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## Turkey as a safe third country?

A study on the safe third country concept and its compliance with  
non-refoulement

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# Summary

In 2016 the EU and Turkey reached an agreement with the goal to end “irregular migration” from Turkey to the EU. Under this agreement asylum seekers who have entered Greece via Turkey will have their asylum applications deemed as inadmissible on safe third country grounds and subsequently be returned to Turkey.

The purpose of this essay is to broaden the understanding of some of the obligations of EU member states when engaging in safe third country practices. Thus, this essay examines the criteria for applying the safe third country concept under EU law and the limitations of its implementation due to international law. To this end, the essay primarily employs a legal dogmatic method.

While most safe third country provisions in EU asylum policy are uncontroversial, some are shown to be quite unclear and potentially leave the member states with a rather wide scope of interpretation. Keeping this in mind, the essay analyzes to what extent the implementation of the safe third country concept on Turkey is compatible with non-refoulement under the 1951 Geneva Convention.

The essay shows that the lack of a fair status determination in Turkey, potentially increases the risk for refoulement. However, asylum seekers returned from Greece to Turkey on safe third country grounds never get their asylum claims materially examined by Greek authorities. Therefore it is difficult to know how many asylum seekers Turkey has illegally expelled to a country of persecution and to which extent Greece has been involved in indirect refoulement.

# Sammanfattning

Under 2016 slöt EU och Turkiet en överenskommelse om att minska antalet ”irreguljära migranter” som tog sig från Turkiet vidare in i EU. Överenskommelsen innebär att asylsökande som tar sig in i Grekland via Turkiet kommer få sina ansökningar bedömda som ogrundade och återsändas till Turkiet på grunden att Turkiet är ett så kallat ”säkert tredjeland”.

Syftet med denna uppsats är att öka förståelsen av de förpliktelser som EU:s medlemsstater är bundna av när de tillämpar bestämmelser om säkra tredje länder. I uppsatsen undersöks de EU-rättsliga kriterierna för att tillämpa dessa bestämmelser samt vilka begränsningar som internationell rätt sätter på dess tillämpning. Undersökningarna företas huvudsakligen genom bruket av en rättsdogmatisk metod.

Medan majoriteten av bestämmelserna kring säkra tredje länder är okontroversiella, visar sig andra vara en aning diffusa, vilket potentiellt ger medlemsstaterna ett stort tolkningsutrymme vid tillämpandet av bestämmelserna. Därmed går uppsatsen över till att analysera i vilken utsträckning implementeringen av bestämmelserna kring säkra tredje länder på Turkiet är kompatibla med principen om non-refoulement under 1951 års Flyktingkonvention.

Uppsatsen visar på att Turkiets bristande asylprocess potentiellt ökar risken för refoulering. I och med att asylsökande som återförvisas från Grekland till Turkiet aldrig får sina skyddsbehov prövade i sak, är det svårt att fastställa hur många asylsökande som Turkiet felaktigen har utvisat till länder där de riskerar förföljelse. Därmed är det svårt att avgöra till vilken grad Grekland har gjort sig ansvarig till indirekt refoulering.

# 1 Introduction

## 1.1 Framing the problem

As stated by international law, states have a responsibility to examine asylum claims made in their territory.<sup>1</sup> However, generalised assumptions of certain countries as “safe” has come to underpin the European asylum legislation in contrast to the individually assessments of refugee status under international law.<sup>2</sup>

*Safe country of origin, first country of asylum and safe third country* are all concepts under the safe country mechanism.<sup>3</sup> These three concepts have different purposes and apply differently in the asylum framework, but are all intended to restrict access for asylum seekers to substantive asylum procedures within the territory of the European Union (hereinafter the EU).

The concept of safe third country denies the asylum seeker the opportunity to choose his or her host country and removes the state obligation to process each claim in substance.<sup>4</sup> By applying this procedural mechanism the responsibility to examine an asylum claim can be allocated to states said to have primary responsibility for the applicant’s claim.<sup>5</sup> Although international refugee law does not specifically require that an asylum seeker makes his or her claim in the first “safe” country of arrival, present EU law establishes this as a key principal.<sup>6</sup>

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<sup>1</sup> Goodwin-Gill & McAdam (2007), p. 392.

<sup>2</sup> O’Nions (2014), p. 63.

<sup>3</sup> Goodwin-Gill & McAdam (2007), p. 393.

<sup>4</sup> Noll (2000), p. 184.

<sup>5</sup> Goodwin-Gill & McAdam (2007) p. 392.

<sup>6</sup> O’Nions (2014), p. 63.

On 18 March 2016, EU heads of State or Government and the Republic of Turkey signed an agreement with the aim to end the “irregular migration”<sup>7</sup> from Turkey to the EU. Pursuant to this agreement, asylum seekers entering Greece via Turkey will have their applications declared “inadmissible”, i.e. rejected without a substantive examination. The agreement is built upon the notion that Turkey is a safe third country and that the asylum seeker should have lodged his or her asylum application there.<sup>8</sup>

In 2016, the European Commission (hereinafter the Commission) presented a proposal to make safe third country practices mandatory for all EU member states. The proposal has yet to go through, but if it does member states will be obliged to examine the possibility of transferring the asylum seeker to a third state, which he or she transited through, before admitting the asylum seeker access to its asylum procedure.<sup>9</sup>

The implementation of safe third country provisions and the interest to make these rules mandatory for all EU member states motivates an analysis of the notion of safe third country in EU asylum policy. It is generally accepted that the fundamental criterion when considering resort to the notion of safe third country is protection against refoulement,<sup>10</sup> i.e. protection from being returned to a country where there one is likely to face persecution.<sup>11</sup> This motivates an analysis to what extent safe third country practices are compatible with this criterion.

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<sup>7</sup> “Movement of persons to a new place of residence or transit that takes place outside the regulatory norms of the sending, transit and receiving countries.”, European Commission, EMN Glossary and Thesaurus, Irregular migration.

<sup>8</sup> European Commission, Fact Sheet, 4 April 2016.

<sup>9</sup> Proposal for a regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, COM (2016) 467 final, Brussels, 13 July 2016.

<sup>10</sup> Goodwin-Gill & McAdam (2007), p. 391; Lavenex (1999), pp. 12-13.

<sup>11</sup> Goodwin-Gill & McAdam (2007), p. 201.

## 1.2 Aim and research questions

The purpose of the essay is to broaden the understanding of some of the obligations of EU member states, both under EU law and international law, when engaging in safe third country practices. The investigation will focus on the criteria for applying safe third country provisions found in the Directive 2013/32/EU<sup>12</sup> (hereinafter Asylum Procedures Directive or Directive). Moreover, the essay will study the compatibility of safe third country practices with the principle of non-refoulement under the 1951 Convention relating to the Status of Refugees<sup>13</sup> (hereinafter the 1951 Geneva Convention or the Convention).

In the light of this, the essay will seek to answer following sub-questions:

1. What are the criteria for applying the safe third country concept under the Asylum Procedures Directive?
2. To what extent is the implementation of the safe third country provisions, by designating Turkey as a safe third country, compatible with article 33(1) of the 1951 Geneva Convention?

## 1.3 Delimitations

The principle of non-refoulement define the outer limits of international refugee protection and is therefore the primary yardstick for testing the boundaries of asylum policy. Although this principle can be found in many international treaties such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>14</sup> and the Convention for the

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<sup>12</sup> 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), in: Official Journal of the European Union, L 180/60, 29 June 2013.

<sup>13</sup> Convention relating to the Status of Refugees, 28 July 1951, Geneva.

<sup>14</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, New York.

Protection of Human Rights and Fundamental Freedoms<sup>15</sup>, article 33(1) of the 1951 Geneva Convention constitutes the primary basis of non-refoulement.<sup>16</sup> Thus, the essay will exclusively focus on non-refoulement as defined in the 1951 Geneva Convention. As the focus of this essay lies on the safe third country provisions under EU asylum policy, it is the practices of the EU and its member states that are relevant.

Even though the implementation of safe third country provisions can be studied in relation to other non-European countries, Turkey will be the subject of focus due to the boundaries of this essay. Furthermore, Turkey provides an interesting case due to it being of contextual relevance with regards to the current situation. Moreover, the essay will mainly focus on whether a return of an asylum seeker to Turkey creates a risk for that asylum seeker to be expelled to a country of persecution. The essay will not study whether Turkey is to be regarded as a country of persecution itself.

## **1.4 Method and material**

In order to establish the criteria for applying the safe third country concept under the Asylum Procedures Directive the essay will rely upon the usage of a legal dogmatic method. This method entails the systematization and interpretation of relevant legal sources to discern the meaning of the law.<sup>17</sup> The material used for this purpose contains of both primary and secondary sources. Primary sources include relevant provisions in EU asylum legislation. As for secondary sources, communications from the European Commission and doctrine from academic and practitioner experts in the field of EU immigration law have been used.

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<sup>15</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, Rome.

<sup>16</sup> See O’Nions (2014), p. 44; Zimmerman (2011), p. 33.

<sup>17</sup> Sandgren (2015), pp. 43-45.



Establishing to what extent the implementation of the safe third country provisions, by designating Turkey as a safe third country, is compatible with article 33(1) of the 1951 Geneva Convention, requires two components. Firstly, the content and scope of protection under Article 33(1) of the 1951 Geneva Convention will be defined by using a legal dogmatic method.

Secondly, the essay will study the readmission agreement between EU and Turkey, Turkish asylum policy and the situation for asylum seekers allocated in Turkey. For this purpose communications, decisions and press releases by the European Commission and the European Council are included in the material, as well as reports and publications from non-governmental organizations.

## **1.5 Research status**

Rules regulating the allocation of the responsibility to examine an asylum claim have been subject to extensive research during the past decade. Eminent authors such as Goodwin-Gill, McAdam and Legomsky have studied regulations of this kind inter alia, safe third country provisions. These studies also constitute a starting point of this essay. However, no comprehensive study has focused on the actual implementation of the safe third country provisions under the Asylum Procedures Directive. Neither has any exhaustive analysis been made on to what extent the implementation of these provisions on Turkey is compatible with non-refoulement as defined in Article 33(1) of the 1951 Geneva Convention.

## **1.6 Disposition**

*Chapter 2* examines relevant provisions on the concept of safe third country and their interrelationship with readmission agreements.

*Chapter 3* aims to establish states obligations under article 33(1) in the 1951 Geneva Convention when engaging in safe third country practices.

*Chapter 4* examines the implementation of the safe third country provisions on Turkey. The chapter will also examine Turkish asylum policy and practices as well as the situation for asylum seekers in Turkey.

*Chapter 5* is devoted to analysing and answering the research questions of this essay by using the findings from previous chapters.

## **2 The Concept of Safe Third Country in the European Legal Framework**

This chapter examines the concept of safe third country through applicable EU law. The chapter also deals with the implementation of the safe third country provisions through readmission agreements.

### **2.1 The Asylum Procedures Directive**

Under article 33 of the Asylum Procedures Directive member states can refrain from examining whether an applicant qualifies for international protection if the claim is considered inadmissible. In addition to claims which due to the Dublin Regulation<sup>18</sup> are the responsibility of another member state,<sup>19</sup> a claim can be considered inadmissible only on the five grounds listed in article 33(2) of the Directive. One of the grounds is if there is a safe third country for the applicant, as defined in article 38 of the Directive.<sup>20</sup>

Article 38 of the Asylum Procedures Directive articulates a set of criteria and consequences for claims from individuals coming to the EU through countries where it is presumed that they could have claimed, and if qualified, enjoyed protection. Thus, the safe third country notion is based on the hypothesis that the applicant could and should have applied for protection in a third country.<sup>21</sup>

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<sup>18</sup> Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), in: Official Journal of the European Union, L 180/31, 29 June 2013.

<sup>19</sup> Article 33(1), Asylum Procedures Directive.

<sup>20</sup> Article 33(2)(c), Asylum Procedures Directive.

<sup>21</sup> Peers (2015), p. 267.

Member states may reject a claim as inadmissible if the allegedly safe third country fulfils a set of cumulative criteria listed in 38(1), requiring (a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion; (b) there is no risk of “serious harm” in the sense of article 15 of the Qualification Directive;<sup>22</sup> (c) the principle of non-refoulement in accordance with the 1951 Geneva Convention is respected; (d) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected; and (e) that it be possible to request refugee status and, if applicable, to receive protection under the 1951 Geneva Convention.

Pursuant to article 38(1)(e) of the Asylum Procedures Directive, when applying the concept of safe third country, the applicant who is to be readmitted must have the possibility to request refugee status, and if found to be a refugee, to receive protection *in accordance with* the 1951 Geneva Convention. According to the United Nations High Commissioner for Refugees (hereinafter UNHCR) this provision means that the designated safe third country has to offer access to refugee status and that the rights of the 1951 Geneva Convention must be ensured in national law of the third country, including ratification of the 1951 Geneva Convention, and in practice.<sup>23</sup> However, the Commission has underlined that the concept of safe third country as defined in the Asylum Procedures Directive requires that the possibility exists to receive protection in accordance with the Convention, but does not require that the safe third country has ratified that Convention without geographical reservation.<sup>24</sup>

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<sup>22</sup> “Serious harm” under Article 15 of the Qualification Directive (2011/95/EU) includes death penalty, inhuman or degrading treatment or punishment, or individual threat from indiscriminate violence in situations of international or internal armed conflict.

<sup>23</sup> UNHCR, Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey as part of the EU-Turkey Cooperation in Tackling the Migration Crisis under the safe third country and first country of asylum concept, 23 March 2016, p. 6.

<sup>24</sup> Communication from the Commission to the European Parliament and the Council, on the State of Play of Implementation of the Priority Actions under the European Agenda on Migration, COM(2016) 85 final, 10 February 2016, Brussels, p. 18.

Aside from establishing these criteria, article 38(2) requires states to adopt certain procedural safeguards in their national legislation in order to apply the safe third country concept. Article 38(2)(a) obliges states to adopt national rules requiring a connection between the applicant and the third country concerned, including the admittance to the territory of the country concerned and reasonableness for the applicant to go to that and apply for asylum there.

Article 38(2)(b) requires member states wanting to apply the safe third country concept to establish rules on methodology by which the competent authorities satisfy themselves that the concept may be applied to a particular country or applicant. The member states may conduct a case-by-case assessment of the safety of a country for a particular applicant and/or designate certain countries as “generally safe”. Furthermore, an individual assessment must be possible if an applicant challenges the safety of the safe third country for him or herself in his or her circumstances. Thus, the presumption of safety for a certain country which is considered to fulfil the criteria in article 38(1) must be open to rebuttal. The applicant shall also have the right to challenge the existence of links between him or her and the third country.<sup>25</sup>

When implementing a decision solely based on article 38, member states shall inform the applicant accordingly and provide him or her with a document informing the authorities of the third country, in the language of that country, that the application has not been examined in substance.<sup>26</sup>

Member states applying safe third country practices are bound to periodically inform the Commission of which countries that are designated as “safe” in accordance with the provisions of article 38.<sup>27</sup> This requirement raises the possibility for the Commission to act in the event that member states are misapplying the criteria.<sup>28</sup>

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<sup>25</sup> Article 38(2)(c), Asylum Procedures Directive.

<sup>26</sup> Article 38(3), Asylum Procedures Directive.

<sup>27</sup> Article 38(5), Asylum Procedures Directive.

<sup>28</sup> Peers (2015), p. 270.

In cases in which the designated safe third country does not permit the applicant to enter its territory, member states are obliged to examine the claim in substance in accordance with the basic principles and guarantees laid down in the Asylum Procedures Directive.<sup>29</sup>

## 2.2 Readmission agreements

The existence of safe third country provisions in national law and the ability to effectively implement these are two separate things. International customary law imposes the obligation on states to take back their own citizens. However, there is no obligation for states to readmit third country nationals and a legal basis for safe third country provisions under international law is therefore not definitely established.<sup>30</sup> Thus, to obtain cooperation for readmitting third country nationals readmission agreements are a necessary tool for the implementation of safe third country provisions.<sup>31</sup>

It is important to note that a readmission agreement itself does not necessarily make specific provisions for asylum seekers and refugees, nor does it require the receiving state to assess an asylum claim. It is simply an agreement through which the destination state consents to readmitting third country nationals who have transited through their territory.<sup>32</sup>

Since the 1990s European states have pursued to negotiate agreements on readmissions with third countries.<sup>33</sup> Today most states continue to negotiate their own agreements, but the Treaty on the Functioning of the European Union provides competence to the EU to sign and ratify own readmission agreements.<sup>34</sup> So far the EU has concluded readmission agreements with

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<sup>29</sup> Article 38(4), Asylum Procedures Directive.

<sup>30</sup> See e.g. Lavenex (1999), p. 78; Coleman (2009) pp. 28, 41.

<sup>31</sup> Lavenex (1999), p. 79, Coleman (2009), pp. 66-68.

<sup>32</sup> See Legomsky (2003), p. 576; Goodwin-Gill & McAdam (2007), p. 407.

<sup>33</sup> O'Nions (2014), p. 167.

<sup>34</sup> Article 79(3), Consolidated version of the Treaty on the Functioning of the European Union.

Hong Kong, Macao, Sri Lanka, Albania, Russia, Ukraine, Bosnia & Herzegovina, Montenegro, Serbia, Moldova, Pakistan, Georgia, Armenia, Azerbaijan, Turkey and Cape Verde.<sup>35</sup> Several of these states are themselves refugee producing countries.<sup>36</sup>

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<sup>35</sup> European Commission, Migration and Home Affairs, Return & Readmission.

<sup>36</sup> Eurostat, First time asylum applicants in the EU-28 by citizenship, Q4 2015 – Q4 2016.

# **3 Responsibilities of States under the Principle of Non-refoulement**

In this chapter the focus is shifted from a European context to an international context. In order to establish the outer boundaries of safe third country practices and the obligations that EU member states are bound when applying these, it is necessary to examine the content of non-refoulement as enshrined in article 33(1) of the 1951 Geneva Convention.

## **3.1 Non-refoulement in the 1951 Geneva Convention**

The Geneva Convention relating to the Status of Refugees of 1951 is the primary source of international refugee law and was designed to establish international minimum standards on refugee protection.<sup>37</sup> The principle of non-refoulement, laid down in article 33(1) of the 1951 Geneva Convention, states that:

“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.”

Over the years, the principle of non-refoulement has gained the status of a peremptory norm of international law, making it universally binding on all states irrespective of their assent to the 1951 Geneva Convention.<sup>38</sup>

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<sup>37</sup> Lavenex (1999), pp. 9-10.

<sup>38</sup> Lavenex (1999), p.13; UNHCR, The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93, 31 January 1994.



This principle limits the prerogative of states to decide the entry and stay of people in need of protection.<sup>39</sup> It applies to refugees as defined in article 1(A) of the Convention, that is “any person who, owing to a 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, unwilling to avail himself of the protection of that country.”<sup>40</sup>

According to UNHCR, the principle of non-refoulement applies to individuals irrespective of if they have been formally granted refugee status or not.<sup>41</sup> Goodwin-Gill and McAdam support this view and argue that protection against refoulement extends in principle, to every individual who has a well-founded fear of persecution, or where there are substantial grounds for believing that the individual would be in danger of torture, inhuman or degrading treatment or punishment if returned to a particular country.<sup>42</sup> Thus, the protection seeker is covered by article 33 as if a refugee, until a status determination would discredit his or her claim, enjoying what may be considered “presumptive” refugee status.<sup>43</sup>

Non-refoulement, as enshrined in article 33, does not constitute a right to asylum as such,<sup>44</sup> but establishes the obligation for states not to return individuals demanding international protection to countries where they would risk persecution.<sup>45</sup>

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<sup>39</sup> Linderfalk, pp. 184-186; Lavenex (1999), p. 12.

<sup>40</sup> Article 1, Convention relating to the Status of Refugees, 28 July 1951, Geneva.

<sup>41</sup> UNHCR, *Safeguarding Asylum No. 82 (XLVIII) - 1997*, 17 October 1997, No. 82, para. (d)(i).

<sup>42</sup> Goodwin-Gill & McAdam (2007), pp. 233-234.

<sup>43</sup> Coleman (2009), p. 236; Goodwin-Gill & McAdam (2007), pp. 232-233.

<sup>44</sup> Legomsky (2003), p. 612; O’Nions (2014), p. 45.

<sup>45</sup> Lavenex (1999), p. 13.

## 3.2 Protection from indirect refoulement

The notion that article 33 prohibits both direct and indirect refoulement is not controversial. Article 33 stipulates that refoulement is prohibited “in any manner whatsoever”, which supports the view that states are prohibited from removing a refugee directly to a state of persecution, as well as indirectly removing him or her to a state that is in turn likely to return the refugee to a state of persecution.<sup>46</sup> Thus, the country in which an asylum application is lodged is ultimately responsible for assuring non-refoulement, even if that country returns the applicant to a third country.<sup>47</sup> UNHCR sees the responsibility for the asylum application as “primary” for the country in which it has been lodged, meaning that this country shall ensure the safety of any third country to which it is considering transfer.<sup>48</sup>

It has generally been assumed that “effective protection” is the predicate for returning an asylum seeker to a third country.<sup>49</sup> Hence, in order for states to return an asylum seeker to a third country, without violating the principle of non-refoulement, the sending state must make sure that the third country in question can provide “effective protection” for the asylum seeker.<sup>50</sup> However, identifying what protection against indirect refoulement precisely requires has proven to be complicated. For instance, different interpretations of the refugee definition among states or a lacking determination system for refugee status may result in refoulement. In a situation where a third country is likely to take a more restrictive approach to interpretation or procedure, the sending state risks committing refoulement by sending a person to that third state.<sup>51</sup>

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<sup>46</sup> Foster (2007), p. 244; Coleman (2009), p. 235.

<sup>47</sup> Legomky (2003), p. 614.

<sup>48</sup> UNHCR, UNHCR's Observations on the European Commission's Proposal for a Council Directive on Minimum Standards on Procedures for Granting and Withdrawing Refugee Status, July 2001, para. 36; UNHCR, UNHCR's Observations on the European Commission's Proposal for a Council Regulation Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in One of the Member States by a Third-Country National, 1 February 2002, para. 5.

<sup>49</sup> See Legomsky (2003), p. 573; Goodwin-Gill & McAdam (2007), p. 393.

<sup>50</sup> Goodwin-Gill & McAdam (2007), pp. 393-394.

<sup>51</sup> Foster (2007), pp. 245-246; Legomsky (2003), p. 585.

The issue is further complicated by the fact that there is no existing international adjudicatory body with the authority to formulate authoritative and binding determinations regarding the correct interpretation of the 1951 Geneva Convention. Although UNHCR's supervisory role pursuant to article 35 of the 1951 Geneva Convention, it lacks the authority to make such determinations.<sup>52</sup>

While the legal framework of the third country is important when determining whether or not it is "safe", even more important is what that third country does in practice.<sup>53</sup> UNHCR has found that protection in a third country is only effective if the asylum seeker does not fear persecution there, has access to means of subsistence sufficient to maintain an adequate standard of living and has his or her fundamental rights respected in accordance with international standards. In addition to this the third state must have agreed to admit the individual as a refugee or asylum seeker, grant access to fair and efficient determination procedures and comply with international refugee and human rights law in practice and not just in theory. These elements, while not exhausting, are critical factors for the appreciation of "effective protection" in the context of returns to third countries.<sup>54</sup>

The question of what the content of protection must be in the third country leads us to the question of whether the third state must be legally bound by the same obligations towards refugees as the sending state. The UNHCR has taken the stand that the third state's ratification of the 1951 Geneva Convention should not be a prerequisite for a transfer to that country. Instead, it is sufficient that it can be demonstrated that the third country has developed practices which are in accordance with the 1951 Geneva Convention.<sup>55</sup>

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<sup>52</sup> Foster (2007), p. 246.

<sup>53</sup> Goodwin-Gill & McAdam (2007), pp. 393-394.

<sup>54</sup> UNHCR Lisbon Expert Roundtable, Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers, 9–10 December 2002, para. 15.

<sup>55</sup> *Ibid.* para. 15 (e).

When it comes to the question of a fair refugee status determination procedures, the 1951 Geneva Convention does not specifically require one to be made. According to Coleman, article 33(1) itself does not contain a state obligation to determine the status of asylum seekers. However, Legomsky and Foster argue, in contrary to Coleman, that a fair status determination is an essential component of article 33 and that without a fair status determination, there is a high risk for violations of non-refoulement.<sup>56</sup>

As can be seen, states are prohibited from returning an asylum seeker to a third country if this would result in indirect refoulement. However, there is no consensus on what the protection from indirect refoulement requires in practice. While it is argued that article 33(1) itself does not contain the right to a status determination, others uphold the importance of a fair status determination for the protection from indirect refoulement.

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<sup>56</sup> Legomsky (2003), pp. 654-655; Foster (2007), p. 249.

## 4 Turkey as a Safe Third Country

The purpose of this chapter is to contextualize the implementation the safe third country concept in conjunction with readmission agreements by examining the readmission between the EU and Turkey and the designation of Turkey as a safe third country. Furthermore, the chapter will study Turkish asylum policy and practices and the situation for asylum seekers allocated in Turkey.

### 4.1 The EU-Turkey Statement

On 18 March 2016, the EU and Turkey reached an agreement on a number of action points discussed since November 2015, including the issues relating to refugees. The content of the statement has not been made public. However, the Commission has explained the content of the statement through press releases. Under the agreement, all “irregular migrants” crossing from Turkey into the Greek Island will be returned to Turkey. People applying for asylum in Greece will have their application processed individually by the Greek authorities. Those not applying for asylum or whose asylum application is deemed inadmissible under the Asylum Procedures Directive will be returned to Turkey.<sup>57</sup>

The Commission has supported Greece by providing it with all elements to conclude that Turkey is a safe third country within the meaning of the Asylum Procedures Directive, for the purpose of returning irregular migrants from the Greek islands to Turkey under the terms of the EU-Turkey Statement.<sup>58</sup> Hence, under the agreement, all applicants who have entered Greece via Turkey, will have their applications deemed as inadmissible on safe third country grounds under article 38 of the Asylum Procedures Directive and be

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<sup>57</sup> European Council, Press Release, EU-Turkey Statement 18 March 2016.

<sup>58</sup> European Commission, Fact Sheet, 15 June 2016.

returned to Turkey. The legal basis of the returns is a bilateral readmission agreement between Greece and Turkey and the EU-Turkey Readmission Agreement.<sup>59</sup>

The readmission agreement between the EU and Turkey contains no explicit referral to refugees. Instead, it contains a non-affected clause which states that the readmission agreement shall be without prejudice to the rights, obligations and responsibilities of the EU, its member states and Turkey arising from international law, including international conventions to which they are party. Among other, the clause explicitly mentions the 1951 Geneva Convention. Moreover, the agreement stipulates that it shall be without prejudice to the Asylum Procedures Directive.<sup>60</sup> In sum, this means that both the EU and Turkey are obliged to respect their obligations under the 1951 Geneva Convention when applying the readmission agreement. Moreover, as for the EU, the application of the readmission agreement must also be in accordance with the provisions laid down in the the Asylum Procedures Directive.

## **4.2 Turkish asylum policy**

Turkey maintains a “geographical limitation” to the 1951 Geneva Convention,<sup>61</sup> thus recognizing refugees originating only from Europe. However, the “geographical limitation” policy does not mean that Turkey does not undertake any legal obligations toward refugees from non-European countries of origins. It only means that Turkey considers itself bound by the 1951 Geneva Convention obligations per se only in regard to such “European” refugees. Furthermore, Turkey’s current domestic law framework for asylum creates a set of binding protection obligations towards everyone seeking international protection in Turkey regardless of their

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<sup>59</sup> European Commission, Fact Sheet, 8 December 2016.

<sup>60</sup> Ibid. para. 18.4.

<sup>61</sup> UNHCR, State Parties to the 1951 Convention relating to the Status of Refugees, p. 5.

country of origin.<sup>62</sup> However, as shown in subchapter 3.1, non-refoulement has gained the status of a peremptory norm, meaning that Turkey is obliged to protect individuals from refoulement, regardless of their origin.

In April 2013 Turkey adopted an EU-inspired new Law on Foreigners and International Protection (hereinafter LFIP). LFIP constitutes the first ever law on asylum and international protection since the establishment of the Turkish Republic.<sup>63</sup> Under the national asylum legislation non-European refugees fleeing persecution are granted a “conditional refugee” status. These are however entitled to a lesser set of right and entitlements than those with refugee status under the 1951 Geneva Convention. Non-Europeans who do not fulfill the criteria for “conditional refugee” status, but who would be subjected to death penalty or torture in their country of origin if returned, or would be at “personalized risk of indiscriminate violence” due to situations or war or internal armed conflict, qualify for “subsidiary protection” status.<sup>64</sup> Furthermore, LFIP also contains safe third country provisions, similar to those in the Asylum Procedures Directive.<sup>65</sup>

Syrians represent a particular case, benefiting from group-based “temporary protection” regime formalized by a Regulation on Temporary Protection.<sup>66</sup> The idea behind this temporary protection regime is to host Syrians until the conflict is over.<sup>67</sup> Moreover, the Turkish temporary protection status grants Syrians the right to legal stay, protection from refoulement and access to some basic rights and services.<sup>68</sup> However, this temporary protection status does

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<sup>62</sup> Asylum Information Database (AIDA), Country Report: Turkey, ed. European Council on Refugees and Exiles (ECRE), December 2015, p. 15.

<sup>63</sup> Ulusoy, Orçun, *Turkey as a Safe Third Country?*, University of Oxford, Faculty of Law, 20 March 2016.

<sup>64</sup> Asylum Information Database (AIDA), Country Report: Turkey, ed. European Council on Refugees and Exiles (ECRE), December 2015, pp. 17-18.

<sup>65</sup> Articles 72, 74, Law on Foreigners and International Protection.

<sup>66</sup> Asylum Information Database (AIDA), Country Report: Turkey, ed. European Council on Refugees and Exiles (ECRE), December 2015, p. 106.

<sup>67</sup> Peers, Steve, Roman, Emanuela, *The EU, Turkey and the Refugee Crisis: What could possibly go wrong?*, 5 February, 2016.

<sup>68</sup> Asylum Information Database (AIDA), Country Report: Turkey, ed. European Council on Refugees and Exiles (ECRE), December 2015, p. 15, 108.

not grant protection in its full sense, as enshrined in the 1951 Geneva Convention.<sup>69</sup>

In addition to the establishment of the new asylum laws a new civilian Directorate General of Migration Management (hereinafter DGMM) was created and mandated to take charge of migration and asylum. The DGMM is still in the process of establishing full operational command on the asylum case load and building a new asylum system from scratch.<sup>70</sup>

As for readmission agreement, it can be said that Turkey has its own agreements on readmission with several countries, among them Kyrgyzstan, Nigeria, Yemen and Syria. Furthermore, on 7 April 2016, barely a month after the adoption of the EU-Turkey Statement, Turkey approved a readmission agreement with Pakistan, enabling returns of Pakistani migrants. The agreement's central aim is to stem mass migration due to the EU-Turkey statement under which Pakistani migrants have been sent back to Turkey. Moreover, it has been reported that Turkey has offered to sign readmission agreements with 14 other countries, among these Iran, Iraq, Afghanistan and Eritrea.<sup>71</sup>

### **4.3 The situation for asylum seekers in Turkey**

Although Turkish national legislation provides for status determination procedures, it has been reported that Turkish migration officers often act against the legislation by inter alia, denying asylum applications without proper examination and executing illegal deportations.<sup>72</sup> For instance, there

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<sup>69</sup> Peers, Steve, Roman, Emanuela, *The EU, Turkey and the Refugee Crisis: What could possibly go wrong?*, 5 February, 2016.

<sup>70</sup> Asylum Information Database (AIDA), Country Report: Turkey, ed. European Council on Refugees and Exiles (ECRE), December 2015, p. 15.

<sup>71</sup> Kart, Emine, *Turkey seeks readmission deals with Iraq & Iran*, in: *Hürriyet Daily News*, 12 April 2016; Hydari, Zaid, *Understanding the EU-Turkey Deal*, Huffington Post, 4 November 2016.

<sup>72</sup> Ulusoy, Orçun, *Turkey as a Safe Third Country?*, University of Oxford, Faculty of Law, 20 March 2016.



have been incidents of collective expulsions of Iranian and Afghan asylum seekers to their country of origin, while still awaiting their status determinations.<sup>73</sup>

Furthermore, Turkey does not have a good record when it comes to respecting the principle of non-refoulement. At the end of 2015, months before signing the EU-Turkey Statement, Amnesty International and Human Rights Watch denounced an increase in deportations, push-backs and physical violence against asylum seekers trying to cross the Turkish border coming from Syria or Iraq, or trying to enter Greece from Turkey.<sup>74</sup> Reports from human rights organizations have shown incidents of Syrian refugees being shot and beaten at the border when trying to reach Turkish territory.<sup>75</sup> There have also been incidents of collective expulsion of Syrian refugees to Syria.<sup>76</sup>

It has been argued that the personnel at the newly established DGMM lack experience and capacity to fully implement the status determination procedure provided by LFIP.<sup>77</sup> Amnesty International has repeatedly requested information regarding the number of protection claims processed by the Turkish authorities and the number of people provided with protection status. However, these requests have been refused on the grounds that it is “confidential”.<sup>78</sup>

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<sup>73</sup> Amnesty International, *Turkey Safe Country Sham Revealed as Dozens of Afghans Returned Hours After EU Refugee Deal*, 23 March 2016.

<sup>74</sup> Amnesty International, *Europe’s Gatekeeper: Unlawful Detention and Deportation of Refugees from Turkey*, 16 December 2015, p. 10; Human Rights Watch, *Turkey: Syrians Pushed Back at the Border*, 23 November 2015.

<sup>75</sup> Human Rights Watch, *Turkey: Border Guards Kill and Injure Asylum Seekers Border Lock-Down Puts Syrian Lives at Risk*, 10 May 2016.

<sup>76</sup> Amnesty International, *Europe’s Gatekeeper: Unlawful Detention and Deportation of Refugees from Turkey*, 16 December 2015, p. 10; Amnesty International, *Turkey: Illegal Mass>Returns of Syrian Refugees Expose Fatal Flaws in EU-Turkey Deal*, 1 April 2016.

<sup>77</sup> Ulusoy, Orçun, *Turkey as a Safe Third Country?*, University of Oxford, Faculty of Law, 20 March 2016.

<sup>78</sup> Amnesty International, *Turkey Safe Country Sham Revealed as Dozens of Afghans Returned Hours After EU Refugee Deal*, 23 March 2016.

## **5 Analysis and conclusions**

It has been concluded in subchapter 2.1 what the criteria are for applying the safe third country concept, as enshrined in the Asylum Procedures Directive. However, some of these criteria raise a number of questions. The purpose of subchapter 6.1 is therefore to summarize and discuss these questions.

Subchapter 6.2 is devoted to analyse to what extent implementation of the safe third country concept on Turkey is compatible with the article 33(1) of the 1951 Geneva Convention.

### **5.1 Criteria for applying the safe third country concept**

As shown in subchapter 2.1, the safe third country provisions laid down in the Asylum Procedures Directive contain both substantive and procedural elements which must be complied in order for them to be applicable.

The substantive elements of the safe third country provisions can be found in article 38(1) of the Directive. While articles 38(1)(a)-(d) set up different variations of protection against ill-treatment or persecution, the actual meaning of article 38(1)(e) has proven to be quite indistinct. Although article 38(1)(e) requires that there is a possibility to request refugee status, and if eligible, be granted international protection *in accordance with* the 1951 Geneva Convention, there is no consensus on whether this provision requires that the designated third country has ratified the Convention without geographical limitation. However, the Commission has stated that “in accordance with” does not mean actual protection under 1951 Geneva Convention, it only requires the third country to provide the transferred

individual with his or her rights under the Convention, if and when his or her status is determined.

Furthermore, article 38(1)(e) does not set up any requirements that an asylum procedure shall be in place in the third country for a member state to legally transfer an applicant there. It simply requires that there exists a possibility to request refugee status. However, the Asylum Procedures Directive does not explain what standard such a status determination procedure should hold. The lack of description on these parts could be viewed as giving the member states a considerable scope of interpretation when applying the concept.

As stated above, certain procedural safeguards apply to the safe third country concept. Articles 38(2)(b)-(c) are quite clear, stating that member states shall have national rules on the methodology for when the safe third country concept can be applied to a particular country or applicant, and rules allowing, as minimum, the applicant to challenge the application of the safe third country concept in his or her particular circumstances. However, certain aspects of article 38(2)(a) raise some questions. According to article 38(2)(a) member states wanting to apply the safe third country concept must establish rules laid down in national law requiring a “reasonable” connection between the third country and the applicant. No further details are provided when it comes to defining what a “reasonable” connection is. Does the asylum seeker have to stay in the third country for a certain amount a time for the connection to be “reasonable”, or is a mere transit sufficient? Given this point, the formulation of article 38(2)(a), arguably, leaves considerable scope for the member states to define what kinds of links between the asylum seeker and the third country are required.

## **5.2 Returns to Turkey – indirect refoulement?**

As stated previously in this chapter, the provisions on the concept of safe third country potentially leave the member states with a rather wide scope of interpretation when practicing the concept. Thus, an analysis of to what extent

these implementations are compatible with the principle of non-refoulement is motivated. The analysis will focus on whether Greece, when returning asylum seekers to Turkey on safe third country grounds, is involving in refoulement.

As shown in Chapter 3, the principle of non-refoulement in article 33(1) of the 1951 Geneva Convention neither constitutes a right to asylum as such, nor does it explicitly prohibit states from returning asylum seekers to third countries. However, article 33(1) equally prohibits both direct and indirect refoulement. Henceforth, an expulsion of an asylum seeker to a third country, in which territory there is no risk of persecution, but which would send him or her onwards to a country where there is, is a violation of refoulement. At this moment, there is no consensus on the content of protection against indirect refoulement. While the term “effective protection” has been frequently used as a requirement for sending an asylum seeker to a third country, the term lacks a clear definition. However, it is obvious that the legal framework in the third country plays an important part.

Turkey has ratified the 1951 Geneva Convention with a limited geographical scope, meaning that Turkey is only obliged to determine those individuals as refugees that have fled from events taking place in Europe. Nonetheless, the protection from refoulement applies to individuals regardless if they have been formally granted refugee status or not, meaning that non-European asylum seekers enjoy the protection of article 33(1) despite the fact that they cannot enjoy refugee status. Since the ratification of the 1951 Geneva Convention should not be a prerequisite for returning an asylum seeker to a third country, it is sufficient that it can be demonstrated that Turkey has developed practices which are in accordance with the Convention.

Despite the geographical limitation, Turkey has a legal framework in place for granting protection to those fleeing persecution from non-European countries. Although this protection does not grant individuals the same rights as they would acquire under the 1951 Geneva Convention, it does grant

protection from refoulement. However, as stated in subchapter 3.2, Greece cannot rely itself on the fact that Turkey is in de jure compliance with article 33(1). Likewise, Greece must also take into regard Turkey's de facto compliance.

As shown in subchapter 4.3, the Turkish Migration Office DGMM has been criticized for lacking the experience and capacity to fully implement status determination procedures. Furthermore, it has been reported that migration officers often act in divergence with the law. Given these points, there seems to be a discrepancy between de jure and de facto aspect of the Turkish asylum policy. As argued by Legomsky, a fair status determination is an essential factor for protection from indirect refoulement. As can be seen, the Turkish status determination procedure cannot be regarded as well-functioning, putting returned asylum seekers at risk for refoulement.

However, asylum seekers returned from Greece to Turkey on safe third country grounds never get their asylum claims materially examined by Greek authorities. Therefore, it is difficult to know how many of the returned asylum seekers Turkey has wrongfully expelled to a country of persecution and to which extent Greece has been involved in indirect refoulement. In order to assess this, the importance of fair status determination in the third country cannot be stressed enough.

Presently, Turkey has its own readmission agreements while simultaneously negotiating agreements with additional 14 countries. On top of that Turkey has safe third country rules of its own laid down in its national asylum legislation. Arguably, this could increase a risk for refoulement. Supposing that Greece returns an asylum seeker to Turkey on safe third country grounds, that asylum seeker could be subsequently returned to another third country considered as safe by Turkey, in order to later be returned from that country to his or her country of origin where there is a risk for persecution.

In conclusion, by examining the implementation of the safe third country provisions on Turkey it has been shown that the EU allows members states to return asylum seekers to third countries which lack proper functioning asylum procedures and regularly engages in refoulement. Although, the Asylum Procedures Directive obliges the member states to respect the principle of non-refoulement when engaging in safe third country practices, one can question if this is respected in practice.

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