

How effective is the principle of non-refoulement in Europe today?

by **Naydès Jeanty**

translated by Jessie Lee & Camille Cottais

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contact@growthinktank.org



Abstract

The principle of non-refoulement is essential in international law and is a pillar of the right of asylum. Although registered in numerous international and regional texts, this principle is more and more often violated by States, including European States. In order not to respect the principle of non-refoulement and the guarantees attached to it, States frequently resort to bypassing mechanisms aimed at removing migrants from European territory. Migrants and asylum seekers are the first to suffer from these violations insofar as they are susceptible to inhuman and degrading treatment, violence or harm to their lives. In addition, the protection afforded by European case law itself is called into question following a recent decision in the matter.

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Migrants as well as asylum seekers are holders of rights that States are required to respect. Since a few years, the trend among States has been to move these migrants away before they can reach their territory. This is shown by the increase in the construction of “anti-migrant” walls. Thus, several countries of the European Union, such as Spain (2014), Greece (2014) or Hungary (2015) have resorted to the construction of this type of wall. From 2015, States called on the safeguard of national security to justify the construction of these walls, in response to the influx of third-state nationals¹.

The question of the compatibility of these measures with the Geneva Convention of 1951 arises insofar as they prevent migrants from entering the territory, including potential asylum seekers². These walls halt them from exercising their rights under this Convention. In particular, it establishes the principle of non-refoulement which prohibits States from returning asylum seekers or refugees to territories where they would face persecution, or where their life or their freedoms would be threatened.

It seems that violations of the principle of non-refoulement are becoming more and more frequent. An investigation by Amnesty International in Poland has shown the extent of the violation of the rights of asylum seekers in this territory. Several migrants, including potential asylum seekers from Belarus, have been returned to the Polish border, left helpless. This type of expulsion is contrary to Union and international law. In addition, on 20 August 2021, Afghan nationals stranded at the Polish border filed an application for international protection. However, their situation remained unchanged³. These latter are left to their own devices and do not benefit from any humanitarian aid⁴. The death of several of these migrants was reported on 24 September 2021⁵.

Moreover, this is not the first time that Poland has faced allegations of illegal deportations. It had already been condemned by the European Court of Human Rights (ECHR) for similar facts dating back to 2017, on 23 July 2020⁶. This example is far from being an isolated case; on the contrary, it illustrates the growing trend of the retreat of protection associated with the principle of non-refoulement.

This tendency has been exacerbated by the arrival of COVID-19. Despite the injunctions of the United Nations High Commissioner for Refugees not to violate the principle of non-refoulement during this

¹ ANCELIN, J. (2019). « Le principe de non-refoulement et l'Union européenne à l'épreuve de la crise syrienne. » *Études internationales*. Jan 15. 49(2). pp.355-389. Available at: <https://doi.org/10.7202/1055690ar>. [Accessed 9 Nov. 2021]

² The United Nations has defined a migrant as “someone who changes his or her country of usual residence, irrespective of the reason for migration or legal status”. Asylum seekers are people who have fled persecution in their country and applied for international protection or have shown their intention to do so.

³ Amnesty International. (2021). *Pologne. Une investigation numérique établit que les autorités ont bafoué les droits de réfugié-e-s.* [online] Available at: <https://www.amnesty.org/fr/latest/news/2021/09/poland-digital-investigation-proves-poland-violated-refugees-rights/> [Accessed 9 Nov. 2021].

⁴ MC MAHON, M. (2021). La Pologne accusée de refouler illégalement des migrants. *Euronews*. [online] 1er oct. Available at: <https://fr.euronews.com/2021/09/30/la-pologne-accusee-de-refouler-illegalement-des-migrants>. [Accessed 9 Nov. 2021].

⁵ N.A. (2021). Pologne : un sixième migrant meurt à la frontière avec le Bélarus. *LEFIGARO* [online] 24 sept. Available at: <https://www.lefigaro.fr/flash-actu/pologne-un-cinquieme-migrant-meurt-a-la-frontiere-avec-le-belarus-20210924>. [Accessed 9 Nov. 2021].

⁶ France-terre-asile. (2020). *Les pratiques de refoulement de la Pologne condamnées par la Cour européenne des droits de l'homme.* [online] Available at: <https://www.france-terre-asile.org/veille-europe-articles-archives/du-16-au-31-juillet-2020/les-pratiques-de-refoulement-de-la-pologne-condamnees-par-la-cour-europeenne-des-droits-de-l-homme>. [Accessed 9 Nov. 2021].

period, many States did not respect this principle⁷. For example, during the pandemic and in contradiction with international law, the United States had chosen to return non-Mexican nationals to Mexico without allowing them to file an application for international protection⁸. Nevertheless, under international law, it is only possible to derogate from the principle of non-refoulement in the event that asylum seekers represent a threat to the national security of the host country⁹.

Concerning the European States signatory to the European Convention on Human Rights (hereinafter ECHR), they may take measures derogating from certain provisions of the Convention, in particular when public health is at stake, in accordance with Article 15(1)¹⁰. However, under Article 15(2)¹¹, certain rights established by the ECHR cannot be derogated from. This is the case with the prohibition of torture, inhuman or degrading treatment and punishment laid down by Article 3 used by the ECHR to protect against deportation.

These numerous violations of the principle of non-refoulement lead us to wonder whether the principle of non-refoulement is still effective and whether it still protects asylum seekers from immediate removal.

The principle of non-refoulement in Europe

International law as the basis of the principle of non-refoulement

In international law, the principle of non-refoulement derives from the right of a person to leave their own country. This right is registered in Article 13¹² of the Universal Declaration of Human Rights (UDHR) of 10 December 1948. In addition, Article 14¹³ of this text also provides that each individual has the right to seek and to benefit from asylum as soon as they are persecuted in their country of origin.

The principle of non-refoulement is explicitly provided for in Article 33 of the 1951 Geneva Convention relating to the status of refugees, but also in the 1967 Protocol linked to the latter.

States that only participate in the Protocol, such as the United States, must comply with Articles 2 to 34 of the Convention. Article 33 specifies that a State party to the Convention or its Protocol may not return

⁷ UN (2020). *La COVID-19 s'accompagne d'une « pandémie de la pauvreté », avertit le Haut-Commissaire pour les réfugiés devant la Troisième Commission*. [online] Available at: <https://www.un.org/press/fr/2020/agshc4308.doc.htm>. [Accessed 9 Nov. 2021].

⁸ UNHCR. (2021) *Le HCR est préoccupé par la décision des Etats-Unis sur les expulsions par avion dans le cadre des restrictions au droit d'asile liées à la pandémie de Covid-19* [online]. Available <https://www.unhcr.org/fr/news/press/2021/8/611646bca/hcr-preoccupe-decision-etats-unis-expulsions-avion-cadre-restrictions-droit.html>. [Accessed 9 Nov. 2021].

⁹ UNHCR. (1977). *Note sur le non-refoulement*. [online] Available at: www.unhcr.org/fr/excom/scip/4b30a58ce/note-non-refoulement.html. [Accessed 9 Nov. 2021].

¹⁰ Article 15(1) of the ECHR “In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under [the] Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law”.

¹¹ Article 15(2) of the ECHR “No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (§ 1) and 7 shall be made under this provision”.

¹² Article 13.2 of the Universal Declaration of Human Rights (UDHR) “Everyone has the right to leave any country, including his own, and to return to his country”.

¹³ Article 14.1 of the Universal Declaration of Human Rights (UDHR) “Everyone has the right to seek and to enjoy in other countries asylum from persecution”.

a refugee “to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”. This principle is also applicable at borders.

The principle of non-refoulement applies to both refugees whose status has been recognised and asylum seekers, since the Convention has an extensive conception of the concept of “refugee”. In international human rights law, the principle applies absolutely when there is a risk of ill-treatment, but also of torture. This principle is also found in other international conventions such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Article 3¹⁴) or the International Convention for the Protection of All Persons from Enforced Disappearance (Article 16¹⁵)¹⁶.

Refugee law not only provides protection for asylum seekers and refugees against deportation, but States are also required to put in place certain safeguards. In humanitarian law, protection against deportation is expressed by the prohibition of immediate return, but does not guarantee the automatic obtaining of refugee status and the rights arising therefrom. In all cases, States must respect, but also protect the human rights of individuals who fall under their jurisdiction¹⁷.

In addition, this principle is also foreseen in regional systems. Thus, the principle of non-refoulement is registered in the European Convention on Human Rights. The ban on the immediate return of asylum seekers derives from Article 3, which prohibits torture, inhuman and degrading treatment and punishment. Finally, this principle is reflected in Union law in various legal instruments.

The principle of non-refoulement in the EU and its procedural guarantees

In terms of EU law, this principle is explicitly mentioned in Article 78(1)¹⁸ of the Treaty on the Functioning of the European Union (hereinafter TFEU). This article specifies that the Union's asylum policy must be carried out in accordance with the principle of non-refoulement as provided for in the Geneva Convention. In addition, the Charter of Fundamental Rights of the EU (hereafter “the Charter”)

¹⁴ Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment “No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture”.

¹⁵ Article 16(1) of the International Convention for the Protection of All Persons from Enforced Disappearance “No State Party shall expel, return (“refouler”), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance”.

¹⁶ RODENHÄUSER, T. (2018). The principle of non-refoulement in the migration context: 5 key points. *blogs.icrc*. [online] 30 mars. Available at: <https://blogs.icrc.org/law-and-policy/2018/03/30/principle-of-non-refoulement-migration-context-5-key-points/>. [Accessed 9 Nov. 2021].

¹⁷ *Ibid.*

¹⁸ Article 78(1) of the TFEU “The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties”.

incorporates this principle in its Article 19¹⁹. In other words, States, as soon as they implement EU law, must imperatively respect this principle.

The principle of non-refoulement provides certain guarantees to asylum seekers. These guarantees apply as soon as an application for international protection is submitted. Therefore, in order to ensure compliance with the principle of non-refoulement, any request for international protection must be dealt with individually. This also applies to decisions refusing international protection²⁰. Besides, the refusal of the admission of an application for international protection gives rise to the right to an effective remedy, guaranteed by Article 47²¹ of the Charter of Fundamental Rights. This article allows a person to go to court when they believe their rights have been violated. It is inspired by Article 13 of the ECHR allowing a national body in the event of violation of the rights proclaimed in the Convention.

Furthermore, in accordance with Article 46²² of the “Procedures” Directive, it is possible for the national authorities to make this appeal suspensive. This right is not, however, automatic when it comes to claims that are considered unfounded.

As regards the ECHR, it does not provide for an automatic suspensive appeal. However, it follows from the jurisprudence of the ECHR that when the transfer of an asylum seeker risks having irreversible effects incompatible with Article 3 of the ECHR, the appeal must be suspensive²³. A suspensive appeal allows the asylum seeker to remain in the territory pending the delivery of the appeal decision.

In the European Union, the principle of non-refoulement and its respect is affirmed by various texts of Union law, but also of international law. However, this does not guarantee the effectiveness of the principle. Indeed, we observe that the principle encounters a constant decline in its effectiveness upon implementation.

¹⁹ Article 19 of the Charter of Fundamental Rights of the EU “No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.”

²⁰ LAUTERPACHT, E., & BETHLEHEM, D. (2001). La Protection des Réfugiés en Droit International : avis sur la portée et le contenu du principe du non-refoulement. *UNHCR*. Available at <https://www.unhcr.org/fr/publications/legal/516bf9e59/protection-refugiés-droit-international-avis-portée-contenu-principe-non.html>. [Accessed 9 Nov. 2021].

²¹ Article 47 of the Charter of Fundamental Rights of the EU “Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice”.

²² Article 46(1) of the “Procedures” Directives “Member States shall ensure that applicants have the right to an effective remedy before a court or tribunal, against the following: (a) a decision taken on their application for international protection, including a decision: (i) considering an application to be unfounded in relation to refugee status and/or subsidiary protection status; (ii) considering an application to be inadmissible pursuant to Article 33(2); (iii) taken at the border or in the transit zones of a Member State as described in Article 43(1); (iv) not to conduct an examination pursuant to Article 39; (b) a refusal to reopen the examination of an application after its discontinuation pursuant to Articles 27 and 28; (c) a decision to withdraw international protection pursuant to Article 45”.

²³ ECHR, judgment of 26 April 2007, *Gebremedhin [Gaberamadhien] c. France* - req 25389/05.

The questioning of the effectiveness of the principle in its application

An effectivity guaranteed by European Courts, but questioned by the evolution of the jurisprudence

The ECHR and the Court of Justice of the EU ensure the effectiveness of the principle of non-refoulement in its implementation by the European States. The ECHR has a protective jurisprudence regarding the non-refoulement principle. For example, in the *M. S. S. v. Belgium and Greece* case (No. 30696/09) of 21 January 2011, The Grand Chamber ruled that the transfer of an asylum seeker by Belgium to Greece, in the framework of the Dublin regulation, constituted a violation of Article 3 of the ECHR because of deficiencies in the asylum system of the host country. Belgium should have made sure that the asylum seeker was not at risk of inhuman and degrading treatment before proceeding with the transfer. This solution was then repeated by the Court of Justice in its judgment, *N.S.* of the Court of Justice of 21 December 2011²⁴.

However, the jurisprudence of the ECHR is not always protective of the third country nationals regarding the principle of non-refoulement. Indeed, in its judgment *N. v. United Kingdom*²⁵, the ECHR reversed its previous jurisprudence which condemned a State for a ricochet violation of Article 3 of the ECHR when it deported a sick migrant to their country of origin because they risked dying there painfully. In this case, the deportation of the applicant was confirmed by the Court even though they were suffering from AIDS.

This restrictive position on non-refoulement was maintained in a judgment of 13 February 2020, *ND and NT v. Spain*²⁶. The case involved two applicants, Malian and Ivorian nationals, who had attempted to cross the Spanish border by climbing the fences. They were sent back to Morocco and argued that the deportation, in the absence of an examination of their individual situation, violated article 4 of the ECHR, which prohibits collective expulsions. The Grand Chamber of the ECHR ruled that the deportation was not in violation of the Convention, as the applicants had deliberately placed themselves in this situation by illegally crossing the fence²⁷. In this judgment, the Court gave a restrictive interpretation of the principle of non-refoulement and thus limited the protection granted by the principle of non-refoulement. This also contributes to the weakening of the effectiveness of this principle in its application²⁸. It can be assumed that this position will be taken up again by the Court of Justice of the EU if it is confronted with a similar case in the future, as has occurred in the past.

The European Courts ensure the effectiveness of the principle, especially in its implementation. However, recent cases have called into question some of the achievements of the jurisprudence in this area. The principle is also undermined by various agreements made by States in order to repatriate migrants.

²⁴ CJUE, 21 December 2011, *N.S.*, C-411/10 et C-493/10, ECLI:EU:C:2011:865.

²⁵ CEDH, judgement *N. c. United Kingdom*, Requête no 26565/05, 27 mai 2008.

²⁶ CEDH, judgement *N.D. and N.T. c. Spain*, Grand Chamber, Requêtes nos 8675/15 et 8697/15, 13 février 2020.

²⁷ *Defenseurdesdroits*.(2020). *Arrêt relatif au fait que l'Espagne n'a pas violé la convention européenne des droits de l'homme en renvoyant au Maroc des migrants qui tentaient de franchir les clôtures de l'enclave de Melilla : n.d. et n.t. c. Espagne*. [online] Available at: https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=31404&opac_view=-1. [Accessed 9 Nov. 2021].

²⁸ HEINRICH, F. et al. (2021). *Le principe de non-refoulement : une remise en cause croissante, appuyée par l'actualité. siteaixhumanitaire* [online]. 25 mars. Available at: www.aixhumanitaire.org/single-post/le-principe-de-non-refoulement-une-remise-en-cause-croissante-appuy%C3%A9e-par-l-actualit%C3%A9. [Accessed 9 Nov. 2021].

The multiplication of circumvention mechanisms of the non-refoulement principle

States are increasingly resorting to mechanisms that allow them to deport migrants, with the aim, among others, of no longer being bound by the principle of non-refoulement.

It is within this context that concepts such as “safe country of origin” or “safe third country” have emerged. These concepts are controversial, but are still used to expel migrants. These practices can be likened to indirect refoulement, insofar as States put the burden of examining an application for international protection on another State, once the application has been submitted on its own territory. As a result, the effectiveness of the principle of non-refoulement is constantly decreasing as asylum seekers can be expelled to places where they are likely to suffer persecution.

In the EU law, the “Procedures” Directive, in its Articles 33²⁹ and 38³⁰, gives Member States the ability to declare an asylum application inadmissible and to make a third country responsible for examining the application. Applicants are thus sent back to a country with which they have a “link of connection”. In addition, the country must be considered “safe” for the applicants. A country can be considered “safe” for an applicant when there is no risk of harm to their life or freedom on any of the grounds of the Geneva Convention or the Qualification Directive. On the other hand, the country in question must respect the principle of non-refoulement as provided for in Article 33 of the Geneva Convention. The State must also respect international law, which prohibits expulsion measures that would expose the individual to a risk of torture or inhuman and degrading treatment. The third country must also allow the applicant to be granted refugee status and protection in compliance with the Geneva Convention. Finally, the implementation of the concept of “safe third country” is subjected to an individual examination of the respect of these criteria for each asylum seeker³¹.

The concept of safe third country was implemented in the EU-Turkey declaration of 17 March 2016³². This agreement was made following the influx of migrants at Europe's borders in 2015. The aim of this agreement was to reduce the number of migrants arriving on European territory via the Greek islands.

The nature of the declaration was a matter of debate. Some felt that it was a binding legal act taken by an EU institution and as such, the agreement would not have respected the procedure set out in Article 218 TFEU, which specifies the procedure to be followed to conclude an agreement with third countries. This statement was challenged in front of the Court of Justice, the General Court of the EU considered that the

²⁹ Article 33 (2) of Directive 2013/32 : “2. Member States may consider an application for international protection as inadmissible only if: a) another Member State has granted international protection; b) a country which is not a Member State is considered as a first country of asylum for the applicant, pursuant to Article 35; c) a country which is not a Member State is considered as a safe third country for the applicant, pursuant to Article 38”.

³⁰ Article 38 (1) of Directive 2013/32 : “Member States may apply the safe third country concept only where the competent authorities are satisfied that an applicant for international protection will be treated in accordance with the following principles in the third country concerned: a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion; b) there is no risk of serious harm as defined in Directive 2011/95/EU; c) the principle of non-refoulement in accordance with the Geneva Convention is respected; d) 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, is respected; and e) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention”.

³¹ Avis sur le « concept de pays tiers sûr », *cncdh*. 19 dec. 2017. Available at: https://www.cncdh.fr/sites/default/files/17.12.19_avis_concept_pays_tiers_sur.pdf. [Accessed 9 Nov. 2021].

³² Consilium Europa <https://www.consilium.europa.eu/fr/press/press-releases/2016/03/18/eu-turkey-statement/#>. [Accessed 9 Nov. 2021].

EU-Turkey declaration was not an act of the EU and as such declared itself incompetent in the orders, NM, NG and NF v. European Council (aff. T-257/16, T-193/16, T-192/16) of 28 February 2017. The Court of Justice confirmed this position in an order of 12 September 2018³³.

According to the EU-Turkey declaration, migrants from Turkey who are present on European territory but are not in need of international protection are to be readmitted to Turkish territory. In addition, the agreement also provides for one Syrian in need of international protection to be taken in charge by the EU for each irregular migrant returned to Turkey. Financial assistance to Turkey has also been included in the agreement³⁴.

Article 38 of the “Procedure” Directive stipulates that a third country can only be classified as a safe third country if the country in question provides refugee status and protection in compliance with the Geneva Convention. Yet, although Turkey has signed and ratified this Convention, it is coupled with a geographical limitation that restricts refugee status to people who have suffered persecution in Europe only. This can be problematic as the majority of refugees come from non-European countries. Turkish law provides for temporary but low-level protection for “Syrians, Afghans, Pakistanis and all nationals of African countries”³⁵. However, it is unlikely that this legislation will be implemented in practice. Indeed, organizations have provided evidence that Turkey has violated the principle of non-refoulement by deporting asylum seekers to Afghanistan³⁶. Moreover, Article 38 of the directive requires a “link of connection” between the country and the asylum seeker³⁷. Given the number of cases processed, it is doubtful that this condition is met for each asylum seeker. For example, Greece has taken 1453 deportation decisions to Turkey between January 2020 and June 2021³⁸.

The recognition of the safety of a country is a matter of national law. Thus, each member state can define the list of third countries that it considers safe. It is within this context that Greece was able to recognize Turkey as a safe country.

³³ FARCY, J. B. et RENAUDIÈRE G. (2017). Tribunal de l’Union européenne, 28 février 2017, NF, NG et NM/Conseil européen, aff. T-192/16, T-193/16 et T-257/16. *UCLouvain*. [online] 28 fév. Available at: <https://uclouvain.be/fr/instituts-recherche/juri/cedie/actualites/tribunal-de-l-union-europeenne-28-fevrier-2017-nf-ng-et-nm-conseil-europeen-aff-t-192-16-t-193-16-et-t-257-16.html>. [Accessed 9 Nov. 2021].

³⁴ ANCELIN, J. (2019). Le principe de non-refoulement et l’Union européenne à l’épreuve de la crise syrienne. *Études internationales*, 49(2), 355-389. <https://doi.org/10.7202/1055690ar>. [Accessed 9 Nov. 2021].

³⁵ TUNABOYLU, S., & ALPES, J. (2017). L’accord UE-Turquie : qu’advient-il de ceux qui retournent en Turquie ? *Forced Migration Review*. [online]. Available at: <https://www.fmreview.org/fr/tunaboylu-alpes>. [Accessed 9 Nov. 2021].

³⁶ *Ibid.*

³⁷ ANCELIN, J. (2019). Le principe de non-refoulement et l’Union européenne à l’épreuve de la crise syrienne. *Études internationales*, 49(2), 355-389. <https://doi.org/10.7202/1055690ar>. [Accessed 9 Nov. 2021].

³⁸ Vues d’Europe. (2021). *Inquiétudes en Grèce après la désignation de la Turquie comme « pays tiers sûr »*. [online] Available at: <https://www.vuesdeurope.eu/la-turquie-designee-pays-tiers-sur-par-la-grece-une-entrave-grave-a-la-protection/#:~:text=Alors%20que%20la%20Gr%C3%A9ce%20consid%C3%A8re.appliquer%20ce%20m%C3%Aame%20concept%20existe>. [Accessed 9 Nov. 2021].

The qualification of Turkey as safe third country by Greece

In September 2017, a decision by the Greek Council of State declared Turkey a safe third country. This decision followed the EU-Turkey declaration of 2016³⁹. This qualification was recently restated by Greece : in a decision of 7 June 2021, the Ministry of Foreign Affairs and Migration listed Turkey among the third countries considered “safe” for nationals from “Syria, Bangladesh, Somalia, Afghanistan and Pakistan”⁴⁰. The Greek government believes that Turkey, in view of the current situation, is able to take care of these asylum seekers⁴¹.

The consequences of this decision for asylum seekers are their removal from Greece to Turkey. Indeed, the Greek authorities can declare inadmissible the requests for international protection of nationals from these countries. However, Syrian, Bangladeshi, Somali, Afghan and Pakistani nationals represent “66% of the total number of applicants present in Greece and 77% of the beneficiaries of protection in 2020”⁴². Thus, people from these countries who transit through Turkey will have their applications for international protection rejected without a substantive examination and will be sent back to Turkey. This will lead to a significant decrease in the number of international protections granted by Greece.

Non-governmental organizations have already warned about Turkey's qualification as a “safe third country”. They consider that the guarantees offered by Turkey are not enough⁴³. Asylum seekers rejected in Greece are afraid of being sent back to their country of origin if their request for international protection is refused by Turkey⁴⁴.

The implementation of this decision remains unsure at the moment. Indeed, the Turkish government has stopped readmissions since the beginning of 2020 due to diplomatic tensions between Ankara and the EU. As a result, the deportation decisions of people whose applications for international protection have been declared inadmissible have not been accepted by Turkey. While deportation is problematic because Turkey does not have sufficient guarantees in terms of the right to asylum, the inability to deport is also likely to hamper the rights of asylum seekers. Indeed, Greece risks being faced with additional requests for international protection to process, thus worsening the fragile situation of the asylum seekers present in the camps⁴⁵.

³⁹ Aedh. (2017). *La Turquie, un pays tiers sûr !...* [online] Available at: <http://www.aedh.eu/turquie-pays-tiers/>. [Accessed 9 Nov. 2021].

⁴⁰ Vues d'Europe. (2021). *Inquiétudes en Grèce après la désignation de la Turquie comme « pays tiers sûr »*. [online] Available at: <https://www.vuesdeurope.eu/la-turquie-designee-pays-tiers-sur-par-la-grece-une-entrave-grave-a-la-protection/#:~:text=Alors%20que%20la%20Gr%C3%A8ce%20consid%C3%A8re,appliquer%20ce%20m%C3%Aame%20concept%20existe>. [Accessed 9 Nov. 2021].

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ Aedh. (2017). *La Turquie, un pays tiers sûr !...* [online] Available at: <http://www.aedh.eu/turquie-pays-tiers/>. [Accessed 9 Nov. 2021].

⁴⁵ Vues d'Europe. (2021). *Inquiétudes en Grèce après la désignation de la Turquie comme « pays tiers sûr »*. [online] Available at:

For example, living conditions in the Moria camp on the island of Lesbos violated many basic rights. According to testimonies, women in the Moria camp lived in fear of being raped by coast guards when going to the bathroom at night. This forced them to wear diapers. In addition, some asylum seekers had to sleep on the floor and their freedom of movement was severely restricted⁴⁶.

These difficulties highlight the limits of the outsourcing of the asylum process in Europe. The will of the States to remove more and more migrants is done at the expense of fundamental rights. It is necessary for the EU to find solutions that put forward European solidarity in the field of asylum.

The agreement with Turkey is not the only one that calls into question the effectiveness of the principle of non-refoulement. Indeed, member States, supported by the EU, have concluded migration agreements that undermine the effectiveness of the non-refoulement principle. This is notably the case of the agreements concluded with Libya. Indeed, while Libya has signed the international convention against torture, it has not signed the Geneva Convention on the status of refugees. The principle of non-refoulement is therefore not recognized. There is also no legislation recognizing refugee status in Libya.

On 2 February 2017, Italy and Libya renewed the agreements that bind them through a Memorandum. Yet, these agreements disregard not only EU law, but also the ECHR jurisprudence. These agreements set up “temporary reception camps” in order to better manage the crisis linked to the arrival of migrants on European territory. Thus, migrants who have passed through Libya and are intercepted are sent back to Libyan territory, despite numerous Amnesty International reports on human rights violations committed against migrants and refugees.

In July 2017, the European Commission released an action plan to help Italy cope with the influx of migrants. This plan included a financial aid of 42 million euros to Libya for border management. This funding finances the acquisition of equipment and the training of Libyan coastguards in an attempt to reduce the number of people arriving in Europe from Libya. In total, Libya has received more than 300 million euros in aid from the EU to secure its borders. This has resulted in a significant decrease in the number of people arriving on the Italian and Maltese coasts. Yet, this reduction has come at the cost of human losses in the form of migrants intercepted by the coast guard and violations of their rights.

Since the beginning of 2021, according to the International Organization for Migration (hereinafter IOM), more than 25,823 migrants, including refugees, have been intercepted and deported to Libya by the Libyan coast guards. The journeys to reach Libya are often deadly. According to the IOM, an estimated 1,486 migrants have lost their lives in the Mediterranean Sea since the beginning of the year. But even when migrants do reach Libya, the reception conditions remain poor. Many non-governmental organizations such as Amnesty International are concerned about the conditions of migrants and asylum seekers in Libya.

<https://www.vuesdeurope.eu/la-turquie-designee-pays-tiers-sur-par-la-grece-une-entrave-grave-a-la-protection/#:~:text=Alors%20que%20la%20Gr%C3%A8ce%20consid%C3%A8re,appliquer%20ce%20m%C3%Aame%20concept%20existe>. [Accessed 9 Nov. 2021].

⁴⁶ KOUROUNIS, A. (2021). Un an après l'incendie du camp de Moria, sur l'île de Lesbos, la Grèce continue sa politique restrictive à l'égard des demandeurs d'asile. *franceinfo*. [online] 9 sept. Available at: https://www.francetvinfo.fr/replay-radio/en-direct-du-monde/en-grece-les-conditions-de-vie-au-camp-de-migrants-refugies-de-lesbos-ne-se-sont-pas-ameliorees_4753889.html. [Accessed 9 Nov. 2021].

In early October 2021, police operations were carried out in the west of Tripoli, an area where there are many migrant camps, resulting in at least one death and five injuries, according to the UN. The operation also led to the arrest of around 4,000 migrants and refugees who were transferred to detention centers. The IOM denounces the unnecessary use of violence in these centers. In addition, according to the testimony of one person who managed to escape from the center, six people were recently killed and dozens were injured following an escape attempt. The organization also deplors the living conditions of the 10,000 people in the detention centers⁴⁷.

The living conditions of migrants and refugees and the violence to which they are subjected are indications of multiple violations of the principle of non-refoulement. Indeed, many migrants present in Libya have been sent back to this country even though their lives are threatened and they are subjected to inhumane and degrading treatment.

The agreements between Libya, Italy and the EU have been contested on numerous occasions with regard to the principle of non-refoulement. In 2019, the International Criminal Court was seized to judge the EU's complicity in deaths in the Mediterranean. There have also been complaints to the United Nations Human Rights Committee. In addition, the Global Legal Action Network (GLAN) has filed a petition with the ECHR, in the case of *S.S. and others v. Italy*⁴⁸. In this case, the applicants claim that the people sent back to Libya are regularly victims of acts of torture. They believe that Italy, in carrying out these deportations, is violating the principle of non-refoulement. More recently, this organization and two other Italian organizations have filed a complaint with the EU Court of Auditors, whose role is to verify the legality of the European budget. These organizations consider that the financial support of the EU and the member States makes them complicit in the human rights violations taking place in Libya⁴⁹.

Despite the contestation surrounding the cooperation among the EU, its member States and Libya in terms of migration policies, this has not prevented the Commission, in its reform proposal for asylum and migration⁵⁰, from relying on cooperation with third States. It is therefore likely that the EU will keep cooperating with States that cannot guarantee the rights of asylum seekers. Moreover, the reform proposed by the Commission shows the shift in the EU's asylum policy. Proposals such as mandatory pre-entry screening for all migrants arriving on European territory potentially jeopardize the right to asylum by removing potential asylum seekers from their territory.

Conclusion

Even though it is enshrined in numerous texts, the principle of non-refoulement is losing its effectiveness in its implementation throughout the world. In Europe, the EU and its member States are concluding agreements that openly violate EU law, but also disregard international law.

⁴⁷ *Ibid.*

⁴⁸ CEDH, *S.S. et autres c. Italie* du 26 juin 2019, req. 21660/18

⁴⁹ *Ibid.*

⁵⁰ COM (2020) 609 final, 23 sept. 2020

<https://eur-lex.europa.eu/legal-content/FR/TXT/HTML/?uri=CELEX:52020DC0609&from=FR>. [Accessed 9 Nov. 2021].

The principle of non-refoulement is equally violated outside Europe. For example, on 21 September 2021, images of Texas police officers chasing Haitian migrants at the border with Mexico went around the world. In these images, one can see police officers on horses, trying to chase away migrants as they would have done with livestock⁵¹. The deportations of these people, fleeing a country in the grip of political instability and seeking international protection, outraged Daniel Foote, the U.S. ambassador to Haiti, who resigned shortly after the events. According to U.S. Customs and Border Protection, 6,768 Haitians were arrested during the month of August, an increase of more than 30% from the previous month⁵². The U.S. will not be sanctioned for this, as no court has jurisdiction to do so. However, the existence of a Court that can sanction state conduct does not mean that the principle of non-refoulement would be better protected. It could weaken the scope of protection provided by the principle of non-refoulement by adopting a restrictive conception of this principle.

Violations of the principle of non-refoulement are symptomatic of a larger trend: States are trying to expel migrants from their territory at all costs. States and the EU conclude agreements in order to externalize their asylum applications while allowing them to receive as few people as possible on their territory. This is shown in particular by the guidelines of the reform for asylum and migration.

Therefore, the effectiveness of the principle of non-refoulement in its implementation continues to be weakened, both by the conduct of States and by European jurisprudence.

⁵¹ N.D. (2021). États-Unis : des gardes-frontières à cheval chassent des migrants, les images créent la polémique. *Franceinfo*. [online] 22 sept. Available at: www.francetvinfo.fr/monde/usa/migrants-aux-etats-unis/etats-unis-des-gardes-frontieres-a-cheval-chassent-des-migrants-les-images-creent-la-polemique_4780111.html. [Accessed 9 Nov. 2021].

⁵² N.D. (2021). Biden dénonce les policiers à cheval ayant chassé des migrants haïtiens : « Ces gens vont payer ». *Libération*. [online] 24 sept. Available at: https://www.liberation.fr/international/amerique/biden-denonce-les-policiers-a-cheval-ayant-chasse-des-migrants-haitiens-ces-gens-vont-payer-20210924_TFEZCZO4NNHNBPE6RWFJ5KLILY/. [Accessed 9 Nov. 2021].

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