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# Fortress or Host Europe? – The EU/Turkey deal and its compliance with human rights law

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# Summary

In light of what have become known as the European migration crisis, this thesis examines the legality of one of EU's burden-sharing responses to this perceived threat – the EU/Turkey deal on March 18 2016.

For many asylum seekers, the dream of a safe haven in the EU goes through Turkey to the Greek islands, leading to a significant rise in the number of would-be asylum seekers in the EU over the last years. Tragically, many have died making this crossing. For those who made it, the present deal enables their return back to Turkey. The arrangement has been criticized as contrary to the international legal framework, particularly of the fundamental principle of *non-refoulement*, and because it undermines the individual's right to seek asylum. This thesis focuses on an assessment of the current legal framework – primary the Refugee Convention, the ECHR and EU law - to identify the EU member states' obligations under these rights.

From the understandings drawn from this legal assessment, I conclude that international law doesn't in principle hinder a member state from returning a protection seeker without a substantive examination of his/hers protection claim. I further derive that, for the EU/Turkey deal to be legal, much depends on the protection seekers access to efficient asylum procedures and whether Turkey satisfies the "safe third country" criteria under the Asylum Procedures Directive. An in depth examination of the legal and the *de facto* situation in Turkey is therefore provided for, asking myself – is Turkey actually safe for return?

In sum, the technical content of the EU/Turkey deal does not provide anything that falls short of the international standards examined in this thesis. However, in light of the worrying picture painted of the *de facto* situation for asylum seekers in Turkey – I doubt it being legal sending someone back there today.

# Sammanfattning

Med avstamp i den så kallade migrationskrisen i Europa, undersöker denna uppsats huruvida en av EUs åtgärder för att hantera detta hot – EU/Turkiet uppgörelsen den 18 mars 2016 – är förenlig med internationell folkrätt.

Många asylsökande drömmer om en fristad i Europa, en dröm som många gånger innebär en resa via Turkiet till de grekiska öarna i Medelhavet. Denna rutt har de senaste åren fört med sig en kraftig ökning av antalet potentiella asylsökande i EU. Tragiskt nog har många mist sitt liv på vägen. För de som klarade sig med livet i behåll, innebär den aktuella uppgörelsen att det är möjligt att skicka dem tillbaka till Turkiet när de anländer till EU.

EU/Turkiet uppgörelsen har kritiserats för att strida mot internationell rätt, i synnerhet den grundläggande principen om *non-refoulement*, och att den underminerar en individs rätt att söka asyl.

Denna uppsats syftar till att kartlägga vilka förpliktelser som finns i förhållande till nämnda rättigheter för EUs medlemsstater – främst med fokus på Flyktingkonventionen, EKMR och relevant EU-rätt.

I uppsatsen dras slutsatsen att folkrätten principiellt inte hindrar en medlemsstat från att skicka tillbaka en asylsökande utan en materiell bedömning av hans ansökan. För att avgöra huruvida EU/Turkiet uppgörelsen är förenlig med folkrätten som undersökts, måste en bedömning göras om personen i fråga fått tillgång till ett effektivt ansökningsförfarande, samt om Turkiet uppfyller kriterierna för ett "säkert tredjeland" under Europaparlamentets och Rådets Direktiv om Gemensamma Förfaranden för att Bevilja och Återkalla Internationellt Skydd.

För att uppfylla syftet med uppsatsen och avgöra om Turkiet är säkert att sända tillbaka asylsökande till, görs en bedömning av rättsläget i Turkiet - både i relation till relevant lagstiftning och samhällssituationen i stort.

Sammanfattningsvis dras slutsatsen att EU/Turkiet uppgörelsen i sig är förenlig med de folkrättsstandards som undersökts. Hur som helst, den bild som målas upp av situationen för asylsökanden i Turkiet idag, får mig att ifrågasätta lagenligheten av uppgörelsen vid ett rent faktiskt genomförande.

# Preface

I have learnt so many things during the process of this study. I would like to take the opportunity to thank my family for their huge support during this semester, especially to Pedro and Amy – *obrigada*. Also, I would heartily like to thank Vladislava, who has been of great assistance and whose comments resulted in great improvements of this thesis.

# Abbreviations

*Note on terminology:* All individuals arriving in the EU not having entered through regular legal channels are deemed ‘irregular migrants’. Some may be refugees and asylum seekers and some may not be. A refugee is someone fleeing persecution on grounds set out in the Refugee Convention, and additionally the EU Qualification Directive provides that those at risk of ‘serious harm are to be provided international protection on a similar basis as those subject to persecution. An asylum seeker or protection seeker is someone claiming to be a refugee or eligible for subsidiary protection but whose status the authorities have not yet determined. A third country or intermediate country is the country where the asylum or protection seeker is returned to, which is not his/hers country of origin.

APD	Procedures Directive (2013/32)
CAT	Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
CEAS	Common European Asylum System
CJEU	Court of Justice of the European Union
Commission	European Commission
ECHR	European Convention on Human Rights
ECtHR	European Court on Human Rights
ECRE	European Council on Refugees and Exiles
EU	European Union
EU Charter	Charter of Fundamental Rights of the European Union
EXCOM	Executive Committee of the Programme of the High Commissioner
HRC	Human Rights Committee
HRW	Human Rights Watch
ICCPR	International Covenant on Civil and Political Rights
LFIP	Law of Foreigners and International Protection (2013/6458)
NGO	Non-governmental organisation
Refugee Convention	Geneva Convention Relating to the Status of Refugees
QD	Qualification Directive (2011/95)
TEU	Treaty on European Union
TFEU	Treaty on the functioning of the European Union



UDHR	Universal Declaration of Human Rights
UNHCR	United Nations High Commissioner for Refugees
VCLT	Vienna Convention on the Law of Treaties

# 1 Introduction

For centuries, people have been forced to flee their homes because of conflict, political, racial and religious persecutions, natural disasters and inhuman treatment occurring in their societies. However, last year over a million potential asylum seekers arrived in Europe, many fleeing the civil war in Syria.<sup>1</sup> Its no doubt that Europe and the European Union (EU) is considered as a sanctuary by a growing number of people fleeing from what appear to be, and many times are, intolerable conditions in their societies.

Nevertheless, the EU, the richest political block in the world, has actively sought to prevent protection seekers from accessing its territory and asylum procedures. In what have been dubbed “Fortress Europe” policies, the EU has i.e. struck deals with neighbouring countries to keep people out, often with people’s life at stake when they are forced to pursue irregular journeys by land or sea. More than 3700 persons were reported missing in the Mediterranean sea 2015, probably drowned.<sup>2</sup>

The question of who should bear responsibility for the new arrivals and how those obligations and burdens should be shared generated very different policy responses among EU member states, with many prioritizing national interests over European solidarity. Practices such as turning back or transferring to non-European coastal states, which fail to comply with international human rights standards, have been highly criticized for prioritizing security at the expense of protection. This responses generated fierce political debates over legal and normative obligations to the displaced within and across member states. Fears of irregular (mass) migration can undermine the values and human rights norms they are committed to uphold.

This approach is reflected in the use of readmission agreements concluded between EU and other countries. Concerning the removal of persons who don’t fulfil the conditions to stay in the territory, they are an important part of the EU’s migration policies. The current refugee crisis has brought the issue of readmission up for debate when a new phase in the EU-Turkey relationship was launched on the 18 March 2016 (“The EU/Turkey deal”). EU and Turkey agreed on a far-reaching migration control deal where decisive action was taken by European leaders to

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<sup>1</sup> Eurostat, *Asylum applicants in the EU*

<sup>2</sup> UNHCR, Clayton & Holland, *Over one million sea arrivals reach Europe in 2015* (30 Dec 2015)

“break the cycle of uncontrolled flows of migrants creating an unsustainable humanitarian crisis”. The goal was to remove the incentive for migrants and asylum seekers to seek irregular routes to the EU, through a combination of action as close as possible to the entry point into the EU - in the Greek islands - and close cooperation between the EU and Turkey.<sup>3</sup>

There have been observers claiming that the EU concluded this deal with “their backs seemingly against the wall, and in an atmosphere of palpable panic”.<sup>4</sup> Turkish officials – including president Recep Tayyip Erdogan himself - are cited numerous times making blunt threats with the refugees as a political weapon: “We do not have the word “idiot” written on our foreheads. We will be patient but we will do what we have to do. Don’t think that the planes and the buses are there for nothing”. The president had earlier threatened European Commission President Jean-Claude Juncker at the G20 meeting in Antalya, implying that Turkey could send refugees to Europe and “open the doors to Greece and Bulgaria anytime and put the refugees on buses”. He confirmed his statements in a speech thereafter: “I am proud of what I said. We have defended the rights of Turkey and the refugees. And we told them (the Europeans): “Sorry, we will open the doors and say goodbye to the migrants”.<sup>5</sup>

As Europe desperately needed Turkey to serve as a migrant waiting room on its borders, as claimed by one author,<sup>6</sup> EU member states seemed increasingly willing to negotiate with Turkey as the migrants kept entering the EU. Ultimately, when the EU was no longer able to bribe Turkey, it acceded to a number of what earlier had been called “blackmailing” Turkish demands.<sup>7</sup>

Consequently, EU and Turkey agreed on a deal, *inter alia* permitting Greece to return to Turkey “all new irregular migrants” arriving after March 20 2016, and EU agreed to assist Turkey with more than six billion Euros in financial support and resettlement of Syrian refugees in the EU.<sup>8</sup>

Importantly, the effect of the EU/Turkey deal meant that the EU as a whole agreed to recognize and treat Turkey as a safe country for return of protection seekers - despite serious and repeatedly human rights violations by the government observed

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<sup>3</sup> European Commission, Communication from the Commission to the European Parliament, the European Council and the Council, *First Report on the Progress made in the implementation of the EU-Turkey Statement*, COM(2016) 231 Final, Brussels, (20 April 2016).

<sup>4</sup> Collet, *The paradox of the EU-Turkey deal*, Migration Policy Institute.org, (March 2016).

<sup>5</sup> *Turkish president threatens to send millions of Syrian refugees to EU*, The Guardian, (11 February 2016).

<sup>6</sup> Wilczek, *When the EU is no longer able to bribe Turkey, the blackmail will begin*, The Spectator, (4 March 2016).

<sup>7</sup> *ibid.*

<sup>8</sup> European Council, *EU-Turkey Statement, 18 March 2016*, (18 March 2016).

by NGOs.<sup>9</sup> As the events this summer revealed, Turkey is moving completely in the wrong direction – from democracy to creeping authoritarianism.

## **1.1 Subject and aim**

Readmission agreements raise two key issues in international law. One issue is whether such agreements are consistent with the obligation of *non-refoulement*, which prohibits return to a place where persecution or serious harm is feared, whether it is the country of origin or not. The second issue is the extent to which any and every state is obliged to examine the substance of an asylum request. This thesis is basically premised on the idea that refugee protection cannot be regarded as present, without guaranteeing effective access to asylum and prohibition on *refoulement*. In light of this, this thesis aspires to analyse the extent of refugee protection under the recent EU/Turkey deal in relation to these rights. The present thesis is basically making an account of the legality and discusses possible fallouts of the EU/Turkey readmission deal from an international human rights perspective, focusing on the rights to seek asylum and to *non-refoulement*.

In order to fulfil the purpose of the study, I will try to answer following research questions:

- What is the content and scope of the right not to be subjected to *refoulement*?
- What is the content and scope of the right to seek asylum and how is it related to *non-refoulement*?
- Is the EU/Turkey deal compatible with the prohibition on *refoulement* and right to seek asylum?

## **1.2 Limitations**

With the current refugee crisis in mind, this graduate thesis examines the legality of readmitting asylum seekers to Turkey today.

Readmission is a network composed of different institutional instruments, ranging from development aid to visa facilitation, from technical cooperation for the

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<sup>9</sup> See chapter 4.2.

externalisation of migration controls to labour exchanges.<sup>10</sup>

Since transfer of responsibility for asylum seekers to another safe country does not find a legal basis in general international law, the EU - to obtain the necessary cooperation for readmitting third-country nationals - commonly relies upon readmission agreements.

I specifically chose to deal with the EU/Turkey deal on March 18, and not to expand, due to the limited space, to other comparable agreements. It is, at the time of writing, debatable whether or not this deal is a source of binding obligations – a treaty - under international law<sup>11</sup> or merely a statement.<sup>12</sup> Important to recall is however that readmission agreements do not provide the legal basis for rejecting asylum seekers, but only facilitate the execution of an expulsion decision, which should always be taken in consonance with international and European human rights and refugee obligations.<sup>13</sup> A readmission agreement *per se* cant therefore violate international human rights law or refugee law, it is a purely administrative tool following a decision of national law authorizing the return of a protection seeker on i.e. safe third country grounds.<sup>14</sup> This means, whether or not the EU/Turkey deal is formally a source of binding obligations – it will always be the following state conduct that potentially violates international human rights law or refugee law.

This thesis is further limited to a study of the EU/Turkey deal's compatibility with the right to seek asylum and *non-refoulement*. The broader right to asylum is a multifaceted concept, which makes it important to understand its scope and the legal structure because different 'rights' lie within. My study will cover asylum and protection seeker's rights to seek asylum and access effective protection procedures, focusing on the right to *apply* protection and to have the substance of the request *examined*.

Focus will be on the major legal issues that may call into question the legality of readmitting asylum seekers to Turkey.

The study is primarily focusing on non-Turkish protection seekers who have transited through Turkey before soliciting protection within the borders of a EU Member State (this state will very likely be Greece due to its geographical proximity), and a substantive examination of the claim is therefore denied because the person *could have* applied for protection in Turkey and will thus be returned

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<sup>10</sup> Giuffrè, *Readmission Agreements and Refugee Rights: from a Critique to a Proposal*, Refugee Survey Quarterly, Volume 32(3), (1 Sep 2013), p.82.

<sup>11</sup> See the Vienna Convention on the Law of Treaties, Article 2(1)(a).

<sup>12</sup> See the discussion in chapter 3.4.

<sup>13</sup> Coleman (2009), p. 286

<sup>14</sup> *ibid.* p. 314.

there.

The thesis is further delimited to a study of the “safe third country” notion, thereby consciously omitted related principles such as “safe country of origin” or “safe first country”. As a practice among European states, it generally implies that a substantive examination of a protection request can be denied if individuals have transited through a safe third country before reaching the State in which they are ultimately soliciting protection - the rationale being that moving to a secondary state is not for protection seeking but rather for migration.<sup>15</sup>

The relevant, and indeed also the most controversial, safe third country exceptions are those, which exclude protection seekers from substantive asylum procedures, and proceed with expulsion without prior status determination, which is the focus of this thesis.<sup>16</sup> A more thoroughly examination of the safe third country concept will be made in chapter 2.4.2.3.1.

Evident from this is the importance of both the substantial and procedural aspect of protection in the sending state, including the evaluation of access to effective protection in the receiving state. However, it would be beyond the scope of this thesis to review the entire spectrum of conditions that must be in place for a sending state contemplating protection elsewhere, this thesis is therefore - as already indicated -limited to the issues concerning *non-refoulement* and the right to seek asylum.

Although relevant, this study has consciously omitted the legal and the *de facto* situation in Greece in relation to the EU/Turkey deal. Instead, my focus it turned to a thorough examination and analyse of the relevant aspects of the situation in Turkey. However, I have left out a study of reception conditions for asylum seekers in Turkey for someone else to examine.

## **1.3 Methods and sources**

This thesis is a legal study aimed at finding the international meaning of the prohibition on *refoulement* and right to seek asylum for thereafter make a comparative analysis whether the EU/Turkey deal suggest anything that falls short of those standards.

This builds upon a theory, contoured by two partly conflicting policy frames: the realist frame of internal security, which emphasizes the need to tighten up

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<sup>15</sup> Goodwin-Gill & McAdam, (2007), p. 392.

<sup>16</sup> Coleman (2009) p. 226.

territorial borders and to fight illegal immigration, and the liberal frame of humanitarianism, which incorporates the human rights-based notions of the rights of individuals to receive protection and to have access to equitable asylum procedures.<sup>17</sup>

While the desire for a common European asylum system appears to be based on justice, fairness and solidarity,<sup>18</sup> criticism has been levelled at burden-sharing measures on the EU level for prioritizing the aim of securing borders. In light of the development of the EU/Turkey deal, this criticism might be legitimate, and I therefore choose to deal with this subject - as a mean to explore this potential gap. As Lavenex states, in liberal democracies, immigration regimes always pursue a middle way between these two normative extremes;<sup>19</sup> however, do the EU/Turkey deal put too much emphasis on control and thereby falls short of complying with international human rights and refugee rights?

With these considerations in mind, the research methodology and material in this study was basically conducted through a review of the EU/Turkey deal in the light of the *non-refoulement* principle and right to seek asylum. It is mainly based on international sources.

The research also included a review of relevant literature, the examination of relevant international and regional instruments, as well as views of international monitoring or supervisory bodies and human rights organizations reports. The international and regional conventions as well as EU law concerning refugee rights will be considered as rule of law. Important to keep in mind as reader as well as a writer, is that while legal scholars certainly offer legitimate and much needed commentary on how the international human rights and refugee law should be interpreted, asylum law is a controversial area of law that evokes a lot of emotion. The legality of return arrangements is not the main feature of all commentary. *It is* can be confused with *it should* when conclusions are deduced more from wishful thinking than actual interpretation of the law.

In order to further fulfil the aim of this thesis it has been necessary to study the *de facto* situation (national law and practices) for asylum seekers in Turkey and to interpret and apply relevant law in a readmission context.

In my research, I have consciously omitted a comparative analysis of the national legislation and procedures of EU member states (*read* Greece). I

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<sup>17</sup> Lavenex, *Migration and the EU's new eastern border: between realism and liberalism*, (February 2001), p.26

<sup>18</sup> Presidency Conclusions – Tampere European Council 15 and 16 October 1999, SN 200/99, para 4.

<sup>19</sup> Lavenex, *Migration and the EU's new eastern border: between realism and liberalism*, (February 2001), p.26

acknowledge the limitations my thesis thus entails and recognize that as a result of excluding this from my study the conclusions will not result in a definite interpretation of whether the EU/Turkey deal is in conformity with investigated provisions.

Furthermore, the exact content and scope of international and human rights standards are delineated by the practice of international human rights bodies, competent to provide authoritative interpretations of the treaties. Relevant for this thesis, the practice and jurisprudence of two main, international monitoring bodies will be taken into account repeatedly. First, the UNHCR primary in relation to the Refugee Convention. Its power is however limited since states only undertake to cooperate with it.<sup>20</sup> Nevertheless, even though much depends upon the goodwill of states, the interpretations by UNHCR in recommendations, conclusions, the handbook etc. provides authoritative guidance. The reporting system under the Refugee Convention itself is a rather weak one and does not provide for the possibility of inter-state or individual complaints. Secondly, the jurisprudence of the ECtHR is of outmost importance. It provides authoritative judgements and guidance in a judicial procedure, which is obligatory to the relevant parties in the case concerned – beyond this most scholars regard the core content of its jurisprudence of the ECHR binding upon all states parties.<sup>21</sup> This is important because the ECHR and its articles are phrased in very general terms and the content of them can only be well understood by studying the ECtHR’s case law. The ECtHR has dealt with readmission cases on several occasions, and I will repeatedly refer to this case law.

In addition, relevant EU law will be covered and analyzed in the light of *non-refoulement* and right to seek asylum. As it is upon the “safe third country” principle – enshrined in EU legislation - the EU/Turkey deal finds its legal basis, this will be in the center of attention while scrutinizing EU law.

## **1.4 Disposition**

To be able to fulfil this thesis’ subject and aim, Chapter 2 contains a theoretical examination of the *non-refoulement* principle and the right to seek asylum, purposed to give a background of the rule of law. Focus is on both international and European law. The first part is primary concerned about the substantive element of *non-*

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<sup>20</sup> The 1951 Convention Relating to the Status of Refugees, Article 35(1)

<sup>21</sup> See, e.g. Battjes (2006), p. 23; ECHR Article 32.



*refoulement*, and the second part with the procedural rights connected to the right to seek asylum.

The EU/Turkey deal will be covered in Chapter 3. I will explain it thoroughly in order to scrutinize it in the light of relevant law in Chapter 5. The primary attention will be given to the parts most relevant for the right to seek asylum and *non-refoulement*.

Chapter 4 continues with a critical study of the *de facto* and *de jure* situation in Turkey relevant for returned protection seekers. The chapter covers issues that may give rise to a real risk of deprivation of designated rights when asylum seekers are returned to Turkey.

To connect above-mentioned facts, I will attempt to analyse the compatibility of the EU/Turkey deal in the light of the right to seek asylum and *non-refoulement*, as well as the Turkey country-facts in Chapter 5.

I conclude this graduate thesis in Chapter 6 by providing an answer to my research questions.

## 2 Theoretical examination of the legal framework

To be able to fulfil the purpose of this thesis, this chapter will identify a series of obligations of international human rights and refugee law, constituting the legal framework regarding return of protection seekers from EU member states to third countries. The following will examine the scope and content of the *non-refoulement* principle and the right to seek asylum, whereby this chapter is delimited to designated rights. Chapter 2.1 deals primary with the substantive aspect of *non-refoulement* in international human rights and refugee law, while Chapter 2.2 primary focuses on relevant procedural aspects in the light of seek asylum.

The universal rights of refugees can be found in two primary sources, the Refugee Convention and general standards of human rights law,<sup>22</sup> and the chapter is duly divided between these. Relevant EU law is covered in the final subchapters.

The conclusions drawn from this chapter will subsequently be compared with the EU/Turkey deal, whereby I will consider if this conduct raises questions under international human rights and refugee law.

### 2.1 Non-Refoulement

The universal principle of *non-refoulement* is of outmost importance for all asylum-seekers, and unquestionably the centrepiece of international refugee law. It stipulates in broad terms the prohibition of expulsion of a person to a country where he/she would be exposed to a specifically defined risk and the term can be derived from the French word '*refouler*', which means to repel or drive back.<sup>23</sup> International obligations relevant to the expulsion of protection seekers to third countries generally follow from explicit or implicit prohibitions of *refoulement*.<sup>24</sup> The principle of *non-refoulement* is solidly grounded in international human rights and refugee law, in treaty, in doctrine, and in customary international law. It is an inherent aspect of the absolute prohibition of torture, even sharing perhaps in some of the latter's *jus*

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<sup>22</sup> Hathaway (2005), p. 154.

<sup>23</sup> Goodwin-Gill & McAdam (2007), p. 201.

<sup>24</sup> Coleman (2009) p.231.

*cogens* character.<sup>25</sup> As will be covered further on, this principle limits States' sovereign right to control entry to its territory, as well as return of protection seekers to other States. It has also consequences for States' obligations to provide access to at least a part of its domestic asylum procedure for those who are reaching its territory in search for refuge.<sup>26</sup>

There is great support that the *non-refoulement* principle is viewed upon as international customary law and is incorporated in numerous legal instruments regarding refugees and asylum seekers.<sup>27</sup> However, in a refugee context the content of the customary principle of *non-refoulement* corresponds largely to Article 33 of the Refugee Convention.<sup>28</sup> This article will be covered in detail in chapter 2.1.1 below. Since all EU countries are parties to this Convention and thereby bound by the principle by treaty obligation, the customary character or meaning matters little why it will not be further discussed here.

It is important to emphasize that the *non-refoulement* principle does not stipulate that an individual can claim a right to asylum. Nevertheless, states have a duty under international law not to hinder a person's right to seek asylum.<sup>29</sup> The principle of *non-refoulement* - the centrepiece of international refugee law - still stands as the strongest commitment of the international community of states to those who cannot turn to their own government for protection.<sup>30</sup>

## 2.1.1 *Non-refoulement* under Refugee Convention

The core among the bundle of refugee rights in the Refugee Convention is certainly the *non-refoulement* principle enshrined in Article 33(1). The apparent purpose of the Convention is to provide protection to refugees. It lacks however an enforcement mechanism, nevertheless the UNHCR works as an overseeing organ to provide

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<sup>25</sup> Goodwin-Gill, *The Right to Seek Asylum: Interception at Sea and the Principle of non-refoulement*, (2011), p. 444.

<sup>26</sup> Held by Vedsted-Hansen, *Non-admission policies and the right to protection: refugees' choice versus states exclusion*, in J. Hathaway (red), *Human rights and refugee law Vol. 2*, (2013), p. 384 and 388.

<sup>27</sup> Goodwin-Gill and McAdam (2007) p. 354.

<sup>28</sup> See Lauterpacht and Bethlehem, *The scope and content of the principle of non refoulement*, in: E. Feller, V. Turk, and F. Nicholson (red), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, 2003 p. 87-181 (2003) p. 149 para.217 ff. for a analyse (Continuing Lauterpacht and Bethlehem (2003))

<sup>29</sup> Goodwin-Gill and McAdam (2007) p357-358.

<sup>30</sup> Gammeltoft-Hansen, *Access to asylum: international refugee law and the globalisation of migration control* (2011), p. 44.

international protection to refugees and to assist governments in pursuing “permanent solutions for the problem of refugees”.<sup>31</sup>

Article 33(1) provides:

“No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever 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 provision is however not absolute as the following Article 33(2) provides exceptions to this rule, where there exist “reasonable grounds” for regarding a refugee as “a danger to the security of the country” or the refugee “having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country”.

The subject of the protection afforded by the *non-refoulement* principle in Article 33(1) Refugee Convention is a “refugee”. Pursuant to Article 1(a)(2) of the Convention, as amended by Article I(2) of the 1967 Protocol, the term refugee applies to any person who:

“Owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it”

The *non-refoulement* principle applies furthermore – in an initial state - to asylum seekers where there is a presumptive or *prima facie* claim to refugee status.<sup>32</sup> For instance, UNHCR’s Executive Committee has argued, that it applies regardless if the individual has been formally recognized as a refugee – refugee hood is thus

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<sup>31</sup> *Statute of the Office of the United Nations High Commissioner for Refugees*, General Assembly Resolution 428 (v) of 14 December 1950, at annex para 1.

<sup>32</sup> Goodwin-Gill and McAdam (2007) p 345-346.

declaratory rather than constitutive.<sup>33</sup>

### 2.1.1.1 Indirect refoulement

UNHCR has frequently stated that Article 33 prohibits not only direct *refoulement* to the country of persecution, but also indirect chain *refoulement*.<sup>34</sup> UNHCR has consistently applied that principle specifically to the return of asylum seekers to third countries. In such cases, UNHCR has reiterated, that the third country must not be one that will *refoule* the person to a place where life or freedom would be threatened on any of the Convention grounds.<sup>35</sup> This interpretation follows from the ordinary meaning of the phrase “in any manner whatsoever” in Article 33, and is confirmed by the *travaux préparatoires*.<sup>36</sup>

Article 33(1) cannot, however, be read as precluding removal to a ‘safe’ third country, i.e. one in which there is no danger of the kind just described. The prohibition on *refoulement* applies only in respect of territories where the refugee or asylum seeker would be at risk, not more generally. It does, however, require that a state proposing to remove a refugee or asylum seeker undertake a proper assessment as to whether the third country concerned is indeed safe, more about the procedural obligations in chapter 2.2.<sup>37</sup> The country in which an asylum application is lodged is and remains ultimately responsible for assuring *non-refoulement*, even if that country transfers the person to a third country.<sup>38</sup> It cannot escape that duty by delegating it.

While the third country remains primarily responsible for a direct act of *refoulement*, the first country, through its act of removal to the third country, is jointly liable for violating the prohibition on *refoulement*.<sup>39</sup> This correspond to the “complicity principle” presented by Legomsky; “no country may send any person to another country, knowing that the latter will violate rights which the sending country

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<sup>33</sup> See UNHCR, Executive Committee Conclusions, No. 6 (XXVIII), *Non-refoulement* (1977), No. 79 (XLVII), *General Conclusion on International Protection* (1996), No. 81 (XLVIII), *General Conclusion on International Protection* (1997), No. 82 (XLVIII), *Safeguarding Asylum* (1997).

<sup>34</sup> ECtHR, *T.I v. United Kingdom* No 43844/98 (7 March 2000) p. 14.; *M.S.S. v. Belgium and Greece*, No 30696/09 (21 January 2011) para. 286 and 342; *Hirsi Jamaa and Others v. Italy*, No. 27765/09, (23 February 2012), para. 146-147 ; UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol* (2007), p. 10.

<sup>35</sup> UNHCR *Global Consultations*, (31 May 2001), para. 50(c).

<sup>36</sup> Coleman (2009) p. 235; Hathaway (2005), pp. 322-323.

<sup>37</sup> Lauterpacht and Bethlehem (2003) p. 122.

<sup>38</sup> UNHCR *Handbook on Procedures and criteria for determining refugee Status under 1951 Convention and the 1967 Protocol relating to the status of refugees*, Geneva, January 1992, UNHCR 1979, Foreword II). (Continuing UNHCR Handbook)

<sup>39</sup> Goodwin-Gill & McAdam (2007), pp. 252-253

is itself obligated to respect, regardless whether the third country is a party to the Refugee Convention or any other human rights conventions”.<sup>40</sup> Legomsky gives numerous examples of when differences in interpretation might affect the ultimate outcome or otherwise disadvantage the applicant in ways that the destination country believes would violate the Convention, e.g. they might interpret the substantive definition of “refugee” differently.<sup>41</sup> He argues that when the third country’s less favourable interpretation falls short of international standards such as *non-refoulement*, return to the third country should be prohibited. However, when the refugee standards of the third country meet international standards, even though lower than the destination country, then the return of the applicant should be permitted even if doing so will ultimately lead to that person’s transfer to the country of origin.<sup>42</sup>

Gregor Noll further argues that there are two approaches that can be taken by states seized with the removal of a person.<sup>43</sup> The first, the “formal approach,” would permit return as long as the third country is a party to the Refugee Convention and thus is formally bound to respect its dictates. On the other end of the spectrum he finds the “empirical approach”. This entails inquiry into not only the relevant legislation in place but also the actual conditions and practices of the third country, mainly as suggested by the ECtHR resting on the interpretation of international law by lawfully established official international entities i.e. UNHCR.<sup>44</sup> Because the country where the application is lodged bears the primary responsibility for the asylum claim it obligates it to follow international law and, arguably, to refrain from knowingly return the person to another country that will violate international law.

## **2.1.2 *Non-refoulement* under Human Rights**

The Refugee Convention is the floor, but not the ceiling for the rights of refugees. Accordingly, it is necessary to consider those developments in human rights law that are applicable to refugees. Consequently, the protection from *refoulement* is additionally ensured under the human rights framework for a person who doesn’t qualify as a refugee, but nevertheless risk serious harm upon return. States are

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<sup>40</sup> Legomsky (2003) p.5.

<sup>41</sup> See the discussion regarding the *T.I v. United Kingdom* No 43844/98 (7 March 2000) in 2.1.2.3 and 2.2.2.

<sup>42</sup> Legomsky (2003) p.58.

<sup>43</sup> Noll, *Formalism v. Empiricism: Some Reflections on the Dublin Convention on the Occasion of Recent European Case Law*, Nordic Journal of International Law, (2001).

<sup>44</sup> *Ibid.* p. 2.

prohibited to send a person to a state with respect to whom there are substantial grounds to believe he/she face a real risk of being subject to ill-treatment. This is particularly true if that person would face a risk of arbitrary loss of life, torture or inhuman or degrading treatment.<sup>45</sup> The prohibition on *refoulement* can be deduced from Article 3 ECHR<sup>46</sup>, Article 7 ICCPR<sup>47</sup> Prohibition of torture and Article 3 CAT prohibiting States to *refouler* someone to a place where they risk torture. Of relevance is also the prohibition of collective expulsion of aliens, enshrined in Protocol 4 Article 4 ECHR. Continuing, my focus will be on the prohibition of *refoulement* deduced from Article 3 ECHR and thus, the provisions enclosed in ICCPR and CAT will not be further regarded because of the wish to enter more deeply in ECHR.

Article 3 states:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment”

Article 3 is an absolute provision, which means that there are no exceptions and no derogations allowed under any circumstances.<sup>48</sup> This provision has significantly limited state’s freedom to remove individuals who may be at risk of ill treatment covered by the article in the territories to which return is contemplated.<sup>49</sup>

The ECHR – an international treaty ratified by all Member States of the Council of Europe<sup>50</sup> - has the purpose of providing minimum standards of protection for human rights. The ECHR applies within the territory of contracting states and impose obligations to respect a variety of mainly civil and political rights.

I will continue this chapter by first establish that Article 3 includes an implicit prohibition of *refoulement*, followed by a discussion about inhuman or degrading treatment or punishment. Thereafter I determine that it also includes indirect *refoulement*.

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<sup>45</sup> See ECHR Article 2 and 3; CAT Article 3; Concerning ECHR Article 3 see *Soering v. United Kingdom* No. 14038/88; Concerning Article 6 and 7 ICCPR see UN Human Rights Committee (HRC), *General Comment No. 20*, para. 9.

<sup>46</sup> See *Soering v. United Kingdom* No. 14038/88 7 (July 1989), para. 90-91.

<sup>47</sup> HRC, *General Comment No. 20*, para. 9.

<sup>48</sup> Articles 3 and 15 ECHR.

<sup>49</sup> Goodwin-Gill & McAdam (2007) p. 366.

<sup>50</sup> Shaw (2014), pp. 250-251.

### 2.1.2.1 Article 3 ECHR – an implicit prohibition of *refoulement*

Confirmation by the ECtHR that Article 3 indeed implies a *refoulement* prohibition followed by the *Soering v. the United Kingdom*.<sup>51</sup> It concluded that the *non-refoulement* principle in Article 3 is applicable regardless of whether the ill-treatment concerned would take place in a Convention state or in another state.<sup>52</sup> According to the ECtHR, an extradition, as it were in this particular case, engages the responsibility of the extraditing state under Article 3 “where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment”.<sup>53</sup> It thereby introduced the “real risk” criterion for assessing the likelihood of treatment contrary to Article 3 in the recipient state.

In the *Cruz Varas and others v. Sweden* case<sup>54</sup> a definition of the implicit prohibition of *refoulement* was formulated. It provided that: a protection seeker may not be removed to a country where substantial grounds have been shown for believing that he or she would face a real risk of being subjected to torture or inhuman or degrading treatment or punishment.<sup>55</sup>

### 2.1.2.2 Inhuman or degrading treatment or punishment

For the *non-refoulement* protection to apply, the person has to fear future ill-treatment that is severe enough to fall within the scope of Article 3 and show substantial grounds that he/she faces a real risk of being subjected to such treatment. Both general and personal circumstances are relevant for the risk assessment.<sup>56</sup>

The substantive reach of the prohibition of *refoulement*, implicit as we saw in Article 3 ECHR, is however difficult to determine. One reason for this is the Article’s broad terms, no definition of the forms of proscribed ill-treatment is to be found in the text of the ECHR. It is therefore important to look at the extensive case law of the Court in this regard.<sup>57</sup>

Exactly when a certain treatment or punishment would cross the minimum threshold for being, at the very least, “degrading” cannot be established generally. It

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<sup>51</sup> *Soering v. United Kingdom* No. 14038/88 (7 July 1989).

<sup>52</sup> *ibid.* para. 91

<sup>53</sup> *ibid.*

<sup>54</sup> *Cruz Varas v. Sweden* No.15576/89, (20 March 1991)

<sup>55</sup> *ibid.* paras. 69-70.

<sup>56</sup> *Sufi and Elmi v. the United Kingdom*, Nos. 8319/07 and 11449/07, (28 June 2011), para. 216.

<sup>57</sup> Coleman, (2009), p.261.



depends on the specific circumstances of the case.<sup>58</sup> The important issue is whether the level of ill-treatment can affect the application of Article 3. The article contains as mentioned three concepts; degrading treatment, inhuman treatment and torture. *Non-refoulement* is applicable to all the levels of ill-treatment prohibited under Article 3. In *refoulement* cases the requirement that the possible treatment must attain a minimum level of severity is often repeated. Again it depends on the facts and circumstances of the case, making it difficult to say, in general, what treatment falls within the scope of Article 3 ECHR.

I will in the continuing give some examples of degrading treatment, since this is the least severe concept and is therefore included in the inhuman treatment or torture. The ECtHR has defined degrading treatment as treatment that “humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance”.<sup>59</sup> As already noticed, the level of severity depends on all the specific circumstances of the case, such as the duration of the treatment, its effects and in some cases the sex, age and state of health of the victim.<sup>60</sup>

Certain is that a “real risk” of exposure to any of the forms of maltreatment covered by Article 3 ECHR in another country would be sufficient to prohibit return.<sup>61</sup>

### **2.1.2.3 Indirect Refoulement**

In *T.I. v. the United Kingdom*<sup>62</sup> the Court confirmed that the obligation on *non-refoulement* persists when a state party deports a person to an intermediate country in which the person does not face a direct threat of ill treatment. T.I. was a Sri Lankan national who challenged his transfer under the Dublin Convention from the United Kingdom to Germany. The court ruled that a deporting state has to take into account the risk that an intermediate country will in turn deport the person to a country in which the person faces a direct threat of ill-treatment.<sup>63</sup> After establishing that T.I. faced an arguable risk of ill-treatment in his country of origin, the Court focused, in the assessment of indirect *refoulement*, on the risk of arbitrary return. The Court ruled that a deportation will expose an asylum seeker to a risk of indirect *refoulement*

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<sup>58</sup> McAdam (2007): *Complementary Protection in International Refugee Law*. Published to Oxford Scholarship Online, 2012, p. 141.

<sup>59</sup> *Pretty v. United Kingdom*, No. 2346/02 (27 July 2002), para 71.

<sup>60</sup> See e.g. *Hilal v. The United Kingdom*, no. 45276/99, para. 60.

<sup>61</sup> *Soering v. United Kingdom* No. 14038/88 (7 July 1989), para. 88.

<sup>62</sup> *T.I v. United Kingdom* No 43844/98 (7 March 2000).

<sup>63</sup> *Ibid.* p. 15,18.

and ill-treatment if the intermediate country's asylum procedure does not provide sufficient guarantees that people who fear ill-treatment receive protection and the intermediate country carries out deportations.<sup>64</sup> The Court concluded that procedural safeguards existed in Germany, but questioned their effectiveness for the applicant because of Germany's interpretation and application of them. This implies that a state, intent on expulsion to a third country, must consider whether the protection seeker would face a real risk of onward removal to another country in breach of Article 3 ECHR.<sup>65</sup> We will discuss this duty to investigate in light of the right to asylum in chapter 2.2.2.

In sum, a situation of indirect *refoulement* involves two elements of risk. First, there is of course the existence of a real risk that the person will be subjected to proscribed ill-treatment in the final country of destination (in the *T.I* case: the country of origin). Secondly, there is the additional risk that the person concerned will be sent to the country of final destination by the intermediary country. Indirect *refoulement* therefore implies an assessment of the risks awaiting an applicant. The main objective being to assess whether, taking into consideration the personal circumstances of the applicant, he/she faces a real risk of ill treatment in the country concerned exists.<sup>66</sup>

## **2.2 Right to seek asylum**

After going through the relevant substantive aspects connected to the *non-refoulement* principle, we will now turn to the right to seek asylum.<sup>67</sup>

The right to seek asylum is essentially a right of an individual to leave his country of residence in pursuit of asylum. The basis for this right is the principle that "a State may not claim to 'own' its nationals or residents."<sup>68</sup> The right to leave is enshrined in several international and regional instruments. Article 13(2) of the UDHR<sup>69</sup> proclaims that, "everyone has the right to leave any country, including his own." It is moreover protected in Article 2(2) Protocol 4 ECHR and Article 12 ICCPR. However, as been noted by Kritzman-Amir and Spijkerboer, while the right

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<sup>64</sup> Ibid. p. 14-18.

<sup>65</sup> Ibid. p.17.

<sup>66</sup> Mink (2012) p.136.

<sup>67</sup> Right to seek asylum encapsulates in this thesis the right to *apply* for asylum and to have the application *examined* – as explained under *Limitations*.

<sup>68</sup> Boed (1994) p. 6.

<sup>69</sup> *Universal Declaration of Human Rights*, GA Res 217A (III), UN Doc A/810 (10 December 1948).

to seek asylum in certain conditions imposes duties on states to prevent and refrain from *refoulement* (if people have the right to leave and seek protection from torture, so, too, do states have a correlative duty to refrain from subjecting people to regimes where their lives and liberty may be endangered, or where they may be subjected to torture), this right does not impose these duties on any specific state.<sup>70</sup> They continue by explaining that the right to seek asylum is a right that requires the cooperation of a potential state of asylum. However, it is not subject to the right of states arbitrarily to refuse to allow the possibility to seek asylum. The reason being that “the recognition of the right to refuge and asylum presupposes that state sovereignty and self-determination have to yield in cases of “well-founded fear of being persecuted” or, in another language, that the basic right or need to security is strong enough to outweigh other rights and competing ethicopolitical, prudential, and realist arguments”.<sup>71</sup>

UDHR was the first instrument that gave the right to seek and enjoy asylum universal recognition. Article 14 provides:

“Everyone has the right to seek and enjoy in other countries asylum from persecution”.

The formulation was controversial, reflecting state’s unease to include a right to be granted asylum since it create a subjective right to enter its territory.<sup>72</sup>

The UDHR is not a legally enforceable instrument in itself and solely provides universal goals for the state parties. Many scholars argue however that it has become binding either through custom, general principles of law or by subsequent practice.<sup>73</sup> Nevertheless, neither state practice nor corresponding *opino juris* regarding the UDHR supports a right to access state territory in order to seek asylum as well as it does not support a duty on the states to grant asylum to those seeking it.<sup>74</sup> The difficulty with this apparently sacrosanct guarantee is that it is not clear who is

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<sup>70</sup> Kritzman-Amir and Spijkerboer, *On the morality and legality of borders: border policies and asylum seekers*, 2013, p.5-6. (Continuing Kritzman-Amir and Spijkerboer (2013)).

<sup>71</sup> Quote by Veit Bader: Veit Bader, *The Ethics of Immigration*, 2005; also cited in Kritzman-Amir and Spijkerboer (2013) p.7.

<sup>72</sup> Goodwin-Gill and McAdam (2007) p. 358-61

<sup>73</sup> Shaw (2014), p 203-204.

<sup>74</sup> Noll, *Seeking Asylum at Embassies: A Right to Entry under International Law?* (2005) p. 547.

obliged to provide asylum.<sup>75</sup> Lautherpacht was highly critical and argued that it simply restated State's existing rights under international law to grant refuge.<sup>76</sup>

Costello argues that, without accessible and fair asylum determination procedures, the international system of refugee protection is undermined. Fairness requires procedures that ensure outcomes that are accurate, efficient and acceptable<sup>77</sup>

The relationship between right to seek asylum and the *non-refoulement* principle is highly intertwined – evident from Kritzman-Amir and Spijkerboer's argument above. As judge Pinto De Albuquerque further argues in his concurring opinion in *Hirsi Jamaa and Others v Italy*<sup>78</sup>; “the *non-refoulement* obligation has two procedural consequences: the duty to advise an alien of his or her rights to obtain international protection and the duty to provide for an individual, fair and effective refugee status determination and assessment procedure, with an evaluation of the personal risk of harm”.

These procedural guarantees apply to all asylum seekers regardless of their legal and factual status. If refugee status is accepted to be declaratory rather than constitutive, as is generally acknowledged,<sup>79</sup> then preventing a refugee from accessing the status determination procedures within a state can be the equivalent of *refoulement*. Aside that fact, as Legomsky points out - whether or not the UDHR or any other sources create a right to *apply* for asylum *somewhere*, no international instrument establishes an absolute right to receive a decision on the substance of an asylum claim by the country of one's *choosing*. To put the point another way, no rule of international law establishes a *per se* prohibition on diverting asylum applicants to third countries.<sup>80</sup>

However, contemplating protection to an intermediate country can be problematic for two reasons as chapter 2.1 explained. Firstly, the protection seeker may face a risk of persecution or ill-treatment in the intermediate country itself. In other words, it may be that the return to the intermediate country constitutes direct *refoulement*. Secondly, potential asylum seekers may also be treated good in the intermediate country but claim that it may return them to their country of origin, where they do face persecution or ill-treatment. In that case, return to the third

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<sup>75</sup> Costello, *The Asylum Procedures Directive and the Profileration of Safe Country Practices: Detention, Deflection and the Dismantling of International Protection?*, (2005), p.35. (Continuing Costello (2005)).

<sup>76</sup> Lautherpacht, *International law and Human Rights*, 1950, p. 422.

<sup>77</sup> Costello (2005) p.35.

<sup>78</sup> *Hirsi Jamaa and Others v. Italy*, No. 27765/09, (23 February 2012).

<sup>79</sup> UNHCR Handbook, par. 28.

<sup>80</sup> Legomsky (2003), p. 39.

country may constitute indirect *refoulement*. From this stem additional questions; can states when contemplating protection elsewhere, properly assess the safety of a third state without addressing the particular circumstances of the request? Or should the sending state assess in each individual case if the intermediate country is safe for that particular individual? Evident from this, and important to keep in mind, is to distinguish between the substantial examination of the risk of persecution or serious harm in the country of origin, and assessment of the risk that the intermediate state will expel the protection seeker in breach of the prohibitions of *refoulement*.

## **2.2.1 Right to seek asylum under the Refugee Convention**

I will in this subchapter first outline the general requirements for the examination of claims to protection that stems from the Refugee Convention in the country where an application for protection is lodged. Thereafter, relevant aspects when returning to a third country will be reviewed.

### **2.2.1.1 General requirements for the examination of protection claims**

To begin with, no matter how intertwined, it is important to separate the right to seek asylum from *non-refoulement*. The *non-refoulement* obligation in Article 33 does not provide a “right to asylum” and a state may return refugees as long as the principle is not violated. This is in line with states’ sovereignty to regulate the entry of non-citizens into their territory. Thus, states have no obligation to admit refugees or any other alien.<sup>81</sup> Article 33 of the Refugee Convention is only concerned with where an individual cannot be sent back to, and not from where the individual is trying to escape.<sup>82</sup>

Neither Article 33 nor any of the other provisions of the Refugee Convention contains an explicit right to seek or enjoy asylum.<sup>83</sup> Similarly, the Refugee Convention neither stipulates that states must determine the status of persons claiming international protection, nor does it specify any procedures to this end. Whether the Refugee Convention, nevertheless, would oblige State parties implicitly to substantively assess a protection request within their jurisdiction is still a

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<sup>81</sup> Goodwin-Gill, & McAdam (2007) p. 206-207.

<sup>82</sup> Hathaway (2005), p. 308-310.

<sup>83</sup> Article 34 of the 1951 Refugee Convention only obliges State parties “as far as possible (to) facilitate the assimilation and naturalisation of refugees”.

somewhat contested issue in the literature.<sup>84</sup> The personal scope of Article 33(1) includes persons recognized as refugees as concluded in chapter 2.1.1. We also recall that in an initial state however, the principle also applies to asylum seekers, *as if* a refugee, where there is a presumptive or *prima facie* claim to refugee status.<sup>85</sup> The fact that protection *seekers* fall within the ambit of Article 33(1) Refugee Convention and that refugee status is declaratory rather than constitutive, as is generally acknowledged,<sup>86</sup> has invited commentators to deduce an obligation upon States to make a substantive examination of an application for asylum. The most common argument is that a State could not be sure that it is not committing *refoulement* by sending a protection seeker back, until determination of his or her status would discredit the protection claim, implying a duty to determine the status of protection seekers.<sup>87</sup>

However, according to the *travaux préparatoires* to the Refugee Convention, not only the right to asylum was intentionally omitted, but also a duty to undertake status determination.<sup>88</sup> It may have been that the states wished not to come too close to the, not wanted, duty to grant asylum. Thus, undertaking status determination is not an obligation under the Refugee Convention. Consequently, the Refugee Convention cannot be considered to contain an obligation for States to implement refugee determination procedures. Status determination under the Refugee Convention is a discretionary choice, although it is many times a practical necessity if a State wishes to avoid breaching the prohibition against *refoulement*.<sup>89</sup> In other words, claiming refugee-hood in a country does not imply that such a claim must be decided or even examined on its merits there under the Refugee Convention.

### **2.2.1.2 Returning to a third country**

The relevance of the findings in previous chapter for returning protection seekers to third states is, according to Coleman, that this may take place without prior substantive examination of the protection claim. Further, whether the third country will undertake status determination does not determine the legality of expulsion to that country. Thirdly, considering that the Refugee Convention allows a destination state to return a protection seeker to a third country, the possibility of onward expulsion to another third country – a “fourth” country – does not *prima facie*

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<sup>84</sup> Coleman (2009), p. 236.

<sup>85</sup> Goodwin-Gill & McAdam (2007), p. 345-346.

<sup>86</sup> UNHCR Handbook para. 28.

<sup>87</sup> Coleman (2009) p.237.

<sup>88</sup> *ibid.*

<sup>89</sup> *ibid.*

determine the legality of expulsion, either. The *non-refoulement* principle require, as my examination showed, that a proper examination must be made however as to the third state is safe. Coleman concludes that as long as States respect the prohibition of direct and indirect *refoulement*, the Refugee Convention does not prevent the continuous expulsion of a protection seeker from one country to another. This means that protection seekers may be subjected to a chain of expulsions, treated as if a refugee for the purposes of Article 33(1) Refugee Convention by every state, but without consideration of the merits of the protection claim anywhere.<sup>90</sup>

UNHCR has repeatedly insisted to this subject that no asylum seeker be returned to a third country, under a safe third country provision or a readmission agreement, unless the third country will provide a fair refugee status determination or provide effective protection without such a determination.<sup>91</sup> Legomsky argues in a similar fashion, that the central (albeit not the only) rationale for fair procedure, is that an unfair procedure necessarily produces an unjustifiably high risk of violating the individual's substantive rights e.g. be erroneously *refouled*. Thus, a fair refugee status determination is one essential component of the Article 33 prohibition on *refoulement*, and consequently, an unfair refugee status determination procedure could - in itself - violate Article 33.<sup>92</sup> Legomsky further states that it is the actual protection, not the formalities that should control. Thus, the third state can afford effective protection from *refoulement* in several ways. If the third country will honour all the elements of effective protection without the formality of a refugee status determination, then the requirements of the present subsection should be deemed satisfied.<sup>93</sup> Taken this in consideration, one can argue that assessment of a refugee claim by the third state is not required as long as there is some sort of permission to stay in the in the third state. As it is this result that counts, it does not matter on what grounds the permission is granted.

If the *non-refoulement* principle implicitly requires a fair asylum procedure (or effective protection without) Left to decide is thus what it takes to make a refugee status determination efficient/fair? The state in which an application is lodged has the

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<sup>90</sup> *ibid.* p.238.

<sup>91</sup> See e.g. UNHCR *Global Consultations in Budapest*, Conclusions, 6-7 June 2001, paras. 15(b,e); This view is widely shared. See, e.g., Council of Europe, *Guidelines on Safe Third Country*, 1997, para. 1(c); Legomsky (2003) p. 73.

<sup>92</sup> Legomsky (2003) p.73.

<sup>93</sup> Legomsky (2003) p.74. There are other who argues differently however; Hurwitz (2009), p.218 for example, argues that the removal of a refugee to a third state not party to the Refugee Convention would seem to entail a violation of the duty to comply in good faith with one's obligations, on grounds that there is in such an instance too high of a risk that the protection seeker will not be protected and will not be given the opportunity to present his/hers claim to the authorities and have it examined substantively.

immediate and primary responsibility to protect the refugee against *refoulement*. Such responsibility includes an assessment of the safety of the third country, if applicable.<sup>94</sup> The condition of safety of the third country concerns not just the sole risk of being returned to the frontiers of territories where there is a threat to his life or freedom in accordance with Article 33(1) Refugee Convention, but also the availability of further effective protection in the third country. This thesis will not provide a detailed discussion of all probable requirements of a fair refugee status determination here due to the limited space. Nevertheless, relevant criteria for the aim thesis includes the absence of a direct threat to an applicants' life or freedom. If not, the removal would be a direct violation of the prohibition of *refoulement*.<sup>95</sup> Secondly, the refugee must have a clear and real ability lawfully to enter and remain in the third country, and as such the third country must expressly agree to admit the refugee to its territory.<sup>96</sup> UNHCR has stated that a fair asylum procedures includes; access to UNHCR, protection of privacy and keeping information confidential, able to testify freely, guarantee that his or her asylum application and specific testimony will not be shared with the country of origin and protection of refugees with special vulnerabilities.<sup>97</sup> Essential is that the examinations of designated criteria must at all times be performed on an individual basis.<sup>98</sup>

## **2.2.2 Protection against *refoulement* under Article 3 ECHR**

This chapter considers whether the ECHR contains a right to seek protection and whether member states are obliged to examine the substance of a protection request. To clarify, neither Article 3 nor any other provision in the ECHR provides a right to asylum. This has been clearly recognized in the ECtHR's case law - in general it initially considers that States parties have a right to control the entry, residence and expulsion of aliens.<sup>99</sup> Nevertheless, it has marked out the boundaries beyond which return might infringe Article 3 – and that is what I will examine.<sup>100</sup>

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<sup>94</sup> Lauterpacht & Bethlehem (2003), p. 122, para. 116.

<sup>95</sup> EXCOM Conclusion No. 58 (XL) 1989, para. (f) (i); See also chapter 2.1 regarding the prohibition on being returned to the frontiers of territories where there is a threat.

<sup>96</sup> Legomsky (2003), p. 54.

<sup>97</sup> UNHCR Global Consultations on *International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, (31 May 2001), para. 50; Legomsky (2003) p. 75

<sup>98</sup> See for a comprehensive analysis of the elements of effective protection Legomsky (2003), pp.52-79f. See also Goodwin-Gill & McAdam (2007), pp. 393-395.

<sup>99</sup> See e.g. ECtHR *Jabari v Turkey*, No. 40035/98, (11 July 2000, ) para. 38.

<sup>100</sup> Goodwin-Gill & McAdam (2007), p. 366ff.



As in chapter 2.1.2, I will solely cover ECHR amongst international human rights instruments for similar reasons as stated there. First, I will analyse general requirements for the right to protection and examination of claims to protection against return under Article 3 ECHR in the country where an application is lodged. Thereafter, relevant aspects of status determination when returning to a third country will be reviewed.

### **2.2.2.1 General requirements for the examination of protection claims**

So, the ECHR does not contain the concept of asylum as the UDHR – despite its clear influences from it. In spite of this, Article 3 ECHR contains an implicit absolute prohibition on *refoulement* as established in chapter 2.1.2.1. States are thereby obliged to protect everyone in the state jurisdiction from the real risk of ill-treatment. The nature of the State’s responsibility under Article 3 in *refoulement* cases lies in exposing an individual to the risk of proscribed ill-treatment and not in subjecting the individual to proscribed ill-treatment itself.<sup>101</sup>

The ECtHR has further concluded that Article 3 also implies procedural obligations upon member states and a requirement of rigorous examination to legal remedies when examining a protection claim linked to a risk of treatment contrary to Article 3, as well as to decisions not to consider such claim.<sup>102</sup>

When examining the procedural limb of Article 3, it is important to include Article 13 in this review. If a claim is submitted and declared inadmissible according to the state, the individual concerned must be able to challenge any subsequent decision to remove him/her, in accordance with both Articles 3 and 13 of the Convention. Article 13 provides:

“Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

The ECtHR has identified many deficiencies in asylum procedures and deportation decisions both in the context of Article 3 and in the context of Article 3 and Article

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<sup>101</sup> See e.g. ECtHR, *Cruz Varas and Others v Sweden*, No. 15576/89, (20 March 1991) para. 76; ECtHR.

<sup>102</sup> Coleman (2009) p.272.

13 combined. Deficiencies in this procedural guarantee may render the protection for asylum seekers against *refoulement* ineffective.

According to ECtHR's constant case law, an effective remedy is one that is "available and sufficient to afford redress in respect of the breaches alleged",<sup>103</sup> and allows the competent authority "both to deal with the substance of the relevant Convention complaint and to grant appropriate relief".<sup>104</sup>

In the very important case *M.S.S. v. Belgium and Greece*<sup>105</sup>, that revolves around both direct *refoulement* if return protection seekers to Greece, and the risk of the applicant being returned to Afghanistan from Greece without a serious examination of the merits of his asylum claim and without access to an effective remedy, the ECtHR found violations by Greece, the intermediate state, and Belgium, the sending state, in respect of the applicant's right to an effective remedy under Article 13 of the ECHR taken in conjunction with Article 3. The Court concluded that due to Greece's failure to apply the asylum legislation and the major structural deficiencies for access to the asylum procedure and remedies, there were no effective guarantees protecting the applicant from onward arbitrary removal to Afghanistan, where he risked ill treatment. Regarding Belgium, the procedure for challenging a transfer to Greece did not meet the ECtHR case law requirements of close and rigorous scrutiny of a complaint in cases where expulsion to another country might expose an individual to treatment prohibited by Article 3.<sup>106</sup>

Another relevant case is *Jabari v. Turkey*.<sup>107</sup> The Court found there that the applicant had been denied an effective remedy, after her application for protection had been rejected without substantive consideration because a failure to request asylum five days after her entry. The Court stated that: "given the irreversible nature of the harm that might occur if the risk of torture or ill-treatment alleged materialised and the importance which attaches to Article 3, the notion of an effective remedy under Article 13 requires independent and rigorous scrutiny of a claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 (...)".<sup>108</sup> In other words, an effective remedy under Article 13, against an Article 3 complaint in an expulsion case, requires *rigorous*, as well as *independent* scrutiny. Coleman argues that rigorous scrutiny implies consideration of the merits of the complaint, i.e. the alleged risk of torture or inhuman or degrading treatment or

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<sup>103</sup> Coleman (2009) p.272.

<sup>104</sup> *Soering v. United Kingdom* No. 14038/88 (7 July 1989), para. 120.

<sup>105</sup> *M.S.S. v. Belgium and Greece*, No 30696/09 (21 January 2011).

<sup>106</sup> *Ibid.* paras. 385-397.

<sup>107</sup> *Jabari v Turkey*, No. 40035/98, (11 July 2000).

<sup>108</sup> *Ibid.* para. 50 Coleman (2009) p.273.

punishment.<sup>109</sup> It follows from this judgement that Article 3 ECHR requires that the expelling state make “a meaningful assessment” of the claim that the expulsion will lead to ill-treatment.<sup>110</sup>

It seems as, because of the special character of the absolute provision in Article 3, the ECtHR tends to insist on substantive examination of an Article 3 claim before removal to that country producing the risk - failing to undertake a substantive examination would under certain circumstances be “at variance with the protection of the fundamental value embodied in Article 3”.<sup>111</sup> As Coleman puts it - this clearly places limits on procedural obstacles under national law, which would prevent such an examination from taking place.

### **2.2.2.2 Returning to a third country**

I will now turn to the issue whether or not a state is obliged under Article 3 ECHR to examine a protection request on its substance before removal to an intermediate country – in other words *not* to the country where he/she actually fears a risk of torture or inhuman or degrading treatment or punishment as examined in previous chapter. Just to clarify, if an individual is returned to an intermediate country where he/she faces persecution, torture, or inhuman treatment, his/her return to that intermediate country constitutes a violation of the same provisions of international law on which asylum law is based on in general, examined in previous subchapter.

The following explores if it is possible for a State under the ECHR to avoid the duty of a rigorous and independent examination by returning the person to an intermediate country. Furthermore, it will also consider whether a substantive examination in the third country is a requirement to determine that country “safe”.

#### **2.2.2.2.1 Substantive examination of protection request before return**

The principles enshrined in the *T.I. v. the United Kingdom*<sup>112</sup> case, as examined earlier in chapter 2.1.2.3, is also relevant when returning a protection seeker to countries outside the Dublin area. As we remember, this case enshrined the important ruling that a sending state is still responsible for the protection seeker under Article 3 even though returning to a third country.<sup>113</sup> The ECtHR ruled in *T.I* that the United

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<sup>109</sup> Coleman (2009) p. 273.

<sup>110</sup> *Jabari v Turkey*, No. 40035/98, (11 July 2000), para 40.

<sup>111</sup> *ibid.* para. 40; N. Coleman (2009) p.236.

<sup>112</sup> *T.I v. United Kingdom* No 43844/98 (7 March 2000).

<sup>113</sup> Coleman (2009) p.275.

Kingdom could not leave out an individual examination under Article 3 by “rely(ing) *automatically* (...) on the arrangements made in the Dublin regulation.”<sup>114</sup> A problem identified by Coleman,<sup>115</sup> central to both the Dublin Convention and safe third country policies, is that they are based on the underlying assumption of equal, or at least harmonized, protection standards between countries.

In this context, the ECtHR in the *T.I* case, reiterated that an Article 3 claim requires a “rigorous scrutiny”, as we saw in the *Jabari*<sup>116</sup> case in chapter 2.2.1.1.<sup>117</sup> This requirement rendered in *T.I* that when deciding whether or not the sending state – United Kingdom - had complied with its international obligations, the ECtHR proceeded with a marginal examination of the applicant’s situation in Sri Lanka –the country of origin - followed by a very elaborate and detailed examination of his situation in Germany – the intermediate country. The ECtHR ruled that the sending state must make sure that the intermediate country’s asylum procedure offers sufficient guarantees, which protects the applicant from being (directly/indirectly) removed without an examination of the risks to be exposed to treatment in contrary to Article 3.<sup>118</sup>

The ECtHR explicitly mentioned the importance of a substantive examination in the sending state, when the application “give rise to concerns” as to the risks faced by the applicant. This illustrates the importance it attributes to a substantive examination. It is thus arguable that the ECtHR hereby imposed such a requirement, but it didn’t clearly indicate that as compulsory.<sup>119</sup> As the “gives rise to concern” criterion is a more marginal concept than the “real risk” criterion it did not impose a full examination of the merits, but a status determination “lite” as Coleman puts it. The *T.I.* case would thus indicate that the state, partly, escape the duty to undertake status determination under Article 3 ECHR by expelling a protection seeker to a third country. In this case, the duty of rigorous examination would be replaced by a duty of marginal examination of the applicant’s situation in the country of origin.<sup>120</sup>

Moreover, the *Hirsi Jamaa v. Italy*<sup>121</sup> case, which concerns the interception of Eritrean and Somali migrants on the high seas and their subsequent return to Libya, contains important safeguards concerning returns to third countries. ECtHR

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<sup>114</sup> Emphasis added. *T.I v. United Kingdom* No 43844/98 (7 March 2000), p.15

<sup>115</sup> Coleman (2009) p. 275.

<sup>116</sup> *Jabari v Turkey*, No. 40035/98, (11 July 2000).

<sup>117</sup> *T.I v. United Kingdom* No 43844/98 (7 March 2000), p. 13-14.

<sup>118</sup> *Ibid.* p. 18

<sup>119</sup> *Ibid.* p. 16. For a further discussion see Coleman (2009) p.276.

<sup>120</sup> Coleman (2009) p.277.

<sup>121</sup> *Hirsi Jamaa and Others v. Italy*, No. 27765/09, (23 February 2012)

emphasized on the right of a protection seeker to gain effective access to asylum procedures and substantiate their complaints by putting forward their arguments against the measure taken by the relevant authority, a right essential for anyone subject to a removal measure, the consequences of which are potentially irreversible, according to the wording of the Court.<sup>122</sup> It further held that a purposive interpretation of Article 4 Protocol 4 of the ECHR (collective expulsion) reveals how the primary goal of the *non-refoulement* principle is to prevent states from removing aliens without examining their individual circumstances.<sup>123</sup> The purpose of the provision is to guarantee the right to lodge a claim for asylum, which will be individually assessed, regardless of how the asylum seeker reached the country concerned. It should be kept in mind, as Kritzman-Amir and Spijkerboer states, that this assessment is not about the substance of the claim in any sense, but about whether the migrant wants to submit a claim. A person who is to be refused entry should be given the opportunity to claim asylum.<sup>124</sup> Consequently, no limitations may be imposed to prevent access to the initial determination procedure. This includes denying access to the procedure because the person concerned can be returned to a safe third country.

Following that line of reasoning, the Court found that the applicants had been carried back to Libya in the absence of identification and individual examination of protection claims, which amounted to a collective expulsion in breach of Article 4 of Protocol 4. Further, it found the Italian Government in breach of Article 13 in combination with Article 3 of the Convention and Article 4 of Protocol 4 since the applicants were deprived of any remedy, which would have enabled them to lodge their complaints with a competent authority and to obtain a thorough and rigorous assessment of their requests before the removal. Important is that the court observed that the general information on Eritrea and Somalia indicated that the situation there posed serious and widespread threats to security. On that fact alone, the applicants had an arguable claim that return would constitute *refoulement*.<sup>125</sup>

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<sup>122</sup> *ibid.* para. 204.

<sup>123</sup> *ibid.* para. 177

<sup>124</sup> Kritzman-Amir and Spijkerboer (2013) p.13.

<sup>125</sup> paras. 149-152

### 2.2.2.2 Requirements upon the intermediate country

In the second part of this chapter, I will examine whether the ECHR requires access to asylum procedures and a substantive examination by the third country as a requirement to determine that country “safe”.

As we have seen, Article 3 ECHR prohibits the expulsion of a protection seeker to a country where he or she runs a real risk of being subjected to torture or to an inhuman or degrading treatment or punishment. Also, Article 3 prohibits the indirect removal, through an intermediary country, of an alien to a country where he/she runs such a risk.<sup>126</sup> Transferring states must therefore assure that the intermediary country’s asylum procedure affords sufficient guarantees to avoid his/hers expulsion to a country where he/she runs a risk of being subjected to such treatment.

The *T.I v. United Kingdom* case referred to above, furthermore addressed the question which safeguards the third state should offer. In this context the court ruled that: “the Court’s primary concern is whether there are effective procedural safeguards of any kind protecting the applicant from being removed from Germany to Sri Lanka.” The ECtHR’s final considerations in *T.I* made clear that “effective protection” can be afforded also by other means than procedural safeguards: “the Court finds that it is not established that there is a real risk that Germany would expel the applicant to Sri Lanka in breach of Article 3 of the Convention. Consequently, the United Kingdom have not failed in their obligations under this provision by taking the decision to remove the applicant to Germany. Nor has it been shown that this decision was taken without appropriate regard to the existence of adequate safeguards in Germany to avoid the risk of any inhuman or degrading treatment”.<sup>127</sup> Thus, the sending state complies with its obligations under indirect *refoulement* if it has “appropriate regarded” that the third state provides for “adequate safeguards” of some kind.

Under the ECHR, a removing state has a duty to verify the risk and assess the foreseeable consequences of a proposed removal, particularly when human rights reports on a country show that the removing state knew or ought to have known of the risks, see for example the considerations about the *Hirsi Jamaa v. Italy* case above.

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<sup>126</sup> e.g. *T.I v. United Kingdom* No 43844/98 (7 March 2000).

<sup>127</sup> *ibid.* p.16

In the very important case of *M.S.S. v. Belgium and Greece* as examined, where the ECtHR found that Belgian authorities were found responsible under Article 3 for a Dublin transfer to Greece, the ECtHR concluded that the Greek asylum procedure did not guarantee that the applicant's request would be seriously examined due to a lack of access to an asylum procedure.<sup>128</sup> The ECtHR's finding establishes that access to a process capable of delivering an effective remedy is a vital human right. Poor information, communication and infrastructure for accepting applications are examples of deficiencies that may hinder asylum seekers that fear ill-treatment from effectively seeking protection.<sup>129</sup> The Court rules that removal of an asylum seeker cannot take place if the removing country "knows or ought to (know) that (there is) no guarantee that his asylum application would be seriously examined" in the third country.<sup>130</sup>

The *M.S.S* case is important because the ECtHR specified, for the first time, the requirements corresponding to the demands of effectiveness under Article 13 ECHR. It accepted that the scope of the obligations under Article 13 varies depending on the nature of the applicant's complaint, but it sets the requirement of effectiveness as a common threshold. The ECtHR insisted that there must exist procedures in a state to enable the protection seekers to ask and be granted the form of protection they are entitled to. First of all the ECtHR submitted that the remedies have to be available in the sense that their exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the intermediate state.<sup>131</sup> Further, it underlined the intermediate country's obligation to facilitate the protection seekers' access to a fair and effective international protection system and their communication with the competent authorities, their access to legal aid if and when necessary and the reception of the necessary information concerning the procedure.<sup>132</sup> The ECtHR maintained that the procedure should be able to guarantee a proper review of an international protection request and/or deportation order with suspensive effect satisfying the needs of legal certainty and protection required in such matters.<sup>133</sup> The systematic administrative deficiencies combined with the failure of Greek government to satisfy the minimum requirements as regards the asylum seekers reception conditions, amounted to a breach of Article 3. As one separate Concurring

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<sup>128</sup> *M.S.S. v. Belgium and Greece*, No 30696/09 (21 January 2011), para. 358.

<sup>129</sup> *ibid.* paras. 173–182, 301.

<sup>130</sup> *Ibid.* para. 358.

<sup>131</sup> *ibid.*, paras. 288–289.

<sup>132</sup> *Ibid.* paras. 304, 318–319.

<sup>133</sup> *Ibid.* para. 293.

Opinion noted, the Court focused entirely on the conditions in Greece, rather than on the specific risks posed if removed to Afghanistan.<sup>134</sup>

The ECtHR's holding in *M.S.S*, confirmed its decisions in the *T.I.* case discussed above. Kritzman-Amir and Spijkerboer identified<sup>135</sup> two emerging principles from the case:

- “When a state removes an asylum seeker to a third state, the removing state must make sure that the third country’s asylum procedure affords sufficient guarantees to prevent an asylum seeker from being removed, directly or indirectly, to his country of origin without an evaluation of the risks he faces from the standpoint of Article 3 of the ECHR (i.e., the right not to be subjected to inhuman treatment, which includes *non-refoulement*)<sup>136</sup>
- In the absence of evidence to the contrary, it must be assumed that the third state complies with its obligations under international law.”<sup>137</sup>

Consequently, an intermediate country is considered safe if there is some safeguard that protects a particular applicant from expulsion to his country of origin. But usually, there will be no such safeguards for the particular applicant. In such case, there may nevertheless be a safeguard in the form of access to examination procedures in the third country. If it is sufficiently sure that the third country will sort out whether the applicant is in need of protection, the third state is safe for the purposes of the prohibitions of *refoulement*.

## **2.3 Conclusion**

This chapter has identified a series of international obligations, relevant to the return of protection seekers to third/intermediate countries. Under international law, states have a right to grant asylum and a duty not to prevent those who wish to emigrate or seek asylum elsewhere from doing so. International asylum law does not specifically regulate procedures for the granting of protection, but the obligation to give full effect to the prohibitions of *refoulement* has implications for such procedures for it does form a distinctive right for people to be protected from return when they can no

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<sup>134</sup> Concurring Opinion of Judge Villiger in *M.S.S v Belgium and Greece*, paras. 93-99.

<sup>135</sup> Kritzman-Amir and Spijkerboer (2013), p.19.

<sup>136</sup> *M.S.S. v. Belgium and Greece*, No 30696/09 (21 January 2011) para. 342.

<sup>137</sup> *Ibid.* para. 343.



longer avail themselves of the protection of their own country and are in need of the protection of the country in which they seek asylum.

However, while there is an obvious relationship between the prohibitions on *refoulement* contained explicitly in the Refugee Convention and implicit in the ECHR as this thesis examined, there is no uniform prohibition of *refoulement*. At first sight there are some obvious differences between the prohibition entailed in Article 33 Refugee Convention and that in Article 3 ECHR. First, the personal scope of Article 33 Refugee Convention is limited to refugees and does not apply to people in general. Secondly, it does not provide absolute protection but allows for exceptions. A closer look at the two prohibitions on *refoulement* reveals other potential differences. There is the issue of the harm from which a person is protected. Article 33 Refugee Convention protects a refugee from being persecuted for a specific reason while Article 3 ECHR protects a person from being subjected to torture or inhuman or degrading treatment or punishment.

Relevant for this thesis is that in principle, the return of protection seekers to a third/intermediate country can be in conformity with the prohibition of *refoulement* under both regimes, even if no substantial examination of the protection claim has been carried out, as long as it has been established that the third/intermediate country will provide protection if necessary. A state where an application has been lodged, must treat the protection seeker *as if* he/she was entitled to protection, for the prohibitions on *refoulement* “in any manner whatsoever” forbids return, if it has not been established that the third state will offer effective protection from *refoulement*. It is important to distinguish between the substantive examination of the risk of persecution or serious harm, and assessment of the risk that the third state will expel the protection seeker contrary to the prohibitions of *refoulement*.

The following conclusions can be drawn from the international human rights and refugee law examined:

- First, migrants must be given a real opportunity to apply for asylum.
- Prohibition on *refoulement* must always be respected, including indirect *refoulement*.
- However, even if triggering the *non-refoulement* guarantee, this does not guarantee access to a full asylum procedure. It implies a duty to investigate the protection needs of the individual protection seeker against *refoulement* in the third/intermediate country concerned.

- In the context of the ECHR in particular, this duty was defined in detail, distinguishing between a risk of onward removal to the country of origin, and onward removal to an intermediate country. Evident from ECtHR's jurisprudence, is that it works with a rebuttable presumption that states will abide by their obligations under international human rights and refugee law. This means; if there are indications that states have violated human rights law, the presumption no longer applies. The sending state must thus examine whether the protection system of the third country provides the possibility of protection, as well as effective procedural safeguards to ensure protection, including an effective remedy against rejection, and probably status determination.
- The *T.I v. United Kingdom, M.S.S v. Belgium and Greece and Hirsi Jamaa v. Italy* cases clearly illustrates that transfers to third countries without such safeguards will violate ECHR.
- However, my analysis further led to the conclusion that, in principle, whether a third/intermediate country will undertake status determination does not determine the legality of expulsion to that country as long as effective protection is afforded without such a determination. In other words, as long as states respect the prohibition of direct and indirect *refoulement*, international human rights and refugee law does not prevent the continuous expulsion of a protection seeker from one country to another.
- If the third country is not a party to relevant conventions, that fact must be considered in determining whether minimum legal requirements for return are met.
- If effective protection is not afforded in the third/intermediate country, the application for protection from ill-treatment must be considered rigorously and independently on its substance.

In sum, safety cannot be an automatic presumption. At a minimum, safety implies an effective form of protection and to which the individual can make a claim. Hence, expulsion without previous examination of the substance of the request can be compatible with the prohibitions of *refoulement*.

## 2.4 EU Law

After examined the meaning of *non-refoulement* and the right to seek asylum under international human rights and refugee law, it is now time to move on to the EU law.

Within the aim to create a harmonized asylum system, the EU has created several legislations regulating refugee rights. EU legislation is divided in primary legislation embodied in the treaties, and secondary legislation in the form of regulations, directives and decisions, which are used to implement the policies set out in the treaties. Following subchapters are focusing on both EU primary law and the more detailed Common European Asylum System, CEAS. The last subchapters examine the safe third country concept, focusing on both its content and scope and critique raised against it.

Before I get to grips with the EU law, I would like to emphasize that there are reasons to believe that the CJEU follows the main line of the well-established ECtHR case law, see the previous chapter 2.2.2.<sup>138</sup> In the *N.S. and M.E.* joined cases, the CJEU clarified that Member States may not transfer an asylum seeker to the member state responsible under the Dublin regulation when the evidence shows – and the member state cannot be unaware of – systemic deficiencies in the asylum procedure and reception conditions that could amount to a breach of Article 4 of the Charter (prohibition on torture).<sup>139</sup>

### 2.4.1 EU Primary Law

The treaties constitute the European Union's 'primary legislation', which is comparable to constitutional law at national level. They lay down the fundamental features of the Union, in particular the responsibilities of the various actors in the decision-making process, the legislative procedures under the Community system and the powers conferred on them. Relevant for this thesis is The Treaty of Lisbon and the EU Charter.

To have an understanding of the EU primary law is important in the context of this thesis, because EU countries must respect the fundamental rights in the primary law when implementing agreements such as the EU/Turkey deal. Consequently,

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<sup>138</sup> Mink (2012) p. 143.

<sup>139</sup> ECJ, *N.S (C-411/10) v. Secretary of state for the home department et M.E and Others (C-493/10) v. Refugee Applications Commissioner and minister for justice, equality and law reform*, judgment of 21 December 2011. Para 94.

returns can only be carried out on the basis of a return decision issued in accordance with these guarantees. The primary law further demonstrates the connection between the international and regional law covered in chapter 2.1-2.2, and the EU law.

#### **2.4.1.1 The Treaty of Lisbon**

The Treaty of Lisbon is the constitutional base of the EU, which amends two of the primary treaties of the EU; the 1992 Maastricht Treaty, also known as the Treaty on the European Union (TEU), and the 1957 Treaty of Rome, also known as the Treaty on the Functioning of the European Union (TFEU).<sup>140</sup>

According to 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 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.”<sup>141</sup>

By virtue of the direct references to it in this article, international law may have effect within the EU.

EU legislation does not take place in a legal vacuum and the TFEU does not provide any additional protection besides the provisions in the Refugee Convention relevant for this thesis. However, Article 78(1) just mentioned, refers to the EU’s development of subsidiary protection and temporary protection that is something that the Refugee Convention does not cover. It is important to keep in mind that obligations under the relevant international treaties, remains unaffected by the adoption of any subsequent treaties concluded by EU member states.<sup>142</sup>

#### **2.4.1.2 The Charter of Fundamental Rights of the EU**

Each and every provision enshrined in the Charter of Fundamental Rights of the European Union (EU Charter) is relevant, and only applicable, when the member states are implementing and applying EU-law.<sup>143</sup>

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<sup>140</sup> Bernitz & Kjellgren, (2014) p. 47-50.

<sup>141</sup> *Treaty on the Functioning of the European Union* Article 78(1).

<sup>142</sup> Mink (2012) p. 128.

<sup>143</sup> Article 51.1 EU Charter.

The EU Charter regulates both the right to asylum,<sup>144</sup> prohibits collective expulsion and codifies the principle of *non-refoulement*,<sup>145</sup> which serves as safeguards for the respect of protection seeker's human rights. Regarding the right to asylum in Article 18, it consists of two elements. First, it determines the right to asylum. Secondly, it imposes the obligation to "guarantee" this right, "with due respect" for the rules of the Refugee Convention and "in accordance with" the Treaty Establishing the European Community. What does this mean? While the reference to the "right to asylum" at first glance appears expansive, the EU Charter seeks only to consolidate existing fundamental EU rights rather than elaborate or amend them. From the preamble it follows that the EU Charter solely refers to a "reaffirmation" of rights as they result from the member states' international obligations, the ECHR, the Social Charters adopted by the Union and by the Council of Europe and the case law of the CJEU and the ECtHR, and the Charter's role to make these existing rights more visible.<sup>146</sup>

Battjes argues that it would be a bold step to say that Article 18 recognizes a right to claim protection, it is limited to a procedural right to apply for asylum, rather than a substantive right to obtain it. Reading the provision otherwise to the effect that every refugee has a right to status determination and can't hence be expelled to a third country would run counter to Article 63 establishing the European Community, that presupposes that Member States can expel refugees.<sup>147</sup> "The right to asylum" implies when expelling refugees, according to Battjes, that member states must "guarantee" that those refugees have access to asylum, that is to durable solutions, and appropriate secondary rights.<sup>148</sup> In summary, Article 18 has one important implication for the application of the exception of the safe third country next to the obligations under international law: it requires that the right to an "appropriate" solution be guaranteed in the intermediate country. Arguably, a country offers "appropriate" protection only if it treats applicants in accordance with "basic human rights standards".<sup>149</sup>

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<sup>144</sup> Ibid. Article 18.

<sup>145</sup> Ibid. Article 19.

<sup>146</sup> Goodwin-Gill & McAdam (2007), p. 368.

<sup>147</sup> Battjes p. 113.

<sup>148</sup> Ibid, p.114.

<sup>149</sup> Ibid. p.406.

## 2.4.2 EU Secondary Law

After the examination of that the rights to seek asylum and have your application examined under the EU primary law, I will move on to examine the right to seek asylum and to have the substance examined under Common European Asylum System, which is a part of EU Secondary legislation made by the EU institutions. Secondary legislation is the third major source of EU law after the treaties (primary legislation) and international agreements. It comprises:

- binding legal instruments (regulations, directives and decisions)
- non-binding instruments (resolutions, opinions)

### 2.4.2.1 The Common European Asylum System

As a result of increasing numbers of asylum seekers in the EU in the 1990's, asylum emerged as a highly politicized European issue. In 1999, the European Council's Tampere milestones included a commitment to the Refugee Convention and international human rights standards by reaffirming the fundamental right to seek asylum:

“The aim is a open and secure European Union, fully committed to the obligations of the Geneva refugee Convention and other relevant human rights instruments, and able to respond to humanitarian needs on the basis of solidarity. A common approach must also be developed to ensure the integration into our societies of those third country nationals who are lawfully resident in the Union.”<sup>150</sup>

Thus, the desire for a common asylum system appears to be based on justice, fairness and solidarity. From this stemmed a new body of secondary legislation based on “minimum standards”.<sup>151</sup> These Directives applies to Member States, which has to implement them into their national legislation. The Directives are binding as to the result to be achieved, which mean that Member States can, by their own accord, decide how to implement the rules.<sup>152</sup>

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<sup>150</sup> Presidency Conclusions – Tampere European Council 15 and 16 October 1999, SN 200/99, para 4.

<sup>151</sup> *Treaty Establishing the European Community*, opened for signature 7 February 1992, [1992] OJ C 224/6.

<sup>152</sup> *Treaty on the Functioning of the European Union* Article 288.

CEAS is primarily constructed upon the Asylum Procedures Directive (APD), Qualification Directive (QD), Receptions Directive (RD) and the Dublin regulations. This thesis covers the recast directives. The continuing focus will be on the QD and APD as they are most relevant for the purpose of this thesis. Those instruments provide rules for which country that have responsibility for a protection claim and obligations regarding access to asylum procedures.

#### **2.4.2.2 The Qualification Directive**

This subchapter will take a look at the Qualification Directive's scope and content. The QD defines the criteria that protection seekers need to meet to qualify as refugees or as persons otherwise in need of international protection, and also the content of rights that come with that status.<sup>153</sup>

The main objective of the QD is, on the one hand, to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection, and, on the other hand, to ensure that a minimum level of benefits is available for those persons in all member states.<sup>154</sup>

The QD emphasises in the preamble that the Refugee Convention provide the cornerstone of the international legal regime for the protection of refugees.<sup>155</sup> Furthermore, it defines international protection in Article 2(a) as 'refugee status and subsidiary protection status'. If the applicant qualifies as a refugee or someone eligible of subsidiary protection – he/she *shall* be granted this protection in accordance with Chapters II and III if a refugee, or if eligible for subsidiary protection in accordance with Chapters II and V.<sup>156</sup>

Article 15 under chapter V stipulates serious harm as a qualification for subsidiary protection. It provides that Member States cannot return individuals to 'the death penalty or execution, torture or inhuman or degrading treatment or punishment in the country of origin, or serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict'.

As soon as possible after international protection has been granted, member states shall issue to beneficiaries of refugee and beneficiaries of subsidiary protection

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<sup>153</sup> QD Preamble recital 12; Gil-Bazo, *Refugee status, subsidiary protection, and the right to be granted asylum under EC law*, 2006, p.1.

<sup>154</sup> QD Preamble recital 12.

<sup>155</sup> QD Preamble recital 4.

<sup>156</sup> QD Articles 13 and 18.

status a residence permit which must be valid for at least 3 years and 1 year.<sup>157</sup>

#### 2.4.2.2.1 Critique against the QD

O’Nions has raised concern over the Qualification Directive’s compatibility with fundamental human rights norms. The absolute character of Article 3 ECHR is not reflected in the QD, which thereby continues to include the exceptions provided in the Refugee Convention.<sup>158</sup> Article 21 QD states:

1. Member States shall respect the principle of *non-refoulement* in accordance with their international obligations.
2. Where not prohibited by the international obligations mentioned in paragraph 1, Member States may *refouler* a refugee, whether formally recognised or not, when:
  - (a) there are reasonable grounds for considering him or her as a danger to the to the security of the Member State in which he or she is present; or
  - (b) he or she, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that Member State.

Consequently, 21(1) requires the member states to comply with their international obligations, but since Article 21(2) provides exceptions from the principle of *non-refoulement*, it unsurprisingly undermines those obligations. Article 21(1)’s reference to obligations under international law means that the QD recognizes that individuals excluded from subsidiary protection under Article 17 may nevertheless be protected from removal. Thus, subsidiary protection, as governed by the QD, is not intended to cover all instances where a state is prohibited under international law from returning an individual to his country of origin, just those where a need for international protection (as defined by the QD)<sup>159</sup> is considered to exist. Although the QD incorporates the principle of *non-refoulement* it fails to explicitly acknowledge the absolute nature of the principle where there are substantial grounds for believing that the persons concerned would face death or ill-treatment if *refouled* to their country of origin or to a presumed safe-third country.<sup>160</sup> The QD is therefore not compliant with

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<sup>157</sup> QD Article 24.

<sup>158</sup> O’Nions, (2014), p. 95-96.

<sup>159</sup> Mandal, *Protection Mechanisms Outside of the 1951 Convention (“Complementary Protection”)* (2005), para. 45.

<sup>160</sup> Mink (2012) p. 146.



the absolute right provided under Article 3 of the ECHR.<sup>161</sup>

The CJEU attempted, in the *Elgafaji judgement*<sup>162</sup>, to draw a distinction between the QD and Article 3 of the ECHR. The CJEU assessed that Article 15(c) concerning the contents of serious harm, in conjunction with Article 2(d) concerning the definition of refugee, of the QD were fully compatible with the ECHR.<sup>163</sup> However, as J.Mink stresses, the implementation of the principles in the QD are seriously hindered, further eroded if not made impossible by the fact that EU allows for various border and specific procedures making possible the avoidance of the meaningful assessment of claims by e.g. the application of ill-defined concepts such as the safe third country notion (discussed further down) as hardly rebuttable presumptions. As ECRE rightly pointed out: a CEAS based on the highest possible standards will be of little use to refugees if it becomes impossible for them to reach the EU.<sup>164</sup> This leads us in to the Asylum Procedures Directive.

#### **2.4.2.3 The Asylum Procedures Directive**

The Asylum Procedures Directive is the instrument used by EU Member States to determine the measures for granting or withdrawing refugee status and subsidiary protection under the Qualification Directive and to ascertain whether protection-seekers can be removed to a safe third country responsible for the examination of their international protection claim.<sup>165</sup>

The APD has a major impact on access to determination procedures and to facilitate access to procedures for those who express the wish to request international protection within the EU.<sup>166</sup> However, many provisions can also be used to keep protection seekers from their right of access to procedures.<sup>167</sup>

The APD has attracted much criticism since its adoption. It has been described as a “catalogue of national practice which allows significant departures from accepted refugee and human rights law”<sup>168</sup> and a “betrayal of the EU’s promise to

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<sup>161</sup> Ibid. p. 146-147.

<sup>162</sup> *Elgafaji v Staatssecretaris van Justitie*, judgment of (17 February 2009), C-465/07.

<sup>163</sup> Ibid. para 44.

<sup>164</sup> ECRE, *Memorandum on the Occasion of the Hungarian Presidency of the EU* (January-June 2011), 2011, p.4.

<sup>165</sup> Giuffrè, *Readmission Agreements and Refugee Rights: from a Critique to a Proposal*, 2013, p.86; APD Article 1.

<sup>166</sup> Goodwin-Gill & McAdam, (2007) p 396-397.

<sup>167</sup> Goodwin-Gill & McAdam, (2007) p 390.

<sup>168</sup> Amnesty International, *The EU – Now More Free, Secure and Justice? Amnesty International’s Human Rights Assessment of the Tampere Agenda*, (2004).

guarantee fundamental rights.”<sup>169</sup> O’Nions write that the criticism centre around two key aspects, the use of accelerated procedures and the use of so called safe countries, relevant for this thesis.<sup>170</sup>

The APD is nevertheless based on the full and inclusive application of the Refugee Convention thus affirming the principle of *non-refoulement*.<sup>171</sup> The preamble states that in the interests of a correct recognition of those persons in need of protection as refugees, within the meaning of Article 1 of the Refugee Convention or as persons eligible for subsidiary protection, every applicant should have an effective access to procedures, the opportunity to cooperate and properly communicate with the competent authorities so as to present the relevant facts of his or hers case and sufficient procedural guarantees to pursue his or her case throughout all stages of the procedure.<sup>172</sup> In other words, every person applying for international protection has the right to have their application examined according to the APD.

Article 6 APD provides that member states are required to refer a person who has expressed an intention to apply for international protection to the asylum procedure by informing him/her as to where and how the application for international protection may be lodged. This shall ensure that there are authorities that can register and treat applications and make sure that the applicant has an effective opportunity to lodge their application as soon as possible.

Article 8 requires in practice that member states have to be proactive in identifying potential protection seekers, inform him/her about the right to apply for international protection and advise him/her on how to make the application.

Article 9 further provides that all persons have the right to remain in the member state pending the examination of their application.

Article 10 obliges national authorities to take a decision after an appropriate examination of a claim, comprising of an individual, objective and impartial assessment.<sup>173</sup>

The APD further confirms certain basic procedural guarantees in chapter II, such as the right to a personal interview,<sup>174</sup> the right to receive information and to

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<sup>169</sup>Immigration Law Practitioners’ Association, Costello, *Analysis and Critique of Council Directive on Minimum Standards on Procedures for Granting and Withdrawing Refugee Status*, 2004, p.4.

<sup>170</sup> O’Nions (2014) p. 99.

<sup>171</sup> APD preamble recital 3.

<sup>172</sup> APD Preamble recital 25

<sup>173</sup> CJEU, Joined Cases C-411/10 and C-493/10, N.S. v. Secretary of State for the Home Department and M.E. and others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform, 21 December 2011.

<sup>174</sup> Article 14.

communicate with UNHCR<sup>175</sup> and the right to a lawyer.<sup>176</sup>

However, member states have a wide scope to apply accelerated procedures with reduced safeguards in practice according to Articles 32 and 33. According to Article 33, states may decide not to provide protection to a person on the assumption that the person can find protection in another country through which he/she might have transited prior entering the EU, a so called safe third country. Access to the asylum procedure may be denied altogether under this rule. This safe third country exception is in the centre of attention of this thesis, why next chapter will examine this in detail.

### **2.4.2.3.1 Safe third country exception**

The principle of access to a fair and efficient procedure for determination of protection claims, has long been a cardinal principle in UNHCR's protection policy, and has been endorsed with equal consistency by the UN General Assembly.<sup>177</sup> The concept of a safe third country however, is used as a procedural mechanism for rejection of protection seekers and returning them to other states that are said to have the primary response for them – keeping protection seekers from the procedural door.

According to Articles 33(2)(c) APD the Member States do not have to examine the substance of the claim if a safe third country can be found. Hence, when the member states return protection seekers under to this arrangement, they have not substantively assessed whether the alien has well-founded fear of persecution or runs a real risk of ill-treatment in his/hers country of origin.<sup>178</sup>

EXCOM Conclusion No. 58 constituted the first attempt to defining what a “safe” country is. The Conclusion provides that protection by the third country should entail permission to enter and remain safely in the country, *non-refoulement* and treatment in accordance with basic human rights standards until a durable situation is found, as well as absence of persecution or threats to safety or freedom.<sup>179</sup>

The practice of returning protection seekers to safe third countries is a European invention, with – as Costello argues – scant foundation in international law. Ostensibly, Article 31 Refugee Convention, leaves space for such practices, by providing that:

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<sup>175</sup> Article 12.

<sup>176</sup> Article 19.

<sup>177</sup> See Goodwin-Gill & McAdam (2007) p. 390 for further references.

<sup>178</sup> Battjes p. 397

<sup>179</sup> EXCOM Conclusion No. 58 para f) i)-ii) and g)

“The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.”

The reference to “coming directly” is said to intimate a requirement that protection seekers seek protection at the first opportunity.<sup>180</sup>

The safe third country exception provides a lower level of fundamental rights protection and a number of important aspects of asylum procedures have been left out. The APD contains five safe country exceptions. Nevertheless, relevant for this thesis - and also the most controversial<sup>181</sup> - is the exception covered in Article 33(2)(c) in conjunction with Article 38 – titled “The safe third country concept”. This allows a member state to declare as inadmissible the protection claims of persons for whom a safe third country (which is not a member state) can be identified, either through transit or access to that country. Member States do not have to examine the merits of a claim for protection “where it can be reasonably assumed that another country would do the examination or provide sufficient protection”.<sup>182</sup>

#### **2.4.2.3.1.1 Safety criteria**

Article 38 APD does not explicitly require that the third country is party to relevant instruments of international law to be considered safe. A third country cannot qualify as safe pursuant to Article 38 because of mere ratification of relevant instruments of international law; rather, it must meet material standards.<sup>183</sup> There are five substantive cumulative principles that must be respected in that country according to Article 38 ADP:

1. Member States may apply the safe third country concept only where the competent authorities are satisfied that a person seeking international protection will be treated in accordance with the following principles in the third country concerned:

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<sup>180</sup> Whether or not this undermines the primary purpose of Article 31 is expressed in: Costello (2005) p. 40

<sup>181</sup> Coleman (2009) p.288.

<sup>182</sup> Preamble recital 43.

<sup>183</sup> Battjes 423.

- (a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion; and
- (b) there is no risk of serious harm as defined in Directive 2011/95/EU; and
- (c) the principle of non-refoulement in accordance with the Geneva Convention is respected; and
- (d) the prohibition on removal in breach 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.

These criteria explicitly reiterate the prohibition on *refoulement* in Article 33 Refugee Convention and Article 3 of the ECHR. As I stated, its not required that the third state has actually ratified these two conventions; important seems to be that it *de facto* adhere to the listed obligations.<sup>184</sup> Furthermore, it only demands the “possibility” to request for refugee status. The UNHCR affirms that the notion of a safe third country should be appropriately applied so as not to result in improper denial of access to asylum procedures, or to violations of the principle of *non-refoulement*.<sup>185</sup> Does the safe third country exception as enclosed in the APD, allow the intermediate country in its turn to expel the applicant to a fourth state? Arguably it does as the prohibitions on indirect *refoulement* in (c) and (d) suppose so. Article 38(1)(e) requires mere “the possibility to request refugee status”, not the opportunity to request it: the intermediate country should run examination procedures, but it is not required that it should examine the refugee status of the applicant.<sup>186</sup> The basic principle is thus that the intermediate state is able to grant effective protection to refugees. What is also clear is that effective protection should not be solely equated with absence of persecution pursuant to Article 1 and 33 Refugee Convention.<sup>187</sup>

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<sup>184</sup> Coleman (2009) p. 289. There are other who argues differently however; Hurwitz (2009), for example, states that the removal of a refugee to a third state not party to the Refugee Convention would seem to entail a violation of the duty to comply in good faith with one’s obligations, on grounds that there is in such an instance too high of a risk that the protection seeker will not be protected and will not be given the opportunity to present his/hers claim to the authorities and have it examined substantively, p. 218

<sup>185</sup> UNHCR, EXCOM Conclusions, No. 87 (L) *General Conclusion on International Protection* (1999); and No. 85 (XLIX) - *Conclusion on International Protection* (1998).

<sup>186</sup> Battjes 421.

<sup>187</sup> Hurwitz (2009) p. 54.

#### **2.4.2.3.1.2 Procedural safeguards**

Application of the safe third country exception rises yet another question: how should the sending state assess the safety of the third state? Consequently, the application of the safe third country exception is subject to a number of procedural requirements in Article 38(2) APD:

- (a) rules requiring a connection between the applicant and the third country concerned on the basis of which it would be reasonable for that person to go to that country;
- (b) rules on the methodology by which the competent authorities satisfy themselves that the safe third country concept may be applied to a particular country or to a particular applicant. Such methodology shall include case-by-case consideration of the safety of the country for a particular applicant and/or national designation of countries considered to be generally safe;
- (c) rules in accordance with international law, allowing an individual examination of whether the third country concerned is safe for a particular applicant which, as a minimum, shall permit the applicant to challenge the application of the safe third country concept on the grounds that the third country is not safe in his or her particular circumstances. The applicant shall also be allowed to challenge the existence of a connection between him or her and the third country in accordance with point (a).

Thus, the safe third country exception applies in case “connection” between the protection seeker and the third country can be determined. The APD however, does not specify when this connection is established. It simply states that it must be “reasonable for that person to go to that country”. Coleman observes that the APD thereby fails to decide the central question of whether protection seekers may be expelled to safe third countries through which they merely travelled. It leaves this question to the national law of the Member States, whilst not excluding the possibility of expulsion due to transit through a third country.<sup>188</sup> UNHCR on the other side considers it inappropriate to derive any responsibility for considering an asylum application from the fact that the applicant has been merely present in the territory of another State. Mere presence in a territory is often the result of fortuitous

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<sup>188</sup> Coleman (2009) p. 289

circumstances, and does not necessarily imply the existence of any meaningful link or connection.<sup>189</sup>

Subparagraph (b) requires that the Member States must be *satisfied* that the safe third country concept may be applied. To “satisfy” is a subjective criterion, and lighter than, for example, a requirement to “establish” or “demonstrate” the safety of a country.<sup>190</sup> Important is that the APD doesn’t oblige Member States to provide for an individualized safety examination to conclude that a country is “safe”– this follows from the continuing of the subparagraph (b) that allows for a national designation of countries considered to be generally safe. In such case, no examination of fear or risk takes place. Instead, the sending state assumes that the intermediate country will not expel the protection seeker contrary to any of its obligations under international law and removal to the third state does therefore not harm the protection seeker.<sup>191</sup>

Nonetheless, according to the preamble to the APD, the safe third country exception may apply only “where that particular applicant would be safe in in the third country concerned”.<sup>192</sup> The APD hence provides for the possibility of rebuttal, which is addressed in Article 38(2)(b) & (c). Article 38(2)(b) requires that the Member States adopt some “methodology” for assessment of the safety of the third country.<sup>193</sup> These provisions means that, if a protection seeker would challenge a safety determination considering the particularities of his/hers case, then an individualized examination must be provided for, in appeal, in accordance with subparagraph (c). This requirement was inserted in the draft to comply with international legal obligations, and prevent denying access to asylum procedures.<sup>194</sup>

In other words, there are no requirements that a member state must guarantee an individual safety examination under the APD, thus permitting administrative decisions based solely on a general safety determination to begin with, “satisfying” the authorities that a particular third country is safe for that individual.<sup>195</sup> Member States are thus permitted to declare third states generally safe for return – as long as they are satisfied that the substantive requirements in Article 38(1) are fulfilled.<sup>196</sup> If

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<sup>189</sup> *UNHCR’s observations on the European Commission’s proposal for a Council Directive on minimum standards on procedures for granting and withdrawing refugee status* (COM(2000) 578, (2000), para. 37.

<sup>190</sup> Coleman (2009) p. 290.

<sup>191</sup> Battjes p. 408.

<sup>192</sup> APD Preamble recital 44.

<sup>193</sup> Battjes p.423.

<sup>194</sup> Costello (2005), p.29-30.

<sup>195</sup> APD Article 33(2)(c); Coleman (2009) p.290

<sup>196</sup> Coleman (2009) p.290.

the applicant thereafter challenges a negative decision, then that designation can no longer be considered as relevant. Member states should ensure that a review of the human rights situation is conducted if becomes aware of a significant change in the human rights situation in the “safe” country (they would no longer be “satisfied” that safe).<sup>197</sup>

Questionable is whether this safeguard is enough to ensure that the principle of *non-refoulement* is not violated which will be discussed thoroughly in chapter 5.<sup>198</sup> As Battjes identifies, Article 38 seems to waver between the general and individual approach to assessment of safety. He further observes that Article 38(1) is couched in ambiguous terms. The competent authorities must be satisfied that the applicant “will be treated” in accordance with the requirements in 38(1), which focus on the particular individual. But on the other hand the procedural requirements in 38(2) are stated in an abstract kind of way.<sup>199</sup>

#### **2.4.2.3.1.3 Critique against the safe third country exception**

There is a debate over the right of access to asylum procedures and the related question of responsibility to substantively examine protection requests. Both the Executive Committee and the UN General Assembly have repeatedly endorsed the general principle of access to asylum procedures.<sup>200</sup> As I concluded above, the principle of *refoulement* is a fundamental requirement when returning to a safe third country, and furthermore, in principle, doesn’t have to stand in the way of contemplating protection elsewhere. A state is not obliged to examine the substance of the claim, unless minded to return the individual to a country in which his/hers life or freedom may be threatened.

The safe third country concept has been criticised numerous times in the literature and has remained a concern according to ECRE.<sup>201</sup> This criticism has mainly involved the risk of both direct and indirect *refoulement*,<sup>202</sup> lack of an individual assessments and has further been perceived by many to restrict the access to a fair and effective asylum procedure.<sup>203</sup> The ECRE has raised concern regarding

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<sup>197</sup> APD Preamble recitals 40, 42 and 48.

<sup>198</sup> Goodwin-Gill & McAdam, (2007), p. 397.

<sup>199</sup> Battjes p. 423

<sup>200</sup> Goodwin-Gill & McAdam, (2007) p. 391

<sup>201</sup> ECRE, *Information Note on Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection (recast)*, 2014, p. 55.

<sup>202</sup> Costello (2005) p. 47.

<sup>203</sup> van Selm (2001) p. 3.



that the procedure has been shifted towards techniques to screen out as many applications as possible rather than focusing on identifying persons in need of protection.<sup>204</sup> Also UNHCR and several NGOs were critical before the passing of the concept because they feared that it would deny access to protection. Similarly, Gammeltoft-Hansen argues that the process within the EU of harmonizing the area on asylum and immigration in itself can be described as to prevent access to asylum procedures.<sup>205</sup>

To cover the main features of this criticism has value in this thesis as it highlights the different perspectives that partly characterize the international human rights and refugee law as well as EU law. As O'Nions have pointed out, generalizing concepts, such as the safe third country concept, have come to underpin the asylum regulations in the EU, which divert from the individual assessment when determining issues related to asylum claims and *non-refoulement* under the Refugee Convention and ECHR.<sup>206</sup> There are legal instruments in place preventing access to asylum procedures<sup>207</sup> and the criticism evokes inevitably the question if EU law really can be considered to be in conformity with international law.

Costello argues that safe third country practices undermine both access to and the integrity of asylum procedures in the enlarged EU. It increases the likelihood of error in asylum determination as it has proved to be unjust, unfair and inefficient, and inevitably lead to *refoulement* as refugees are deported or refused access to proper procedures.<sup>208</sup>

The ECtHR has stated that states cannot escape responsibility for *refoulement* by relying automatically on the fact that the country has ratified the Refugee Convention.<sup>209</sup> Costello has also argued that there are facts suggesting that some EU neighbouring countries, such as Turkey, really are not safe.<sup>210</sup> This will be further discussed in the following chapter. She also emphasises the importance of the individual responsibility of States, as stressed in the jurisprudence of ECJ and ECtHR.<sup>211</sup> States cannot hide behind something as the safe country concept. The

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<sup>204</sup> ECRE, *The Way Forward: Towards Fair and Efficient Asylum Systems in Europe*, 2005, p 5.

<sup>205</sup> Gammeltoft-Hansen, *Right to Seek – Revisited – On the UN Human Rights Declaration Article 14 and Access to Asylum Procedures in the EU*, 2008, p. 448.

<sup>206</sup> O'Nions (2014) p. 63.

<sup>207</sup> Gammeltoft-Hansen, *Right to Seek – Revisited – On the UN Human Rights Declaration Article 14 and Access to Asylum Procedures in the EU*, 2008, p. 440.

<sup>208</sup> Costello (2005) p. 37.

<sup>209</sup> *T.I v. United Kingdom*, p. 15; Hathaway (2005) p. 326.

<sup>210</sup> Costello (2016) p. 255.

<sup>211</sup> Costello (2016) p. 277.

responsibility and obligations under the principle of *non-refoulement* remains.<sup>212</sup> To generally assume that a country is safe and that collectively send people back to the "safe countries" is something that, according to critics, might constitute *refoulement* in itself.<sup>213</sup> The generalized presumptions the concept is based on, is considered to challenge the fundamental building blocks of international protection, in particular the need for individual decisions and fair proceedings.<sup>214</sup> As we can see, the criticism revolves around this particular matter; the lack in the procedure of an individual assessment of a claim. A country may be safe for some people, and for others not.<sup>215</sup> UNHCR has insisted that the analysis of whether the protection seeker can be sent to a third country for determination of the claim must be done on an individualized basis.<sup>216</sup>

Another argument raised regarding individual assessments is that the safety standards differ so much between states, an individual assessment is therefore needed to live up to international obligations it is argued.<sup>217</sup> Thus, variations in protection standards may indicate that the assumption of safe countries is dangerous.<sup>218</sup>

UNHCR's Executive Committee have in a conclusion emphasized that the concept of safe third country should not be applied so that it result in improper denial of access to asylum procedures, or to violations of the principle of *non-refoulement*.<sup>219</sup> In this context, Costello has pointed out that many countries have an asylum law, but which is implemented in such a limited way that this cannot provide access to an appropriate asylum procedure.<sup>220</sup> To have a statutory asylum procedure is not something that ensures safe proceedings.<sup>221</sup>

In sum, the APD provides a right for asylum-seekers to seek protection and get their application examined but at the same time, it also provides a right for the Member States to apply the safe third country exception and declare the application as inadmissible.

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<sup>212</sup> van Selm (2001) p. 22 para.50; *T.I v. United Kingdom*, p. 14; *M.S.S v. Belgium and Greece* para.359 .

<sup>213</sup> Hathaway (2005) p. 325; O'Nions (2014) p. 63.

<sup>214</sup> O'Nions (2014) p. 119; Goodwin-Gill and McAdam (2007) p. 392.

<sup>215</sup> Goodwin-Gill and McAdam (2007) p. 392

<sup>216</sup> *UNHCR's observations on the European Commission's proposal for a Council Directive on minimum standards on procedures for granting and withdrawing refugee status* (COM(2000) 578 Final, 2000, para. 33.

<sup>217</sup> Hurwitz (2009) p. 221.

<sup>218</sup> O'Nions (2014) p. 63, 103-104.

<sup>219</sup> UNHCR, EXCOM conclusion No. 87 (L) section (j).

<sup>220</sup> Costello (2016) p. 254.

<sup>221</sup> Peers (2015) p. 271.

That being said, does it follow that a state may apply the exception of the safe third country only after an individual examination of each and every protection request? I concluded above in chapter 2.3 that in principle there is no duty to examine the substance of a request for asylum under international law. Partially I agree with the critics on the point that effective protection from indirect *refoulement* entails that the sending state should establish that the intermediate country is actually safe for the particular applicant – which amounts to a duty to perform an individual examination at least to the safety of the intermediate state. However I would not go so far as suggesting that international law necessarily requires a complete examination of the request. I tend to agree with Battjes argument that absolute trust that an intermediate state is safe cannot take place, which is also evident from the jurisprudence from the ECtHR. However, requiring examination of each and every case is too strict: it renders all formal obligations nugatory. Battjes continues by arguing that some sort of intermediary position between an individual and general assessment is arguably defensible under international law. Thus, when the authorities in a state receive a request for protection, they can declare it inadmissible and thus refuse to examine the substance of the claim on the grounds that another country is responsible for this examination under the third safe country exception. The state can base this on the assumption that the intermediate country is *prima facie* safe, however this trust cannot be absolute. This means that the applicant must have the opportunity to rebut this assumption and present counter evidence to the effect that the third country is not safe.

In general, the same safeguards that are required for determining the substance of a asylum request should be required for the determination of whether contemplating protection to a intermediate country – basically; will the intermediate country afford the applicant effective protection?<sup>222</sup>

If he/she succeeds, the exception of the safe third country cannot apply (and the sending state could return the person only if the substantial examination of the claim shows that he/she has no well-founded fear of persecution and risk of serious harm).<sup>223</sup> Similarly, UNHCR has advised against a general safety determination with safe third country “lists,”<sup>224</sup> but accepts their use as long as the asylum procedures ultimately allow for an individualized assessment into whether the country is actually

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<sup>222</sup> Legomsky (2003), p. 86

<sup>223</sup> Battjes p. 409-410

<sup>224</sup> UNHCR *Observations on EC Proposal on Asylum Procedures*, (July 2001), p. 33; UNHCR *Global Consultations in Budapest, Background Paper No. 2*, (May 2001), p. 3

safe for the particular applicant.<sup>225</sup> Consequently, an applicant must at least be given an opportunity to rebut the presumption of safety.<sup>226</sup> After taking account of the understandings presented in chapter 2, I consider this approach to be safe and sound as it demands and allows for an individual assessment, if proper counter-arguments are presented that this is necessary.

## **2.5 Conclusion EU Law**

Even if the EU law is its own legal system, it is clear that the safeguarding of individual rights in the EU member states are partially determined by common standards of international law. EU's asylum policy is building upon, and shall correspond to, the Refugee Convention and ECHR.

Nevertheless, my analysis demonstrated that despite the importance of the international obligations stemming from the *non-refoulement* principle examined in previous chapter, with the development of the CEAS, and in particular the adoption of the EU Qualification and Procedures Directives, a right to seek and enjoy asylum has been formulated in EU legislation. The right to seek asylum is further guaranteed under the EU Charter, which also incorporates the obligation of *non-refoulement*. Nevertheless, the safe third country exception in the APD makes it possible for a member state to declare an application inadmissible and deny access to parts of the asylum procedures.

My analyse shows that the international law sets a minimum level, which the member states cannot go below and neither can invoke secondary EU law to derogate from the obligations under the ECHR or the Refugee Convention.

The EU asylum system includes a right to have one's claim for protection examined according to certain minimum standards and furthermore a right to refugee status or subsidiary protection if the required conditions are met. However, as thoroughly examined, the APD includes exceptions to when a member state doesn't have to examine an application request in substance. As international law in principle allows for expulsion of protection seekers to an intermediate country, this doesn't have to be problematic. Beyond the requirements of effective protection deduced from international human rights and refugee law, the right to asylum of Article 18

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<sup>225</sup> UNHCR *Observations on EC Proposal on Asylum Procedures* (July 2001) para. 33

<sup>226</sup> UNHCR *Global Consultations in Budapest, Conclusions*, (6-7 June 2001), para. 15(a); UNHCR *Considerations on Safe Third Country*, (8-11 July 1996), p. 2

EU Charter requires that the protection seeker will enjoy appropriate status in the third state, and thus be treated in accordance with basic human rights standards.

The safe third country exception in Article 38 APD authorizes a state to return a person claiming refugee status to any safe state through which he or she may have passed en route to the country in which he/she is now present. To qualify as a safe third country, there must be a determination, satisfying the authorities that the destination country is prepared to consider the applicant's refugee claim, and will not expose the claimant to persecution, risk of torture or related ill-treatment, or *refoulement*.

When applying the safe third country concept all basic principles and guarantees laid down in Chapter II of the APD must be respected as the examination of asylum applications carries with it certain obligations on member states and, subsequently, rights for individual applicants.

The safe third country notion is the legal basis for the EU/Turkey deal. To fulfil the aim of this thesis we must therefore consider whether the safe third country exceptions contained in the APD reflect at least the minimum requirements prescribed by the international and regional law examined, and do not suggest anything which falls short of that standard. That comparison takes place in chapter 5, but before that it is time to be familiarized with the EU/Turkey deal and the situation for refugees in Turkey.

## 3 The EU/Turkey deal

Faced with an increasing refugee crisis, with desperate people trying to reach Europe, EU have focused on reaching agreements with Turkey to prevent irregular departures from its territory. On 15 October 2015, the EU and Turkey agreed on a Joint Action Plan to prevent irregular migration from Turkey to the EU.<sup>227</sup> In it, Turkey agreed to intensify its efforts to restrict the movement of people through its territory to Europe and to readmit from the EU all irregular migrants who had transited through Turkey and who were found not to be in need of international protection by EU member states. In the months that followed the Joint Action Plan, the intended decrease in irregular arrivals to Europe did not take place, and the EU and Turkey therefore announced the EU/Turkey deal as a second, far-reaching agreement.

This chapter will highlight relevant aspects of the EU/Turkey deal of March 18 2016<sup>228</sup>, which has aroused considerable legal and political controversy. However, before we get to grips with the EU/Turkey deal itself, a brief overview of the existing readmission agreement between Turkey and Greece is appropriate.

### **3.1 The existing Greece-Turkey readmission agreement**

Regardless the legal and political turmoil following the announcement of the EU/Turkey deal, some elements in the deal are not new. Turkey's cooperation on return of migrants has not only been with the EU. Greece and Turkey has dealt with this question in over a decade, with a bilateral readmission agreement signed as early as 2001. Under this existing bilateral readmission agreement, irregular migrants (in this context referring to people who did not claim asylum and people whose applications for asylum were judged to be unfounded) could be returned.<sup>229</sup> This readmission agreement was however succeeded by the EU-Turkey Readmission

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<sup>227</sup> European Commission (2015), *EU-Turkey Joint Action plan*, (15 October 2015).

<sup>228</sup> European Council (2016), *EU-Turkey Statement*, (18 March 2016).

<sup>229</sup> *Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation*, Official Journal of the European Union, (7 May 2014).

Treaty 1 June 2016.<sup>230</sup> This treaty<sup>231</sup> has applied since October 2014. Turkey agreed to readmit its own citizens straight away, but wanted to wait three years before it could be possible to return nationals of other nationalities under the agreement. However, in light of the development of the refugee crisis, EU didn't want to wait that long until it could return third-state citizens back to Turkey.

Essential for this thesis is that asylum seekers are not covered by these readmission agreements; the legal basis for their return - if their application is deemed inadmissible - is the safe third country exception in the APD. As this thesis consciously omitted an examination of other migrants than refugees and asylum seekers, I will not examine this existing readmission agreement further but move on to the EU/Turkey deal on 18 March.

## **3.2 Documents**

Even though the core parts of the EU-Turkey deal is concluded by the European Council meeting on 18 March 2016<sup>232</sup>, it must be read alongside with the European Council Conclusions of 17-18 March 2016<sup>233</sup>, where the Council confirms its comprehensive strategy to tackle the migration crisis, and the European Commission Communication “*Next Operational Steps in EU-Turkey Cooperation in the Field of Migration*”<sup>234</sup>, where the Commission *inter alia* examines the principle of returning all new irregular migrants crossing from Turkey into the Greek islands thoroughly.

## **3.3 Content**

The deal contains of three major elements:

1. Return of all irregular migrants crossing from Turkey to the Greek islands

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<sup>230</sup> European Commission, *Fact Sheet, EU-Turkey Agreement: Questions and Answers*, (19 March 2016).

<sup>231</sup> *Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation*, Official Journal of the European Union, (7 May 2014).

<sup>232</sup> European Council (2016), *EU-Turkey Statement*, (18 March 2016).

<sup>233</sup> European Council (2016), *European Council Conclusions*, (17-18 March 2016), Brussels.

<sup>234</sup> European Commission (2016), *Communication from the Commission to the European Parliament, the European Council and the Council, Next Operational Steps in EU-Turkey Cooperation in the Field of Migration*, COM(2016) (16 March 2016).

2. Resettlement of Syrians from Turkey to the EU and,
3. Prevention of departure from Turkey.

The focus of this thesis is on the first element that will be identified in this chapter, the complete deal is however to be found in Annex 1.

As we will see, under the terms of this deal, certain categories of people crossing irregularly from Turkey into Greek islands after 20 March 2016 will be returned to Turkey. In exchange, the EU promised to, i.e., resettle one Syrian refugee from Turkey to the EU for each Syrian refugee returned from Greece to Turkey, grant visa-free travel for Turkish nationals by June 2016 and revive the stalled negotiations for Turkey to accede to the EU. The remaining of this subsection will identify the relevant key elements of the deal.<sup>235</sup>

*Return of all irregular migrants crossing from Turkey to the Greek Islands*

- All new irregular migrants crossing from Turkey into Greek islands as from 20 March 2016 will be returned to Turkey.
- This will take place in full accordance with EU and international law, thus excluding any kind of collective expulsion. All migrants will be protected in accordance with the relevant international standards and in respect of the principle of *non-refoulement*.
- It will be a temporary and extraordinary measure which is necessary to end the human suffering and restore public order
- Migrants arriving in the Greek islands will be duly registered and any application for asylum will be processed individually by the Greek authorities in accordance with the Asylum Procedures Directive, in cooperation with UNHCR.
- Migrants not applying for asylum or whose application has been found unfounded or inadmissible in accordance with the said directive<sup>236</sup> will be returned to Turkey.
- Turkey and Greece, assisted by EU institutions and agencies, will take the necessary steps and agree any necessary bilateral arrangements, including the presence of Turkish officials on Greek islands and Greek officials in Turkey as from 20 March 2016, to ensure liaison and thereby facilitate the smooth functioning of these

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<sup>235</sup> European Council (2016), *EU-Turkey Statement, 18 March 2016*, (18 March 2016),

<sup>236</sup> APD



arrangements. The costs of the return operations of irregular migrants will be covered by the EU.

### **3.4 Scope of the EU/Turkey Deal**

To begin with, the actual form and legal basis of the EU/Turkey deal is not clear and therefore important to highlight. There are two viewings upon the deal's form and legal basis. First, Peers – a professor of EU and Human Rights Law at the University of Essex – claims that the deal has the form of a statement.<sup>237</sup> He argues, “since the agreement will take the form of a ‘statement’, in my view it will not as such be legally binding. Therefore there will be no procedure to approve it at either EU or national level, besides its endorsement by the summit meeting. Nor can it be legally challenged as such. However, the individual elements of it – new Greek, Turkish and EU laws (or their implementation), and the further implementation of the EU/Turkey readmission agreement – *will* have to be approved at the relevant level, or implemented in individual cases if they are already in force.” According to Peers's argument, the deal is not a legal instrument that is possible to test judicially.<sup>238</sup>

A second way to assess the EU/Turkey deal, is presented by Den Heijer and Spijkerboer- assistant professor of international law at the Universiteit van Amsterdam and professor of migration law at the Vrije Universiteit - who states that the deal could constitute a treaty and, as such, be unlawful because the EU's procedure for negotiating and concluding treaties with third countries, laid down in Article 218 TFEU, has not been followed.<sup>239</sup> According to the authors, the form and legal basis of the deal and the lack of consultation with the European Parliament raise serious questions about the rule of law and has negative impact on European democracy.

Continuing, another problematic aspect of the EU/Turkey deal is that the duration of these arrangements is not specified.<sup>240</sup> The deal explicitly states that the return of “all irregular migrants” shall be a “temporary and extraordinary measure”. Concern has been raised that measures such as these, even if temporary, may have a more durable application and possibly providing future precedential value, such as

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<sup>237</sup> Peers, *The final EU-Turkey refugee deal: a legal assessment*, (18 March 2016).

<sup>238</sup> *Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation*, Official Journal of the European Union, (7 May 2014).

<sup>239</sup> Den Heijer, Spijkerboer, *Is the EU-Turkey refugee and migration deal a treaty?*, 2016

<sup>240</sup> Peers, *The final EU-Turkey refugee deal: a legal assessment*, 2016.

has been verbalized by Italy.<sup>241</sup>

Further uncertainties are found in the specific geographical scope of the deal. The *Hirsi Jamaa and Others v. Italy*<sup>242</sup> case ruled that States are obligated to grant protection seekers the possibility to apply for asylum regardless if intercepted at the border, on board vessels or in international waters. Therefore the application of the EU/Turkey deal to those irregular migrants “crossing from Turkey into the *Greek islands*”, doesn’t fully mirror that obligation.<sup>243</sup>

The relevant subject of the deal is “all new irregular migrants”. Many are those who criticise this paragraph. To quote Peers: “To be frank, anyone with a legal qualification who signed off on this first sentence should hang their head in shame”.<sup>244</sup> The contentious compliance of this provision with international law will be discussed in the x.

### **3.5 Legal safeguards and the safe third country exception**

The EU/Turkey deal states: “migrants not applying for asylum or whose application has been found unfounded or inadmissible in accordance with the said directive (the APD) will be returned to Turkey.” According to the European Commission Communication,<sup>245</sup> the return to Turkey of all irregular migrants and asylum seekers newly arriving in Greece must be carried out in respect for European and international law. It continued by stating that it is a fundamental requirement flowing from the ECHR and the EU Charter that every case needs to be treated individually. In that regard, the APD lays down the particular legal and procedural parameters to be respected. Consequently, according to the Communication, there is therefore no question of applying a "blanket" return policy, as this would run contrary to these legal requirements.<sup>246</sup>

However, the Communication further refers to the safe third country exception

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<sup>241</sup> Politi, *Italy pleads for Greek-style push to return its migrants*, Financial Times, (4 April 2016); Expressed in: JRS Europe, *The EU-Turkey deal Analysis and Considerations*, p.9.

<sup>242</sup> *Hirsi Jamaa v. Italy* No 27765/09 (23 February 2012).

<sup>243</sup> Peers, *The final EU-Turkey refugee deal: a legal assessment*, (2016). Emphasis added

<sup>244</sup> Ibid.

<sup>245</sup> European Commission (2016), *Communication from the Commission to the European Parliament, the European Council and the Council, Next Operational Steps in EU-Turkey Cooperation in the Field of Migration*, COM(2016) (16 March 2016).

<sup>246</sup> Ibid. p.3

in the APD and confirms that this will be applied to persons that could have applied for protection in Turkey because they are guaranteed effective access to protection there.<sup>247</sup> The application of this exception shall however be in accordance with all procedural guarantees as identified in this thesis's chapter 2, *inter alia*, registration, personal interview and appeal. The substantial requirements are also underlined in the Communication, stating that before returning a person in need of international protection Member States need to be satisfied that the third country will respect a set of standards concerning fundamental rights, non-discrimination, and respect for international law.

Consequently, as the EU/Turkey deal should be read together with this Communication – it has identified the legal requirements of readmitting a protection seeker to Turkey, and as long as Greece and Turkey respect these safeguards, this scheme will be in accordance with European and international law.

However, is the reassurance that all migrants will be protected in accordance with the relevant international standards, enough to consider Turkey as a safe country of return? I will discuss this in chapter 5. Before that, the actual conditions and practices in Turkey will be examined.

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<sup>247</sup> *ibid.* p.3

## 4 Treatment in Turkey

The contours of the 18 March Agreement between EU and Turkey meant in effect that the EU as a whole agreed to recognize and treat Turkey as a safe country of return. Apparent from the examination of the international and regional framework in previous chapters, there are certain requirements that must be in place in the third country before it's qualified as "safe". Consequently, this chapter will examine relevant aspects of Turkish law and asylum procedures - as well as potential protection concerns – for the purpose of assessing the legality of return of protection seekers to Turkey in section 5; *Is the deal in compliance with refugee and human rights law?*

As I demonstrated, important criterion for "safety" is that the asylum procedures are available, and the access to a fair and effective international protection system is provided and that the system in place should be able to guarantee a proper review of an international protection request and/or deportation order, satisfying the needs of legal certainty and protection required in such matters.<sup>248</sup> The Asylum Procedures Directive explicitly states that the safe third country concept may only be applied where a number of safeguards are fulfilled, including respect for the principle of *non-refoulement* and the possibility to request and receive protection in accordance with the Refugee Convention. This section will accordingly highlight relevant aspects of the situation in Turkey, focusing on above mention criteria.

### 4.1 Turkish asylum legislation

As a gateway between Europe, Asia, and Africa, Turkey has historically been a focal point for transcontinental migration and its location places it on a prime route for migrants looking to enter Europe.<sup>249</sup> Turkey currently hosts both a mass-influx refugee population from neighbouring Syria and a surging number of individually arriving asylum seekers of other nationalities, most principally originating from Iraq, Afghanistan, Iran and Somalia, among other. These two populations of protection

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<sup>248</sup>See i.e. *M.S.S. v. Belgium and Greece*, No 30696/09 (21 January 2011), see chapter 2.2.2.2.2 for a examination

<sup>249</sup>Kilberg, *Turkey's Evolving Migration Identity*, Migration Policy Institute, (July 2014)

seekers are subject to two different sets of asylum rules and procedures. As such, the Turkish asylum system has a dual structure.<sup>250</sup>

### 4.1.1 The Geographical limitation

In April 2013 Turkey adopted a comprehensive, EU-inspired new Law on Foreigners and International Protection (LFIP), which establishes a dedicated legal framework for asylum in Turkey and affirms Turkey's obligations towards all persons in need of international protection, regardless of country of origin, at the level of binding domestic law.<sup>251</sup>

Unlike the majority of signatory countries to the Refugee Convention, Turkey maintains a geographical limitation, affording refugee status only to individuals from European countries. As a result, asylum seekers from non-European countries are expected to be resettled elsewhere, or returned to their countries of origin. If this will allow these refugees to remain indefinitely and integrate into Turkish society is unclear.<sup>252</sup>

### 4.1.2 Law on Foreigners and International Protection

The law refers to the principle of *non-refoulement*, meaning that a correct refugee reception according to the law cannot violate against *non-refoulement*.<sup>253</sup> As for the right to seek asylum, the law explicitly entitles every foreigner or stateless person the right to apply for asylum.<sup>254</sup> However, Turkey implements a temporary protection regime for refugees from Syria on a *prima facie*, group-basis, which grants beneficiaries right to legal stay as well as some level of access to basic rights and services.<sup>255</sup> On the other hand, asylum seekers from other countries of origin are expected to apply for an individual "international protection" status under LFIP.<sup>256</sup>

Non-European refugees, acquire "conditional refugee" status under the "international protection" regime. This application concerns a temporary residence in

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<sup>250</sup> AIDA, *Country report Turkey*, (Dec 2015), p.15.

<sup>251</sup> AIDA, *Country report Turkey*, Dec (2015), p. 15

<sup>252</sup> Kilberg, *Turkey's Evolving Migration Identity*, Migration Policy Institute, (July 2014)

<sup>253</sup> Law on Foreigners and International Protection Article 4(1)

<sup>254</sup> *ibid.* Article. 65(3).

<sup>255</sup> This is based on LFIP Article 91 and the Temporary Protection Regulation of 22 October 2014.

<sup>256</sup> AIDA, *Country report Turkey*, Dec (2015), p. 15.

Turkey until resettlement to a final asylum country.<sup>257</sup> Most importantly, “conditional refugee” status holders are not offered the prospect of long-term legal integration in Turkey and excluded from “family unification” rights.

Persons who do not fulfil the eligibility criteria for either “refugee” status or “conditional refugee” status are given “subsidiary protection” status under LFIO. This fully replicates the subsidiary protection definition provided by the EU Qualification Directive. Similar to the “conditional refugee” status holders, “subsidiary protection” beneficiaries receive a lesser set of rights and entitlements as compared to “refugee” status holders and are barred from long-term legal integration in Turkey.

Therefore, the Turkish “temporary protection” concept and “subsidiary protection” in their current forms falls short of promising a secure, long-term solution to refugees from Syria and other protection seekers seeking safety in Turkey, while it does create a framework for addressing the immediate and short-term protection and humanitarian needs of beneficiaries.<sup>258</sup>

The LFIP, in addition to laying down these eligibility grounds for asylum in Turkey, also provides, for the first time in Turkey, a full-fledged “international protection” application and determination procedure, complete with basic procedural safeguards, including guarantees on access to legal representatives and to UNHCR and new legal remedies that secure applicants’ right to stay in Turkey until the full exhaustion of the procedure.<sup>259</sup>

Although the law makes sure that Turkey complies with international standards on refugee rights and is largely based on EU migration and asylum acquis – albeit with some notably exceptions, including the “geographical limitation” policy - the law is quite new and the migration control system created with it untested. According to AIDA, it is therefore important to observe that the new asylum procedure design provided by the LFIP does not yet fully correspond to the reality on the ground.<sup>260</sup>

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<sup>257</sup> Law on Foreigners and International Protection Article 62(1).

<sup>258</sup> AIDA, *Country report Turkey*, Dec (2015), p.16.

<sup>259</sup> *ibid.* p.18.

<sup>260</sup> *ibid.* p.17

## 4.2 Potential Protection Concerns

This subchapter will highlight voiced concerns - raised primarily by international NGO's - relevant for the assessment whether or not the actual conditions and practices in Turkey complies with relevant international standards.

### 4.2.1 Concerns related to the implementation of the LFIP

Concerns have been voiced that the Law on Foreigners and International Protection will take years to be implemented and that there are not enough training for personnel implementing the law with respect to human rights and refugee law.<sup>261</sup> The UN Special Rapporteur on the Human Rights of Migrants, François Crépeau, noted in a report for the UNHCR that although the law represents a major step towards a comprehensive migration framework, it still requires coordinated effort across multiple agencies and ministries for successful implementation, which has been an issue in the past.<sup>262</sup>

The law has also drawn strong disapproval for not removing the geographical limitation on refugee status, which critics believe is crucial to providing full-coverage international protection. Amnesty International has criticized the limitation in Turkey, claiming it forces “most (conditional refugees to) live in destitution and/or work illegally in exploitative conditions.”<sup>263</sup> Human Rights Watch Director Bill Frelick writes that any Syrian, Iraqi, or Afghan returned to Turkey would not be allowed to request refugee status there, as required by the APD, because Turkey excludes non-Europeans from qualifying for refugee status.<sup>264</sup>

The Refugee Solidarity Network has further derided the maintenance of the geographical limitation as preventing refugees from seeking long-term relief in Turkey. In 2012 the Chairman of the refugee-rights non--profit Mülteci-Der was quoted as saying, “Overall it is a good law, but in my view as long as the

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<sup>261</sup> Council of Europe. Parliamentary Assembly, *Turkey's draft law on Foreigners and International Protection* (written question by Joe Benton, United Kingdom, (2013).

<sup>262</sup> UN General Assembly, Human Rights Council. *Report by the Special Rapporteur on the human rights of migrants, François Crépeau, Addendum, Mission to Turkey (25-29 June 2012)*. 2013.

<sup>263</sup> Amnesty International. *The Human Cost of Fortress Europe: Human Rights Violations Against Migrants and Refugees at Europe's Borders*, (2014).

<sup>264</sup> Frelick, *Is Turkey safe for refugees?*, (2016), hrw.org.

geographical limitation is maintained, it remains problematic.”<sup>265</sup>

## 4.2.2 Incidents of *refoulement*

The APD also requires the safe third country to respect the principle of *non-refoulement*. That principle not only forbids governments from deporting refugees to places where their lives or freedom would be threatened but also from rejecting asylum seekers at their borders who would face such threats. At the very time the EU was announcing the EU/Turkey deal, Turkey had closed its border to a huge amount of Syrians fleeing the war in the Syrian city Aleppo, a “massive and egregious flouting of this norm of customary international law”, according to Human Rights Watch Director Bill Frelick.<sup>266</sup> He continues by stating that Syrians for whom Turkey offers temporary protection, and other nationalities with even less protection, should be able to challenge whether Turkey provides them effective protection before being sent back there.<sup>267</sup>

Amnesty<sup>268</sup> has reported that since September persons attempting to cross the Greek-Turkish land border have been detained, many herd onto buses and transported to isolated detention centres far away, where they have been held incommunicado. A Human Rights Watch<sup>269</sup> report highlighted how Syrians are being denied entry to Turkey at the border and being pushed back to Syria. These reports, while they mainly entail allegations that problematize the shortcomings of Turkey’s “temporary protection” regime for refugees from Syria, they also generally indicate alleged practices in detention facilities and border regions that do not comply with the rule of law framework and basic procedural safeguards from arbitrariness established by LFIP.<sup>270</sup>

According to a recent Amnesty special report<sup>271</sup>, there have been illegal mass returns of Syrian refugees, which expose fatal flaws in the EU/Turkey deal. Its

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<sup>265</sup> Cited in Gustensept, *As Refugees Flood Turkey, Asylum System Nears Breakdown*, New York Times, (2012).

<sup>266</sup> Frelick, *Is Turkey safe for refugees?*, (2016), hrw.org

<sup>267</sup> *ibid.*

<sup>268</sup> ECRE, *ECRE strongly opposes legitimising push-backs by declaring Turkey a “safe third country”*, (29 January 2016).

<sup>269</sup> *ibid.*

<sup>270</sup> Amnesty International, *Europe’s Gatekeeper: Unlawful Detention and Deportation of Refugees in Turkey*, (16 December 2015); Amnesty International, *Fear and Fences: Europe’s Approach to Keeping Refugees at Bay*, (17 November 2015); Amnesty International, *Struggling to Survive: Refugees from Syria in Turkey*, (20 November 2014); Human Rights Watch, *Turkey: Syrians Pushed Back at the Border*, (23 November 2015).

<sup>271</sup> Amnesty International, *Turkey: Illegal mass returns of Syrian refugees expose fatal flaws in EU-Turkey deal*, (1 April 2016).



reported that new research carried out in Turkey's southern border provinces suggests that Turkish authorities have been rounding up and expelling groups of around 100 Syrian men, women and children to Syria on a near-daily basis since mid-January 2016. "In their desperation to seal their borders, EU leaders have wilfully ignored the simplest of facts: Turkey is not a safe country for Syrian refugees and is getting less safe by the day. It seems highly likely that Turkey has returned several thousand refugees to Syria in the last seven to nine weeks<sup>272</sup>. If the agreement proceeds as planned, there is a very real risk that some of those the EU sends back to Turkey will suffer the same fate." said John Dalhuisen, Amnesty International's Director for Europe and Central Asia. The recent research further shows that the Turkish authorities have scaled back the registration of Syrian refugees in the southern border provinces.

Continuing, ECRE strongly opposes declaring Turkey as "safe" in a report from January 2016. Beside concern for the protection of Syrian refugees, ECRE states that asylum seekers from other nationalities face a largely dysfunctional asylum system under Turkey's international protection procedure. Despite recent reforms, the protection system is still in the early stages of building the necessary capacities to implement the Law on Foreigners and International Protection. Numerous barriers to state-funded legal aid, coupled with resource constraints on NGOs, leave asylum seekers without legal representation and advice. The increasingly hostile climate for human rights protection in the country, for foreigners as well as the country's own citizens, is also a concern.<sup>273</sup>

### **4.2.3 Access to seek asylum**

International and European human rights and refugee law requires, as we remember, that a person can be returned to an intermediary country as long as they are guaranteed effective access to protection. Some argue however that this may not be the case in Turkey.

The Law on Foreigners and International Protection grants all basic human rights to migrants, asylum seekers, and refugees in line with EU legislation: access to legal counselling and a lawyer, prohibition of torture and ill treatment, extended

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<sup>272</sup> Statement made 1 April 2016.

<sup>273</sup> ECRE, *ECRE strongly opposes legitimising push-backs by declaring Turkey a "safe third country"*, (29 January 2016).

protection, rights for minors, and so on. However, according to Orcun Ulusoy - a human rights lawyer from Turkey and a founding member of Multeci-Der - the well drafted law hasn't provided nor guaranteed basic human rights for migrants, asylum seekers, and refugees in Turkey. This failure has several reasons he argues: First, the newly established responsible authority - Directorate General of Migration Management - lacks capacity and experience. Second, the Syrian Refugee influx created pressure on the newly established system. Third, there is not enough juridical capacity. Fourth, a retroactive migration management tradition and security based approach to migration in Turkey is still dominant.<sup>274</sup> He further describes the Turkish asylum system as: "Inexperienced, under-equipped, under-trained, and under the wrong influences, this system is far away from providing a safe haven for migrants and refugees. Today, it's only creating a legal limbo where migrants and asylum seekers are waiting without seeing their futures."<sup>275</sup>

Amnesty International released a report in March 2016 claiming that asylum seekers and refugees are denied access to fair and efficient procedures for the determination of their status in Turkey.<sup>276</sup> The report follows Ulusoy's line of argument and states that Turkey's asylum system is still in the process of being established, and is not capable of coping with the millions of asylum-seekers and refugees in the country. All the available evidence indicates that many crucial aspects of the country's new asylum system, as set out in the LFIP are not operating in practice.<sup>277</sup> The Report also highlights potential flaws regarding the quality of the decision-making, and concludes that the Turkish authorities are not consistently fulfilling the procedural fairness provisions set out in the LFIP.<sup>278</sup> Concrete concerns are e.g. the speed at which the 30,000 decisions reportedly made in April 2016 that raises serious doubts about their quality, and the very low number of cases to reach the courts that raises serious doubts about access to review procedures.<sup>279</sup> These concerns about detainees' access to fair procedures are particularly salient in the context of the EU/Turkey Deal, given that most of the people returned from Greece under the terms of the deal have been detained,<sup>280</sup> and some denied access to legal

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<sup>274</sup> Ulusoy, *Turkey as a Safe Third Country?*, (29 March 2016)

<sup>275</sup> *ibid.*

<sup>276</sup> Amnesty International, *No safe refuge: Asylum-seekers and refugees denied effective protection in Turkey*, (March 2016).

<sup>277</sup> *ibid.* p.15

<sup>278</sup> *ibid.* p.16

<sup>279</sup> *ibid.* p.16

<sup>280</sup> Dutch Council for Refugees and European Council on Refugees and Exiles, *The DCR/ECRE Desk Research on Application of a Safe Third Country and a First Country of Asylum Concepts to Turkey*, (May 2016), para. 32.

representation – including at a detention camp in Düziçi in Osmaniye province.<sup>281</sup> This is a facility where Amnesty International research in late 2015 showed that people were being pressured – or actually forced – to return to a risk of serious human rights violations in Iraq and Syria.<sup>282</sup>

### **4.3 Conclusion**

Despite the positive steps taken by the Turkey in order to introduce a fair and efficient asylum system in accordance with international human rights and refugee standards, the above examination shows that there are many that argue that that this has not been achieved so far. The asylum system is characterized by multiple deficiencies, including its dual structure and maintenance of a “geographical limitation” to the Refugee Convention, routine pushbacks, lack of procedural safeguards during the asylum procedure and access to effective remedies in law and in practice. My analysis was based on various publicly available reports of national and international organizations.

Although the Turkish law – LFIP – also provides for a legal framework for processing asylum applications of “non-Europeans” and establishes an administrative authority competent to deal with such applicants, it is clear that it is still in the starting blocks of establishing the necessary institutional capacity and is currently unable to cope with the increased numbers of persons seeking protection. Many essential safeguards that should be afforded to protection seekers seems many times to be inaccessible to them in practice – raising questions if there is a gap between what is required under the law and the actual practices.

In light of the considerations outlined in this chapter, it makes it hard to argue that the situation in Turkey is satisfactory from a safe third country perspective.

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<sup>281</sup> Amnesty International, *Urgent Action: Syrians Returned from Greece, Arbitrarily Detained*, (19 May) 2016.

<sup>282</sup> Amnesty International, *Europe’s Gatekeeper: Unlawful Detention and Deportation of Refugees from Turkey*, (16 December 2015).

## 5 Is the deal in compliance with refugee law and human rights law?

The primary question for this analyse is whether refugees' access to protection might be impaired under the EU/Turkey deal. I will connect the findings in previous chapters and analyse whether or not the EU/Turkey deal reflect at least the minimum requirements prescribed by the international refugee and human rights law examined, and do not suggest anything which falls short of that standard. The focus has been on the Refugee Convention, the ECHR, UDHR and relevant EU Law - why these are covered in this analyse.

I would like to begin to emphasize that in studying the relationship between the EU/Turkey deal and international and regional law, states cannot contract out their pre-existing obligations under international refugee and human rights law by concluding a subsequent agreement.

Important is also that the EU/Turkey deal does not provide the legal basis for rejecting asylum seekers, but only facilitates the execution of an expulsion decision. The deal cannot therefore *per se* violate international human rights law or refugee law. The legal basis for the rapid return of asylum seekers under the EU/Turkey deal is the safe third country exception enshrined in the APD. Under this, Greek authorities are entitled to return someone to Turkey if the person's asylum request is found inadmissible on the basis that for that individual, Turkey is a safe third country, meaning that the person can receive effective protection there. The effect of the inadmissibility is primarily that the authorities in Greece are not required to conduct a substantive examination of protection claims. Important to remember when appraisal the APD, is that it purports to minimum standards only, drafted in very general terms. This means that member states are always free to adopt higher standards of protection.

## 5.1 The EU/Turkey deal and refoulement

My starting point in this analysis, is that the ability of a country in which an application is lodged (continuing Greece) to return protection seekers to an intermediate country (continuing Turkey) is subject to limitations under the *non-refoulement* principle. Taking into consideration the conclusions drawn in previous chapters, the safe third country exception – as a matter of principle - is compatible with the international legal framework. In other words, Greece is allowed to return protection seekers entering its territory, back to Turkey as long as required legal safeguards are attached. In principle, return is in conformity with the prohibition on *refoulement*, even if no substantive examination of the asylum request has been made in Greece, as long as it has been established that Turkey will provide protection if necessary. So, while it must be concluded that returning protection seekers under the EU/Turkey deal is not *necessarily* prohibited under the legal framework examined, the prohibition on *refoulement* of refugees to their country of origin “in any manner whatsoever” under the Refugee Convention, implies a prohibition to return them to an intermediate country where they will not be protected against *refoulement*.

If we turn to the European context and the ECtHR’s case law, it is evident that it proposes a rebuttable presumption that states will abide by their international obligations. However, derived especially from the *Hirsi Jamaa v. Italy* case, if there are indications that a potential intermediate country has violated human rights law, the presumption can no longer apply. A state cannot knowingly send someone back to a place where he/she will experience harm. This conclusion would be in line with Legomsky’s complicity principle.

In sum, if Greek authorities decides not to examine the substance of the request, as proposed by the EU/Turkey deal, the authorities must treat the migrant *as if* a refugee under the Refugee Convention or *as if* there is a real risk of torture or inhuman or degrading treatment under the ECHR. This derives from the fact that refugee status is declaratory rather than constitutive. Hence, Greece must assume that its obligations under international law are involved if returning the applicant to Turkey. Taking into consideration the scope of the *non-refoulement* principle as carefully reviewed in previous chapters, this implies that even people who invoke the prohibition on *refoulement* in their request can be returned to a Turkey if they will be protected against *refoulement* there.

However, an essential finding from the *M.S.S v. Belgium and Greece* case (especially in connection to the EU/Turkey deal as I will demonstrate) is that the

removing country cannot return someone, knowing that there is no guarantee that his asylum application would be seriously examined in the third country. Emphasized has also been that even if a country seems generally safe, a person who invokes the prohibition on *refoulement* must always be able to rebut the presumption that the third country really is safe in his/hers individual case. Providing for the possibility of individual safety determination is thus not a fully discretionary choice under the international obligations of the member states.

The ECtHR has been stating that “adequate safeguards” and “sufficient guarantees” is what must be provided for in the intermediate country, and the returning state can never - “in any manner whatsoever” – knowingly breach the prohibition on *refoulement* under the Refugee Convention. Essential is therefore to establish that the intermediary country will offer effective protection from *refoulement* (that is, to the full personal scope of those prohibitions), however that the applicant must have the substance of the request examined is not required. Nevertheless, an effective procedure where the request is assessed in accordance with prevailing international standards, makes the *non-refoulement* principle most likely to be observed.

The ECtHR’s jurisprudence indicates that all migrants must be given a realistic opportunity to request asylum and this claim must be examined on an individual basis. To remove without a “rigorous” and “independent” examination of the asylum claim is itself contrary to the prohibition on *refoulement* as we saw in the *Jabari v. Turkey* case. However, if a safe third country is established it can be relevant for the outcome of the examination. In the context of the EU/Turkey deal this means; when a migrant enters Greece, he/she must be able to request asylum there. If the request is declared inadmissible under the safe third country exception, he/she must be given a real opportunity to invoke the prohibition on *refoulement*. A proper individual examination on the substance of the request must then be carried out whether Turkey actually is safe for this particular individual.

In sum, there must exist adequate safeguards against the risk of returning a protection contrary to the prohibition on *refoulement*. International law does not specify any procedures to this end.<sup>283</sup> This is however provided for in the APD (and domestic legal systems, outside the scope of this thesis). The obvious question is whether these minimum standards suggest anything that falls short of the

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<sup>283</sup> ECHR Article 13 include “Right to an effective remedy” and implicit procedural requirements can be deduced from Article 3. However, as I conclude that APD confirm international standards, I assume from this.

international protection. My research shows that is not the case, Article 38 APD puts up no obstacles for the member states to adhere to their international obligations when implementing the safe third country provision. In two aspects the APD even provide more far-reaching protection than required under international law. Firstly, that refugees should enjoy the secondary rights laid down in the Refugee Convention – this is however in compliance with Article 18 EU Charter, recognizing “a right to asylum”, absent under international human rights and refugee law. This implies that someone with “a right to asylum” may not be returned without guaranteed basic human rights standards in the intermediate country. Secondly, that a protection seeker must have a previous “connection” with the intermediate country is not a requirement under international law either.

So, up until now the EU/Turkey deal arouses no legal problems. However, taking into consideration the actual conditions and practices in Turkey examined in chapter 4, far less certain is whether Turkey actually meets the statutory threshold under the APD. The formal effectiveness may also be prejudiced by restrictions on access, for example, because of its geographical limitations on the extent of obligations. The simple agreement of legal (international/national) instruments does not equate to compliance with the required standards, which requires substantive and procedural guarantees for protection. This is an interpretation in line with Gregor Noll’s empirical approach.

Following this general discussion of the legal principles guiding the analysis of return under the EU/Turkey deal, we will therefore look at the implications when implementing the deal and especially Turkey as a safe third country.

## ***5.2 Implementation of the EU/Turkey deal and Turkey as a safe third country***

To begin with, the deal explicitly states: "all irregular migrants will be returned to Turkey". This is problematic because it raises the prospect of collective expulsion, which is prohibited by the EU Charter, Protocol 4 Article 4 of the ECHR and related jurisprudence and also breaches the right to seek asylum. To state that “all new irregular migrants” will be returned is an obvious breach of this legislation. As thoroughly examined, such practice has been condemned by the ECtHR in the *Hirsi Jamaa v Italy* case. Consequently, the crucial question for migrants entering Greece

is whether they will be given an opportunity to apply for asylum, as required under ECtHR's case law, as well as under the EU Charter, UDHR and APD. Despite the provision that "all irregular migrants will be returned to Turkey", to return without possibility to request protection is probably not really the intention, as the rest of the paragraph, including the reference to *non-refoulement*, completely contradicts that. Nothing in my review indicates that migrants are hindered from applying for asylum in Greece under the EU/Turkey deal. What difference does this make however, if their application is declared inadmissible under the safe third country exception? This is important because he/she is thus entitled to rebut the safety of Turkey in his/hers case. The EU/Turkey deal explicitly confirms that "migrants arriving in the Greek islands will be duly registered and any application for asylum will be processed individually by the Greek authorities in accordance with the Asylum Procedures Directive". A further analyse of the legal and factual situation in Greece is beyond the scope of my research and will not take place here. I will just mention that in light of recent changes to Greek law, a careful examination of the legislation will be necessary to assess its compliance with international and EU law and its application in practice. Essential is that the Greek authorities have the required procedural guarantees in place and provides for an individual examination in accordance with international standards as outlined above.

Returning to the substance of the EU/Turkey deal, it further contains a non-affectation clause confirming that the deal will "take place in full accordance with EU and international law". Together with the fact that it simply constitutes a purely administrative tool serving the purpose of smoothing the final stage of the return procedure for asylum seekers whose claims will be examined elsewhere, I would argue that no issue of incompatibility with the *non-refoulement* principle and the right to seek asylum stem from the technical content of the deal.

Nevertheless, once we take the actual conditions and practices in Turkey into consideration, the relationship between the EU/Turkey deal and refugee rights turns out not to be that coherent and consistent. The implementation enhances the risk of direct and indirect *refoulement* and may lead to violations of the right to seek asylum as a consequence of asylum seeker's transfer to Turkey. My argumentation assume from that potential incompatibilities of the EU/Turkey deal with the right to seek asylum and protection against *refoulement* is mainly due to deficiency of the domestic asylum system in Turkey, rather than to the existence of specific provisions within the EU/Turkey deal.



So, besides the issues that we have focused on so far, the crucial substantive question in relation to the EU/Turkey deal is: does Turkey comply with the requirements of effective access to asylum procedures? Can Turkey be considered a safe third country? A country where: asylum seekers do not have their life or liberty threatened on ground of “race, religion, nationality, membership of a particular social group or political opinion,”<sup>284</sup> there is “no risk of serious harm”;<sup>285</sup> the applicant won’t be sent to another, “fourth”, country which is unsafe;<sup>286</sup> and “the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Refugee Convention”.

In light of Article 78 TEU together with relevant provisions under the EU Charter,<sup>287</sup> Article 38 APD require that the applicant have a possibility to apply for international protection, and if recognized, will be able to enjoy effective protection in Turkey. To the question whether Turkey can ensure access to effective asylum procedures for all persons in need of international protection, there are a number of reasons for doubt. First, while Turkey is a signatory to the Refugee Convention, it adopted a geographical limitation whereby only refugees from European states are entitled to full protection; for all others, Turkey may grant limited or “temporary protection” in the form of temporary status. Accordingly, any non-Europeans cannot fall within the scope of Article 38 APD because they cannot request nor be given refugee status in conformity with Refugee Convention in Turkey. It is from this limitation much of the concern regarding whether Turkey respects the principle of *non-refoulement* stems. This is because the APD explicitly states that the safe third country must respect the principle of *non-refoulement* in accordance with the Refugee Convention. Whether or not it is required that the third state has actually ratified the Convention, for example to comply in good faith with one’s obligations, are there different opinions about. I assume from that important seems to be that it *de facto* adhere to the listed obligations and not the formal ratification. Much depends therefore on the meaning of the words “in accordance with” the Refugee Convention. Whether Turkey does apply equivalent standards in practice is open to question. Even if LFIP created an international protection system that allows individual asylum seekers to seek "conditional refugee status" and protections in line with the Refugee Convention, non-Europeans are excluded from it because the temporary protection

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<sup>284</sup> See Refugee Convention Article 33

<sup>285</sup> See the definition of subsidiary protection in QD Article 15 (death penalty, torture etc, civilian at risk in wartime)

<sup>286</sup> The prohibition on indirect *refoulement*, referring specifically to the Refugee Convention, plus as laid down by ECHR case law.

<sup>287</sup> Articles 4, 18 and 19.

regulation that governs their status is explicitly outside the scope of that system. Consequently, the geographical limitation provides a barrier to accessing asylum procedures for example a Syrian, Afghani or Iraqi.

As chapter 4.2 demonstrated, observers have raised concerns over Turkey's treatment of refugees and ability to guarantee effective access to protection. These concerns include the lack of local capacity to process migrants and implement proper individual status determinations, especially considering the size of the influx, the lack of juridical capacity to review asylum cases and the possibility of individuals being subsequently deported from Turkey to their country of origin, based on recent reports of "large scale returns" or push-backs of refugees from Turkey to Syria. These practices are in clear violation of the *non-refoulement* principle.

Emphasized throughout this thesis has been that an assessment must be available to rebut whether it would be safe for that *particular* applicant to be removed to a particular country - a general consideration of *non-refoulement* would not appear to be the relevant test in such case. However, if the requested state is not complying in general with this standard, this should warn the sending state that its potential partner is actually not safe for returnees. Similarly, under the ECHR - both general and personal circumstances are relevant for the risk assessment when evaluating real risk of ill-treatment.

Much points to that Turkey does not have a fully developed asylum procedures in place and take worryingly narrow views of the substantive eligibility criteria for refugee status. Overall the EU/Turkey deal emphasizes that the EU law will be applied to those entering Greece, and that Turkey must meet the statutory threshold under the APD when taking people back. Nevertheless, the technical "legality" approach is clearly undermined by the actual conditions and practices in Turkey.

I conclude that there are indications that many crucial aspects of Turkey's asylum system, as set out in LFIP, are not operating in practice. The EU/Turkey deal in itself does not however contain any provision directly violating any international human rights or refugee rights, especially not the right to seek asylum or *non-refoulement*. The key legal question will therefore be how the commitments under the EU/Turkey deal are implemented in practice.

## 6 Conclusion

This thesis has identified the main protection concerns regarding the EU/Turkey deal on 18 March 2016. My analysis above demonstrate general concerns over the fact that protection seekers and refugees are returned to Turkey today, as the actual conditions and practices raise serious doubts whether Turkey really can be considered a “safe” third country for return. As the conditions by which to determine “safety” are delimited by international and EU obligations, this thesis has identified a series of obligations stemming from the *non-refoulement* principle and right to seek asylum in international human rights and refugee law and EU law, relevant to the return of protection seekers from EU member states to intermediate countries. A conclusion of the outcome of this analysis, constituting the international legal framework can be found in chapter 2.3. In sum, the state contemplating protection elsewhere, does not have to give full access to its asylum procedures in each and every case. It can to a certain extent rely on generic safety determinations that the requirement of effective protection is fulfilled. However, it must always allow for rebuttal from the part of the protection seeker. The safe third country exception under the APD appears to be in line with the international protection obligations of the Member States, although a restrictive interpretation thereof. This means that to return protection seekers, who are rejected under that policy, cannot in principle be said to suggest anything that falls short of designated standards.

This thesis has made clear that burden sharing agreements such as the EU/Turkey deal, takes place in a conflict between internal security, which emphasizes the need to tighten up territorial borders and to fight illegal immigration, and the liberal frame of humanitarianism, which incorporates the human rights-based notions of the rights of individuals to receive protection and to have access to equitable asylum procedures. I asked myself in the introduction whether the EU/Turkey deal put too much emphasis on control and thereby falls short of complying with international human rights and refugee standards? A thorough analysis of this question can be found in chapter 4. In sum, I conclude that no inconsistencies stem from the technical content of the deal itself. This conclusion derives primary from the finding that the EU/Turkey deal does not provide the legal basis for return of protection seekers, it is an administrative tool facilitating the return. It would be the return-decision under national law on safe third country grounds that potentially could breach designated standards. Secondly, the non-

affection clauses safeguards compliance with designated obligations. After a detailed review of the safe third country exceptions in the APD, I came to the conclusion that the safe third country exception, in principle, is in conformity with the international legal framework.

I recognize that a comprehensive understanding of the impact the EU/Turkey deal would require further research, especially in relation to informal border practice in Turkey and in Greece. Nevertheless, caution should be observed that although in the strict legal sense the EU/Turkey deal is not a problem, my study indicates that the actual conditions and practices in relation to international obligations in Turkey could be a cause for concern if returning protection seekers there. It is indicated that international protection obligations are not strictly adhered to and flaws in the implementation of asylum procedures as well as direct human rights violations. There are grounds to assume that Turkey today does not live up to the requirements of a safe third country.

As a concluding observation, it is sad to see that the EU member states, in order to solve one of the biggest human rights issues of today given the numbers of people in need of protection, cannot cooperate so as to share this responsibility across the whole Union and stand united for people risking their lives for the sake of protection.

# Annex 1

## **EU-Turkey statement, 18 March 2016** <sup>288</sup>

Today the Members of the European Council met with their Turkish counterpart. This was the third meeting since November 2015 dedicated to deepening Turkey-EU relations as well as addressing the migration crisis.

The Members of the European Council expressed their deepest condolences to the people of Turkey following the bomb attack in Ankara on Sunday. They strongly condemned this heinous act and reiterated their continued support to fight terrorism in all its forms.

Turkey and the European Union reconfirmed their commitment to the implementation of their joint action plan activated on 29 November 2015. Much progress has been achieved already, including Turkey's opening of its labour market to Syrians under temporary protection, the introduction of new visa requirements for Syrians and other nationalities, stepped up security efforts by the Turkish coast guard and police and enhanced information sharing. Moreover, the European Union has begun disbursing the 3 billion euro of the Facility for Refugees in Turkey for concrete projects and work has advanced on visa liberalisation and in the accession talks, including the opening of Chapter 17 last December. On 7 March 2016, Turkey furthermore agreed to accept the rapid return of all migrants not in need of international protection crossing from Turkey into Greece and to take back all irregular migrants intercepted in Turkish waters. Turkey and the EU also agreed to continue stepping up measures against migrant smugglers and welcomed the establishment of the NATO activity on the Aegean Sea. At the same time Turkey and the EU recognise that further, swift and determined efforts are needed.

In order to break the business model of the smugglers and to offer migrants an alternative to putting their lives at risk, the EU and Turkey today decided to end the

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<sup>288</sup> European Council (2016), *EU-Turkey Statement, 18 March 2016*, 18 March 2016. <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/> [accessed 4 August 2016]

irregular migration from Turkey to the EU. In order to achieve this goal, they agreed on the following additional action points:

1) All new irregular migrants crossing from Turkey into Greek islands as from 20 March 2016 will be returned to Turkey. This will take place in full accordance with EU and international law, thus excluding any kind of collective expulsion. All migrants will be protected in accordance with the relevant international standards and in respect of the principle of non-refoulement. It will be a temporary and extraordinary measure which is necessary to end the human suffering and restore public order. Migrants arriving in the Greek islands will be duly registered and any application for asylum will be processed individually by the Greek authorities in accordance with the Asylum Procedures Directive, in cooperation with UNHCR. Migrants not applying for asylum or whose application has been found unfounded or inadmissible in accordance with the said directive will be returned to Turkey. Turkey and Greece, assisted by EU institutions and agencies, will take the necessary steps and agree any necessary bilateral arrangements, including the presence of Turkish officials on Greek islands and Greek officials in Turkey as from 20 March 2016, to ensure liaison and thereby facilitate the smooth functioning of these arrangements. The costs of the return operations of irregular migrants will be covered by the EU.

2) 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. A mechanism will be established, with the assistance of the Commission, EU agencies and other Member States, as well as the UNHCR, to ensure that this principle will be implemented as from the same day the returns start. Priority will be given to migrants who have not previously entered or tried to enter the EU irregularly. On the EU side, resettlement under this mechanism will take place, in the first instance, by honouring the commitments taken by Member States in the conclusions of Representatives of the Governments of Member States meeting within the Council on 20 July 2015, of which 18.000 places for resettlement remain. Any further need for resettlement will be carried out through a similar voluntary arrangement up to a limit of an additional 54.000 persons. The Members of the European Council welcome the Commission's intention to propose an amendment to the relocation decision of 22 September 2015 to allow for any resettlement commitment undertaken in the framework of this arrangement to be offset from non-allocated places under the decision. Should these arrangements not meet the

objective of ending the irregular migration and the number of returns come close to the numbers provided for above, this mechanism will be reviewed. Should the number of returns exceed the numbers provided for above, this mechanism will be discontinued.

3) 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.

4) Once irregular crossings between Turkey and the EU are ending or at least have been substantially and sustainably reduced, a Voluntary Humanitarian Admission Scheme will be activated. EU Member States will contribute on a voluntary basis to this scheme.

5) The fulfilment of the visa liberalisation roadmap will be accelerated vis-à-vis all participating Member States with a view to lifting the visa requirements for Turkish citizens at the latest by the end of June 2016, provided that all benchmarks have been met. To this end Turkey will take the necessary steps to fulfil the remaining requirements to allow the Commission to make, following the required assessment of compliance with the benchmarks, an appropriate proposal by the end of April on the basis of which the European Parliament and the Council can make a final decision.

6) The EU, in close cooperation with Turkey, will further speed up the disbursement of the initially allocated 3 billion euros under the Facility for Refugees in Turkey and ensure funding of further projects for persons under temporary protection identified with swift input from Turkey before the end of March. A first list of concrete projects for refugees, notably in the field of health, education, infrastructure, food and other living costs, that can be swiftly financed from the Facility, will be jointly identified within a week. Once these resources are about to be used to the full, and provided the above commitments are met, the EU will mobilise additional funding for the Facility of an additional 3 billion euro up to the end of 2018.

7) The EU and Turkey welcomed the ongoing work on the upgrading of the Customs Union.

8) The EU and Turkey reconfirmed their commitment to re-energise the accession process as set out in their joint statement of 29 November 2015. They welcomed the opening of Chapter 17 on 14 December 2015 and decided, as a next step, to open Chapter 33 during the Netherlands presidency. They welcomed that the Commission will put forward a proposal to this effect in April. Preparatory work for the opening of other Chapters will continue at an accelerated pace without prejudice to Member States' positions in accordance with the existing rules.

9) The EU and its Member States will work with Turkey in any joint endeavour to improve humanitarian conditions inside Syria, in particular in certain areas near the Turkish border which would allow for the local population and refugees to live in areas which will be more safe.

All these elements will be taken forward in parallel and monitored jointly on a monthly basis.



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