “Law” approving the ratification of this Decision,²⁸ (ii) in 18 May 2016, the President of the Republic decided to promulgate that “Law”,²⁹ (iii) in 20 May 2016, this “Law” was published in Official Gazette³⁰ and entered into force on that date.³¹ Nonetheless, the Council of Ministers will execute the provisions of this “Law”.³² On part of the EU, to my knowledge, EU has not followed the necessary internal procedures yet.³³

Secondly, RA was modified in accordance with EU-Turkey statement of 29 October 2015 (and 18 March 2016): In 5 May 2016, Turkey and Bulgaria signed an Implementation Protocol of RA.³⁴ On part of Turkey, to my knowledge, it has not ratified this Protocol yet. On part of Bulgaria, according to a news agency, Bulgaria ratified this Protocol in 22 June 2016.³⁵ Besides, in keeping with RA, this Protocol will enter into force only after the readmission committee has been notified.³⁶

²⁵ Article 19(1/b) of the RA.

²⁶ Article 1 of the Decision No 2/2016 of the Joint Readmission Committee.

²⁷ Article 2 of the Decision No 2/2016 of the Joint Readmission Committee.

²⁸ Article 90(1) of Turkish Constitution. Law No: 6714, of 3 May 2016.

²⁹ Article 104/a of Turkish Constitution.

³⁰ Official Gazette No: 29717, dated 20 May 2016.

³¹ Article 2 of the Law No: 6714.

³² Article 3 of the Law No: 6714.

³³ Initially, the Council adopted a Decision establishing the position to be taken on behalf of the EU within the Joint Readmission Committee; however, I could not find any measure on its ratification. (For the former, see Council Decision (EU) 2016/551 of 23 March 2016 establishing the position to be taken on behalf of the European Union within the Joint Readmission Committee on a Decision of the Joint Readmission Committee on implementing arrangements for the application of Articles 4 and 6 of the Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation from 1 June 2016 [2016] OJ L 95/9.)

³⁴ See Article 20(1) of the RA. <<https://www.icisleri.gov.tr/bulgaristan-basbakan-yardimcisi-ve-icisleri-bakani-rumyana-bacvarova-baskanligindaki-heyetler-arasinda-gorusme>>, accessed 10 August 2016.

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<<http://www.novinite.com/articles/175066/Bulgaria+Ratifies+Protocol+on+EU's+Readmission+Agreement+with+Turkey>>, accessed 10 August 2016.

³⁶ Article 20(2) of the RA. Also see Article 20(3) of the RA.

In the meantime, the Commission has been monitoring the progress in EU-Turkey Visa Liberalisation Dialogue and political compromises of 15 October 2015 and 18 March 2016. The Commission adopted third reports on progress by Turkey in fulfilling the requirements of its visa liberalisation roadmap, first in 20 October 2014,³⁷ second in 4 March 2016³⁸ and third in 4 May 2016.³⁹ Besides, the Commission adopted two reports on the progress made in the implementation of the EU-Turkey Statement of 18 March 2016, first in 20 April 2016⁴⁰ and second in 15 June 2016.⁴¹ Moreover, in 4 May 2016, the Commission proposed an amendment to the EU legislation in order for Turkish citizens to travel to the Schengen area without a visa in the short term.⁴² However, there has been a dispute over a “requirement” of the Roadmap, *i.e.* anti-terrorism law of Turkey, and the migrant deal seems to be at risk because of this, at least for now.⁴³

Next issues related to the *effective* implementation of RA or *political* dimension will be scrutinized.

II. The Issues Related to the Effective Implementation of the EU-Turkey Readmission Agreement: Political Dimension

There are three issues related to the *effective* implementation of RA or *political* dimension: (i) the correlation between the “readmission agreement” and “visa free regime”, (ii) the correlation between the readmission obligation of third country nationals and

³⁷ COM(2014) 646 final Report from the Commission to the European Parliament and the Council on progress by Turkey in fulfilling the requirements of its visa liberalisation roadmap.

³⁸ COM(2016) 140 final Report from the Commission to the European Parliament and the Council on Second Report on progress by Turkey in fulfilling the requirements of its visa liberalisation roadmap.

³⁹ COM(2016) 278 final Report from the Commission to the European Parliament and the Council on Third Report on progress by Turkey in fulfilling the requirements of its visa liberalisation roadmap.

⁴⁰ COM(2016) 231 final Communication from the Commission to the European Parliament, the European Council and the Council on First Report on the progress made in the implementation of the EU-Turkey Statement.

⁴¹ COM(2016) 349 final Communication from the Commission to the European Parliament, the European Council and the Council on Second Report on the progress made in the implementation of the EU-Turkey Statement.

⁴² COM(2016) 279 final, Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (Turkey).

⁴³ For instance, according to the news on euobserver, dated 9 August 2016, “Turkey won't amend its anti-terrorism law, a blow which could upend the EU-Turkey migrant-swap deal signed off with Ankara in March.” <<https://euobserver.com/foreign/134599>>, accessed 10 August 2016.

stateless persons “in law” and “in fact”, (iii) the correlation between “expenses” and “financial assistance” related to the RA.

1. Readmission Agreement v Visa Free Regime

The first correlation is between the “readmission agreement” and “visa free regime”. After roughly 10 years of negotiation,⁴⁴ RA could be signed in 16 December 2013, only since it was accompanied with the initiation of the “EU-Turkey Visa liberalisation dialogue”.⁴⁵ In sum, EU-Turkey Visa liberalisation dialogue aims to “make progress towards the elimination of the visa obligation currently imposed on the Turkish citizens travelling to the Schengen area for a short term visit”.⁴⁶ To fulfil this Road Map, Turkey needs to comply with some requirements, listed under “five blocks”, *i.e.* “documents security”, “migration and border management”, “public order and security” and “fundamental rights”, “readmission of irregular migrants”, in addition to the use of biometric travel documents and the Commission will monitor the progress.⁴⁷

Against this background, firstly, I argue that the correlation between the “readmission agreement” and “visa free regime” might pose difficulties to the effective implementation of RA, since it introduces a vulnerable equation. This equation has three factors. On the side of EU, it *wants* no or few migrants crossing from Turkey into Greece (or EU in general), it *is unwilling to* grant Turkish nationals visa exemption;⁴⁸ however, it *concedes* visa exemption to Turkey in order to get what it wants.⁴⁹ On the side of Turkey, it *wants* visa exemption from the EU for its nationals, it *is unwilling to* stop or take back all migrants from crossing

⁴⁴ On this point see Nils Coleman, *European Readmission Policy* (Martinus Nijhoff 2008) 178–182; Ahmet İçduygu and Damla B Aksel, ‘Two-to-Tango in Migration Diplomacy: Negotiating Readmission Agreement between the Eu and Turkey’ (2014) 16 *European Journal of Migration and Law* 337, 337–363; Sarah Wolff, ‘The Politics of Negotiating EU Readmission Agreements: Insights from Morocco and Turkey’ (2014) 16 *European Journal of Migration and Law* 69, 85–93.

⁴⁵ The Commission Press Release named “Statement of Commissioner Malmström on the entry into force of the Readmission Agreement between Turkey and the EU” of 1 October 2014 stated as follows: “On 16 December 2013, EU Commissioner for Home Affairs Cecilia Malmström and the Turkish authorities, signed in Ankara, the EU-Turkey readmission agreement, and initiated, **jointly**, the EU-Turkey Visa liberalisation dialogue.” (**Emphasis** added.) <http://europa.eu/rapid/press-release_STATEMENT-14-285_en.htm>, accessed 10 August 2016. For the text of EU-Turkey Visa liberalisation dialogue, see: <http://ec.europa.eu/dgs/home-affairs/what-is-new/news/news/docs/20131216-roadmap_towards_the_visa-free_regime_with_turkey_en.pdf>, accessed 10 August 2016.

⁴⁶ <http://europa.eu/rapid/press-release_STATEMENT-14-285_en.htm>, accessed 10 August 2016.

⁴⁷ EU-Turkey Visa liberalisation dialogue, fn. 45.

⁴⁸ See, for instance the news on euobserver, dated 28 April 2016, “France, Germany want easier ways to suspend visa-free travel.” <<https://euobserver.com/tickers/133246>>, accessed 10 August 2016.

⁴⁹ See, for instance the news on euobserver, dated 2 May 2016, “EU advances Turkey visa deal amid migration fears.” <<https://euobserver.com/migration/133298>>, accessed 10 August 2016.

from Turkey into Greece (or EU in general); however, it *concedes* RA to the EU in order to get what it wants.⁵⁰ In other words, on the side of EU, the perception will be probably that the more Turkey implements effectively the RA, the more EU will take steps towards the visa exemption. On the side of Turkey, the perception will be probably that the more EU takes steps towards the visa exemption, the more Turkey will implement effectively the RA.

There have been some signs about the perception of the parties in this regard. For instance, it is stated under the “EU-Turkey Visa liberalisation dialogue” that “[t]he pace of movement towards visa liberalisation will depend on Turkey’s progress in adopting and implementing the measures and fulfilling the requirements set out in this Roadmap, *including* full and effective implementation of the readmission agreement.”⁵¹ Hence, this demonstrates that, on the part of the EU, Turkey’s effective implementation of the RA comes first. According to the news on euobserver, dated 1 August 2016, “Foreign minister Mevlut Cavusoglu said his country would no longer abide by the [migrant] deal should the EU fail to lift short-term visa restrictions on Turks”.⁵² Thus, this shows that, on the part of Turkey, EU’s steps towards the visa exemption come first.

Overall, these signs show that where the price of the concession becomes higher than the price of what the parties want, this equation might easily break down. On the other hand, as long as what the parties want maintain their importance, this equation will survive, albeit with its vulnerability.

2. Readmission Obligation of Third Country Nationals and Stateless Persons: “In Law” and “In Fact”

The second correlation is between the readmission obligation of TCN’s and stateless persons “in law” and “in fact”.⁵³ This readmission obligation seems problematic,⁵⁴ since it is

⁵⁰ See, for instance the news on euobserver, dated 1 August 2016, “Turkey threatens to scrap migrant deal with EU, again.” <<https://euobserver.com/migration/134539>>, accessed 10 August 2016.

⁵¹ EU-Turkey Visa liberalisation dialogue, fn. 45. (*Emphasis added.*)

⁵² <<https://euobserver.com/migration/134539>>, accessed 10 August 2016.

⁵³ In this regard, the readmission obligation of own nationals seems unproblematic, since it is also (Compare with Article 3(2) and 5(2) of the RA) an obligation flowing from public international law. See, for instance Article 12.4 of the International Covenant on Civil and Political Rights, Article 3(2) of the Fourth Protocol to the European Convention of Human Rights. Also see Jean-Pierre Cassarino, ‘Readmission Policy in the European Union’ (European Parliament 2010) European Parliament’s Committee on Civil Liberties, Justice and Home Affairs PE 425,632 13; Coleman (n 44) 41; Kay Hailbronner, ‘Readmission Agreements and the Obligation on States under Public International Law to Readmit Their Own and Foreign Nationals’ (1997) 57 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 1, 11; Tineke Strik, ‘Readmission Agreements: A Mechanism for Returning Irregular Migrants (Explanatory Memorandum)’ (Council of Europe / Parliamentary

not an obligation flowing from public international law,⁵⁵ but flowing directly from RA itself,⁵⁶ however, more decisively, though it is neutral on paper, it delivers unequal results in practice.⁵⁷ Hence, as Guild acknowledges for the readmission agreements in general, “of course, despite the form of reciprocity in practice the agreements will overwhelmingly be applied to expel persons *from* the [EU], *not to it*”.⁵⁸

Against this background, secondly, I argue that readmission obligation of TCN’s and stateless persons might pose difficulties to the effective implementation of RA, since it will probably deliver unequal results in practice to the detriment of Turkey.⁵⁹ Unless Turkey takes the necessary steps, such as concluding readmission agreements with source third countries or adopting measures on receiving TCN’s, like building readmission centres,⁶⁰ to reduce the negative results, such as economic and social burdens,⁶¹ deriving from this readmission obligation in due time, these negative results may have a negative impact on the effective implementation of RA.

To sum up, the more Turkey readmits TCN’s and stateless persons, the harder it will become for Turkey (Turkish politicians) to stand behind the RA, probably affecting the

Assembly 2010) Report of the Committee on Migration, Refugees and Population Doc. 12168 8; Florian Trauner and Imke Kruse, ‘EC Visa Facilitation and Readmission Agreements: A New Standard EU Foreign Policy Tool’ (2008) 10 *European Journal of Migration and Law* 411, 431.

⁵⁴ According to the Commission, “All third countries hold a deep aversion to the TCN clause...”. COM(2011) 76 final, Communication from the Commission to the European Parliament and the Council Evaluation of EU Readmission Agreements, p. 9. According to Özsöz, as regards readmission obligation, TCN’s and stateless persons form undoubtedly the most controversial group. Murat Özsöz, ‘Türk Vatandaşlarının Vizesiz Avrupa Yolculuğu: Vize Sorunu, Geri Kabul ve Sonrası’ (İktisadi Kalkınma Vakfı 2014) İKV Değerlendirme Notu 85 14. According to Trauner and Kruse, “The most difficult issue to agree upon is the readmission of third country nationals and stateless persons.” Trauner and Kruse (n 53) 428.

⁵⁵ Cassarino (n 53) 13; Coleman (n 44) 41; Hailbronner (n 53) 37; Strik (n 53) 8.

⁵⁶ Göçmen (n 3) 37.

⁵⁷ In this regard see, for instance Mehmet Özcan and others, ‘Türkiye - AB İlişkilerinde Geri Kabul: Hangi Şartlarda?’ (Uluslararası Stratejik Araştırmalar Kurumu 2010) Uluslararası Stratejik Araştırmalar Kurumu 10–23.

⁵⁸ Elspeth Guild, ‘Readmission Agreements’ in Steve Peers and others (eds), *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition: Volume 2: EU Immigration Law* (Martinus Nijhoff Publishers 2012) 562. For similar remarks, see Carole Billet, ‘EC Readmission Agreements: A Prime Instrument of the External Dimension of the EU’s Fight against Irregular Immigration. An Assessment after Ten Years of Practice’ (2010) 12 *European Journal of Migration and Law* 45, 68; İçduygu and Aksel (n 44) 338; Martin Schieffer, ‘Community Readmission Agreements with Third Countries - Objectives, Substance and Current State of Negotiations’ (2003) 5 *European Journal of Migration and Law* 343, 356.

⁵⁹ Actually, on the one hand according to the RA, readmission obligation of TCN’s and stateless persons seems to be the *exception*: “The Member States and Turkey shall make *every effort* to return a person [who is TCN’s and stateless person] *directly* to the country of origin.” Article 7(1) of the RA (*Emphasis added*). On the other hand, as mentioned by Strik, “it might be difficult to implement a readmission agreement with regard to third-country nationals, [since] it is very difficult for the sending country to meet the criteria and provide the evidence as required by the agreements.” Strik (n 53) 14.

⁶⁰ See, for instance Özcan and others (n 57) 35 ff.

⁶¹ *ibid* 31.

effective implementation of it. For now, though the readmission obligation of TCN's and stateless persons has begun (via Turkey-Greece readmission protocol), the numbers have still been too few to check the validity of this argument. According to the news on euobserver, dated 9 June 2016, "Turkey has taken back 449 irregular migrants from Greece, ..., under its accord with Turkey of 18 March".⁶² Hence, the time will tell whether and when the readmission obligation of TCN's and stateless persons really poses serious difficulties to the effective implementation of RA.

3. Readmission: Expenses v Financial Assistance

The third correlation is between "expenses" and "financial assistance" related to the RA. As it is acknowledged by the RA itself, Turkey will incur "expenses" owing to the implementation of RA; hence there will be a need for "financial assistance" in return. According to the RA,⁶³ its implementation "is based on the principles of joint responsibility, solidarity, and an equal partnership to manage the migratory flows" and "in this context, [EU] is committed to making available financial resources in order to support Turkey in the implementation of [RA]".⁶⁴

Against this background, thirdly, I argue that the correlation between the "expenses" and "financial assistance" might pose difficulties to the effective implementation of RA, since financial issues may easily become a matter of dispute between the parties,⁶⁵ affecting on the effective implementation of RA.

Today, though not directly related with the implementation of RA, there have been some signs that financial issues, concerning indirectly also RA, have been disputed between the EU and Turkey. According to the news on euobserver, dated 26 July 2016, "Turkish president Recep Tayyip Erdogan has told the EU to pay its dues if it wants to keep a migrant deal with Ankara intact".⁶⁶ This means that the compromise of 29 October 2015 and/or 18 March 2016, including Turkey implementing RA in all its provisions as from June 2016, might be

⁶² <<https://euobserver.com/tickers/133765>>, accessed 10 August 2016.

⁶³ Also according to RA's Preamble: "... [RA] is based on the principles of joint responsibility, solidarity, and an equal partnership to manage the migratory flows between Turkey and the Union and that in this context the Union is ready to make available financial resources in order to support Turkey in its implementation..."

⁶⁴ Article 23 of the RA. Also see the Joint Declaration on technical assistance attached to the RA.

⁶⁵ In Turkey some authors argued that "financial assistance" is one of the most controversial topics related to the RA. See Özcan and others (n 57) 36; Özsöz (n 54) 18. Compare with (about Albania) Sokol Dedja, 'Human Rights in the EU Return Policy: The Case of the EU-Albania Relations' (2012) 14 *European Journal of Migration & Law* 95, 105.

⁶⁶ <<https://euobserver.com/migration/134487>>, accessed 10 August 2016.

discontinued if the EU does not provide an initial 3 billion euro of additional resources, as agreed. According to the news on euobserver, dated 28 July 2016, Commission said that it paid “€105 million of the €3 billion promised, ...€229 million had been contracted already, ... €2.2 billion had been “allocated” by the commission and member states”.⁶⁷

In my opinion, these news demonstrate that the financial issues may easily become disputed between the parties, hence they, the ones either directly or indirectly linked to the RA, might have an adverse effect on the effective implementation of RA.

Next issues related to the *proper* implementation of RA or *legal* dimension will be scrutinized.

III. The Issues Related to the Proper Implementation of the EU-Turkey Readmission Agreement: Legal Dimension

There are two issues related to the *proper* implementation of the RA or *legal* dimension: (i) the correlation between the “readmission agreement” and “removal process”, (ii) the correlation between the “ordinary readmission procedure” and departures from it, such as “accelerated readmission procedure”. These may, from a broader *legal* context, add complications to the *proper* implementation of the RA, mainly because of human rights and asylum law obligations.

1. Readmission Agreement v Removal Process

The first correlation, which might add complications to the *proper* implementation of RA, is between the “readmission agreement” and “removal process”. In this regard, I argue that, *in legal terms*, the issues related to human rights and asylum law have to be exhausted, in principle, before the use of the RA;⁶⁸ nonetheless, *in practice*, RA might be used as a tool in circumventing human rights and asylum law obligations.

⁶⁷ <<https://euobserver.com/tickers/134519>>, accessed 10 August 2016.

⁶⁸ In this regard also see Article 18 of the RA. For instance, according to Strik: “Readmission agreements normally do not include safeguards with regard to the non-application of the agreement in individual cases. The reason for this is presumably, that if concerns with regard to human rights existed, the return decision should not have been taken in the first place, and the readmission agreement thus never been applied.” Strik (n 53) 12. According to the Commission: “...if it would be against the principle of *non-refoulement*,... no readmission procedure can be initiated and this is acknowledged by [EU’s readmission agreements] in what is called a ‘non-affection clause’ confirming the applicability of and respect for instruments on human rights. Consequently, any return/readmission can only be carried out as a result of a return decision which may only

In general, RA forms the last phase in the removal of a person from a country, *i.e.* removal process. Removal process consists essentially of three phases: (i) A State should become aware of a person who does not fulfil the conditions in force for entry to, presence in, or residence on, its territory, *i.e.* illegal stay. (ii) That State should determine this illegality by a return decision in application of its relevant applicable (administrative) laws and procedural guarantees enshrined therein (legal representation, judicial review, respect of *non-refoulement etc.*)⁶⁹ (iii) That State may⁷⁰ use the RA as an instrument to enforce such a decision.⁷¹

To be more explicit, the possibilities in the removal process of a person from a country (Figure 1) can be demonstrated as follows:

- (1) Does the migrant fulfil the conditions in force for entry to, presence in, or residence on, the territory? If yes, then she/he is a *regular* migrant. If no, then:
- (2) Does the migrant wants to apply for international protection? If no, then she/he is an *irregular* migrant, thus where appropriate a return decision may be taken against her/him⁷² and enforced with **RA**. If yes, then:
- (3) Can the migrants' application for international protection be evaluated by another country, *i.e.* first country of asylum or safe third country?⁷³ If yes, then she/he is *deemed as* an *irregular* migrant, thus where appropriate a return decision may be taken against her/him⁷⁴ and enforced with **RA**. If no, then:

be issued if the guarantees [such as the principle of *non-refoulement*] are observed." COM(2011) 76 final, fn. 54, p. 11.

⁶⁹ COM(2011) 76 final, fn. 54, p. 10.

⁷⁰ See Article 18(7) of the RA: "Nothing in this Agreement shall prevent the return of a person under other formal or informal arrangements". These may be "memoranda of understanding, exchanges of letters, informal co-operation and concerted practice between border authorities or between diplomatic personnel." Strik (n 53) 12. Nonetheless, this has been criticised by the doctrine. For instance, according to the Giuffr : "These instruments do not generally contain the same safeguards of readmission agreements, and are also not subjected to public scrutiny and monitoring." Mariagiulia Giuffr , 'Readmission Agreements and Refugee Rights: From a Critique to a Proposal' (2013) 32 Refugee Survey Quarterly 79, 92. According to the Commission: "...more seriously, human rights and international protection guarantees in [EU's readmission agreements] may be ineffective if MS do not return irregular migrants under [them]". COM(2011) 76 final, fn. 54, p. 4.

⁷¹ See Strik (n 53) 11. In this regard, according to the RA: "'Readmission' shall mean the *transfer* by the Requesting State and *admission* by the Requested State of persons (nationals of the Requested State, third country nationals or stateless persons) who have been found illegally entering, being present in or residing in the Requesting State, in accordance with the provisions of this Agreement..." Article 1(n) of the RA (*Emphasis added*).

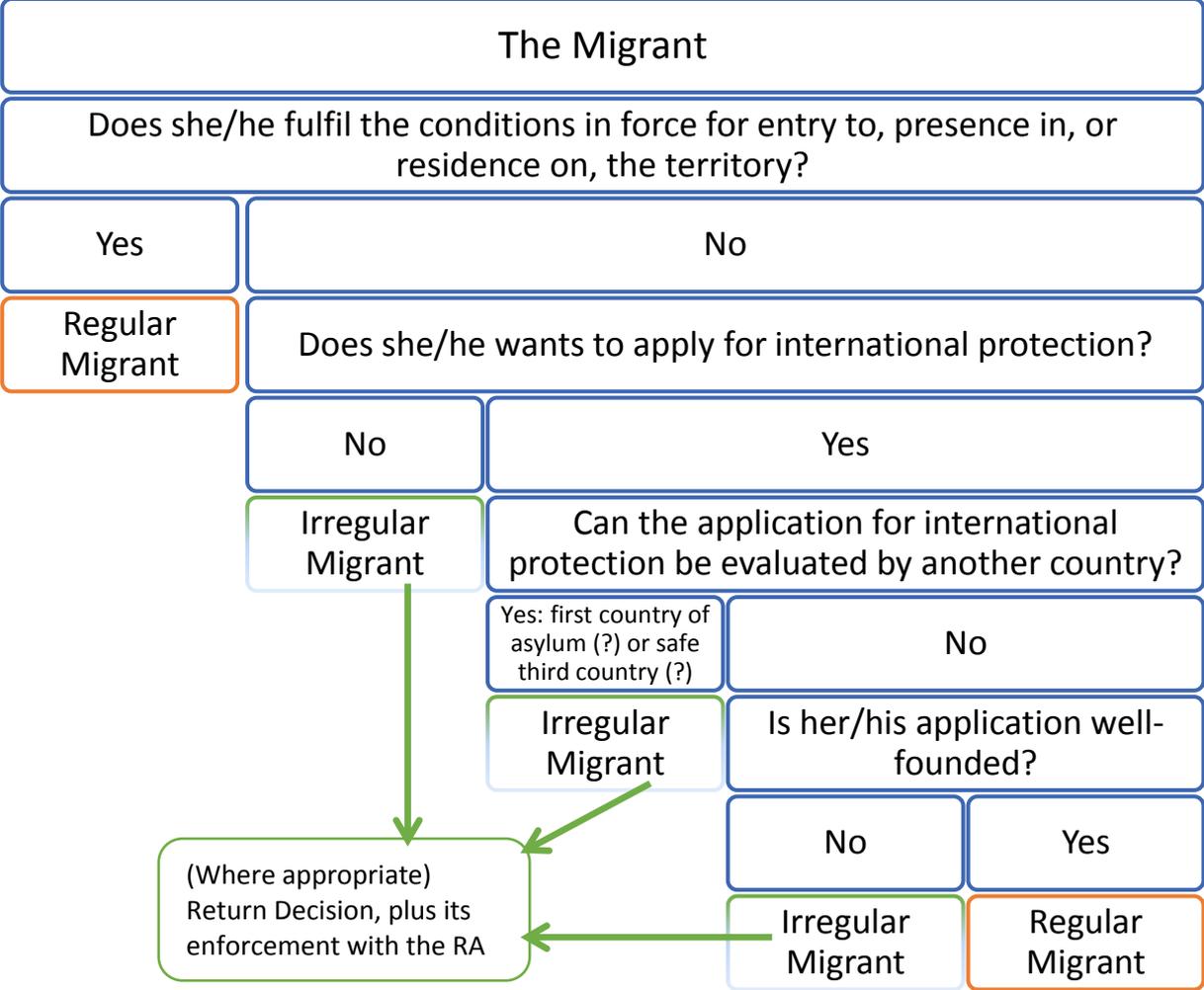
⁷² On the part of the EU, see Directive 2008/115/EC. On the part of Turkey, see Law No: 6458.

⁷³ On the part of the EU, see Article 35, 38 and 39 of the Directive 2013/32/EC. On the part of Turkey, see Article 73 and 74 of the Law No: 6458.

⁷⁴ On the part of the EU, see Directive 2008/115/EC. On the part of Turkey, see Law No: 6458.

(4) Is the migrants’ application well-founded? If yes, then she/he is a *regular* migrant. If no,⁷⁵ then she/he is an *irregular* migrant, thus where appropriate a return decision may be taken against her/him⁷⁶ and enforced with RA.

Figure 1: The Possibilities in the Removal Process of a Person from a Country



To highlight, the most contentious possibility in this removal process regarding RA is the question of whether Turkey can be considered as a first country of asylum or *especially* a safe third country.⁷⁷ There have been a lot of blog posts on this topic, arguing for and against.⁷⁸ In legal terms, *inter alia*, the debate has proceed on whether in Turkey “the

⁷⁵ On the part of the EU, see Article 32(1) of the Directive 2013/32/EC. On the part of Turkey, see Article 78 of the Law No: 6458.
⁷⁶ On the part of the EU, see Directive 2008/115/EC. On the part of Turkey, see Law No: 6458.
⁷⁷ See Article 35, 38 and 39 of the Directive 2013/32/EC. The concept of “safe third country” and readmission agreements are contentious in itself. For instance, see N Albuquerque Abell, ‘The Compatibility of Readmission Agreements with the 1951 Convention Relating to the Status of Refugees’ (1999) 11 International Journal of Refugee Law 60, 60–83. As regards Albania, see Dedja (n 65) 113.
⁷⁸ For the ones arguing that Turkey can be seen as a safe third country, see Daniel Thym, ‘Why the EU-Turkey Deal Can Be Legal and a Step in the Right Direction’ <<http://eumigrationlawblog.eu/why-the-eu-turkey-deal-can-be-legal-and-a-step-in-the-right-direction/>> accessed 10 August 2016.

possibility exists to request refugee status and, if found to be a refugee, to receive protection *in accordance with* the Geneva Convention”.⁷⁹ For instance, according to Peers and Roman, “... it is arguable that the ‘safe third country’ clause can only be interpreted as applying to countries which have ratified and fully apply the Geneva Convention”; however, “Turkey ratified the 1951 Geneva Convention and its 1967 Protocol, but maintains a geographical limitation for non-European asylum-seekers, thus recognising refugees originating only from Europe”.⁸⁰ On the other hand, according to Thym, “the safe third country concept does not require full ratification of the [Geneva] Convention — for as long as its requirements are met in practice; ... [that] will have to be assessed carefully in relation to Turkey”.⁸¹

In practice, roughly speaking, Turkey has been regarded as a first country of asylum or *especially* a safe third country. According to the Commission, “[it] has continued to support Greece by providing it with all the elements to conclude that Turkey is a safe third country and/or a country of first asylum...”.⁸² Moreover, Greek Asylum Service declared inadmissible 267 asylum applications out of 1,429 by 12 June 2016.⁸³ Still, in legal terms, sooner or later, the Court of Justice will end this debate with its decisions on this matter.⁸⁴

To sum up,⁸⁵ as long as the migrants are dealt with *individually*, including taking into account their human rights and asylum law claims, when adopting a return decision, the RA

For the ones arguing that Turkey cannot be seen as a safe third country, see Steve Peers and Emanuela Roman, ‘The EU, Turkey and the Refugee Crisis: What Could Possibly Go Wrong?’ <<http://eulawanalysis.blogspot.com.tr/2016/02/the-eu-turkey-and-refugee-crisis-what.html>> accessed 10 August 2016. Sergio Carrera and Elspeth Guild, ‘EU-Turkey Plan for Handling Refugees Is Fraught with Legal and Procedural Challenges’ <<https://www.ceps.eu/publications/eu-turkey-plan-handling-refugees-fraught-legal-and-procedural-challenges>> accessed 10 August 2016.

Also see Henri Labayle and Philippe de Bruycker, ‘The EU-Turkey Agreement on Migration and Asylum: False Pretences or a Fool’s Bargain?’ <<http://eumigrationlawblog.eu/the-eu-turkey-agreement-on-migration-and-asylum-false-pretences-or-a-fools-bargain/>> accessed 10 August 2016. James C Hathaway, ‘The EU-Turkey Agreement on Migration and Asylum: False Pretences or a Fool’s Bargain?’ <<http://verfassungsblog.de/taking-refugee-rights-seriously-a-reply-to-professor-hailbronner/>> accessed 10 August 2016.

⁷⁹ Article 38(1/e) of the Directive 2013/32/EC. (*Emphasis added.*)

⁸⁰ Peers and Roman (n 78).

⁸¹ Thym (n 78). In this regard, also see COM(2016) 85 final, Communication from the Commission to the European Parliament and the Council on the State of Play of Implementation of the Priority Actions under the European Agenda on Migration Brussels, 10.2.2016 p. 18.

⁸² COM(2016) 349 final, fn. 41, p. 5.

⁸³ COM(2016) 349 final, fn. 41, p. 5.

⁸⁴ To my knowledge, there has just been a case about the relationship of Regulation 604/2013/EU with safe third country concept, *i.e.*: *Shiraz Baig Mirza v Bevándorlási és Állampolgársági Hivatal* [2016] Court of Justice Case C-695/15 PPU, ECLI:EU:C:2016:188 [54–63].

⁸⁵ As reported by Strik, according to some “...if a human rights issue arises – and it might very well do so – this happens when taking the return decision, not when enforcing that decision through the application of a

will only be the tool to perform that decision, hence being neutral on these claims. Nonetheless, it has to be observed cautiously whether the RA is being used to circumvent human rights and asylum law obligations, such as promoting the adoption of return decisions with a light touch upon such claims.

2. Readmission Procedure: Ordinary Readmission Procedure v Departures From It (ex: Accelerated Readmission Procedure)

The second correlation, which might add complications to the *proper* implementation of RA, is between the “ordinary readmission procedure” and departures from it, such as “accelerated readmission procedure”. In this regard, I argue that, *in legal terms*, the issues related to human rights and asylum law have to be exhausted, in principle, before the use of the RA; nonetheless, *in practice*, RA might be used as a tool in circumventing human rights and asylum law obligations.

Firstly, departing from ordinary readmission procedure, when readmission application or written notification becomes non-compulsory, the officials may be keener to return a person under such a situation hastily at the expense of human rights and asylum law obligations. This is the case where the person to be readmitted is in possession of a valid travel document or identity card and, in the case of TCN’s or stateless persons, a valid visa or a residence permit of the Requested State.⁸⁶

Secondly, departing from ordinary readmission procedure, the accelerated readmission procedure is more problematic in terms of taking into account of human rights and asylum law obligations, because of its minimisation of safeguards. Accelerated procedure works as follows: (i) It is applicable where a person has been apprehended by the Requesting State⁸⁷ in the border region after having entered illegally and directly from the territory of the

readmission agreement.” Strik (n 53) 11. Contrary to this, according to others “... the existence of a readmission agreement may also encourage the taking of bad return decisions, and consequently serve as a catalyst for the enforcement of such questionable decisions.” *ibid* 12. According to Strik, “...the existence of readmission agreements *might* accelerate the taking of bad readmission decisions. ... Once again, the readmission agreement as such is neutral and the problem relates to the decision to expel the people concerned.” *ibid* 21. (*Emphasis added.*)

⁸⁶ Article 7(3) of the RA. Note that this will not prejudice the right of the relevant authorities to verify at the border the identity of the readmitted persons. Article 7(3) of the RA. ‘Requested State’ means “the State (Turkey or one of the Member States) to which a readmission application pursuant to Article 8 or a transit application ... is addressed”. Article 1(j) of the RA.

⁸⁷ ‘Requesting State’ means “the State (Turkey or one of the Member States) submitting a readmission application pursuant to Article 8 or a transit application”. Article 1(i) of the RA.

Requested State.⁸⁸ (ii) The Requesting State may submit a readmission application within three working days following this person's apprehension.⁸⁹ (iii) The Requested State should reply in writing within five working days.⁹⁰ (iv) Where the Requested State agrees or gives no answer in five working days, the person concerned will be transferred within three months.⁹¹

In such situations, the concern is that a kind of "justice in haste, justice denied"⁹² situation may occur. For instance, according to Strik, "the speed with which a return is enforced under readmission agreements might prevent the returnee from properly accessing all legal remedies that would or should be at his or her disposal".⁹³ According to the Commission, "although the safeguards under the EU *acquis* (such as access to asylum procedure and respect of *non-refoulement* principle) are by no means waived by the accelerated procedure, there is a potential for deficiencies in practice".⁹⁴

Overall, as long as the migrants are dealt with *individually*, including taking into account their human rights and asylum law claims, when adopting a return decision, the RA will only be the tool to perform that decision, hence being neutral on these claims. In this regard, it is essential to note that it is not a "must" to send a migrant without a readmission application or written notification or to use accelerated procedure.⁹⁵ Still, whether the RA is being used to circumvent human rights and asylum law obligations, such as promoting the adoption of return decisions with a light touch upon such claims should be observed carefully.

Conclusion

This paper argued that there might be problems with the *effective* and *proper* implementation of RA, due to in turn *political* and *legal* reasons. While the *political* context might pose difficulties to the *effective* implementation of RA, the *legal* context, comprising

⁸⁸ Article 7(4) of the RA. For the meaning of 'Requested State' see fn. 86.

⁸⁹ Article 7(4) of the RA.

⁹⁰ Article 11(2) of the RA.

⁹¹ Article 11(3) of the RA.

⁹² For this term, see Allan Rosas, 'Justice in Haste, Justice Denied? The European Court of Justice and the Area of Freedom, Security and Justice' (2009) 11 *The Cambridge Yearbook of European Legal Studies* 1.

⁹³ Strik (n 53) 12.

⁹⁴ COM(2011) 76 final, fn. 54, p. 12. Moreover, as noted by the Commission, "MS may choose not to apply some of the safeguards of the Return Directive to persons apprehended in the border region because the Directive merely obliges the MS to observe a certain number of key provisions, including the non-refoulement principle". (p. 12.) See Article 2(2/a) and 4(4) of the Directive 2008/115/EC.

⁹⁵ For instance, according to the Commission, at least in 2010, "MS' use of ... accelerated procedures is extremely low." COM(2011) 76 final, fn. 54, p. 5.

inter alia of human rights and asylum law obligations, might add complications to the *proper* implementation of RA. In political terms, challenging issues include the correlation between (i) the “readmission agreement” and “visa free regime”, (ii) the readmission obligation of TCN’s and stateless persons “in law” and “in fact”, and (iii) “expenses” and “financial assistance” related to the RA. In legal terms, challenging issues include the correlation between (i) the “readmission agreement” and “removal process”, and (ii) “ordinary readmission procedure” and departures from it, such as “accelerated readmission procedure”.

What might be done to overcome these potential problems? In political terms, though the current conjuncture seems unsuitable, in addition to keeping their promises, trust-enhancing measures between the parties appear to be essential. Regarding this, as agreed in “EU-Turkey statement” in 29 October 2015, “a structured and more frequent high-level dialogue is essential to explore the vast potential of Turkey-EU relations”,⁹⁶ and to enhance trust. In legal terms, dealing migrants *individually* and giving adequate consideration to their human rights and asylum law claims is a must, before using the RA to enforce a return decision. In this regard, Joint Readmission Committee, which was set up to provide mutual assistance in the application and interpretation of RA,⁹⁷ may play a useful role in monitoring human rights and asylum law compliance in general.⁹⁸

In the end, it is inescapable for EU and Turkey to cooperate somehow, both in general and in relation to migration crisis, within which the RA can be placed, and as agreed in “EU-Turkey statement” in 29 October 2015, the aim should be “to reinforce the European Project”,⁹⁹ with Turkey being a respected part of it.

⁹⁶ EU-Turkey statement of 29 October 2015, fn. 11, pt. 3.

⁹⁷ Article 19(1) of the RA.

⁹⁸ For instance, according to Gillade: “Their task is to monitor the implementation of the agreement and as such is the ideal body to ensure human rights compliance”. Kim Gillade, ‘Readmission Agreements Concluded by the EU’ (Master Thesis, Universiteit Gent 2011) 87.

⁹⁹ EU-Turkey statement of 29 October 2015, fn. 11, pt. 2.

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