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**TURKEY: BETWEEN EDEN AND HADES**

**REVISITING NATION STATE PRACTICE THROUGH THE FIELD  
OF ASYLUM IN TURKEY AND ITS PATH TO EU ACCESSION**

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# Contents

<b>SUMMARY</b>	<b>1</b>
<b>PREFACE</b>	<b>2</b>
<b>ACKNOWLEDGEMENTS</b>	<b>3</b>
<b>ABBREVIATIONS</b>	<b>4</b>
<b>1 INTRODUCTION</b>	<b>6</b>
1.1 Conceptual Framework	6
1.2 Methodology	8
1.3 Construction of the Legal Field – Turkish Asylum Policy at a Glance	9
1.4 Outline of Chapters	12
<b>2 HUMAN RIGHTS OF REFUGEES IN TURKEY</b>	<b>13</b>
2.1 Procedural Rights	13
2.1.1 <i>Access to Asylum for European Refugees</i>	13
2.1.2 <i>Access to Asylum at Frontiers and in Guest Houses</i>	14
2.1.2.1 Frontiers and Transit Zones	14
2.1.2.2 Guest Houses	15
2.1.3 <i>Two Headed System: UNHCR and MOI</i>	17
2.1.4 <i>Appeal Rights: Effective Remedy in the Light of ECtHR</i>	18
2.2 Social Rights	20
2.2.1 <i>RSD Waiting Process</i>	20
2.2.2 <i>Access to Rights</i>	21
2.2.2.1 Residence Fees	21
2.2.2.2 Freedom of Movement	22
2.2.2.3 Access to Education	23
2.2.2.4 Access to Healthcare	23
2.2.2.5 Access to Social Support	24
2.2.3 <i>Sentenced to Informality: Access to Work</i>	25
2.3 Perspective	28
<b>3 EUROOPENIZATION&amp; SECURITIZATION: ASYLUM ON THE PATH TO EU MEMBERSHIP</b>	<b>30</b>
3.1 Europeanization of Asylum	30
3.1.1 <i>Partial Europeanization – Changes in Turkey</i>	30

<b>3.1.2</b>	<b><i>CEAS – Turkey and Draft Bill</i></b>	<b>32</b>
3.1.2.1	Qualification Directive	33
3.1.2.2	Procedures Directive	34
<b>3.1.3</b>	<b><i>Dublin System – IHRL Responsibilities and Turkey</i></b>	<b>35</b>
3.1.3.1	Responsibility under the Dublin System in ECtHR decisions	36
3.1.3.2	Sovereignty clause – Suspension of Dublin Returns	37
3.1.3.3	Turkey - Dublin Relationship	38
<b>3.2</b>	<b>Securitization Process</b>	<b>38</b>
<b>3.2.1</b>	<b><i>Dilemma: EU Negative List, Schengen Visa and Turkey</i></b>	<b>39</b>
<b>3.2.2</b>	<b><i>The nexus of the Irregular Migration-Schengen Regime, Asylum and Turkey</i></b>	<b>41</b>
3.2.2.1	Irregular Migration-Border Controls Relation	41
3.2.2.2	Irregular Migration - Asylum – Borders Relation	43
<b>3.2.3</b>	<b><i>Readmission Agreements</i></b>	<b>44</b>
<b>3.3</b>	<b>Perspective</b>	<b>47</b>
<b>4</b>	<b>OVERVIEW: HUMAN RIGHTS V. SOVEREIGNTY</b>	<b>49</b>
4.1	Whose Freedom?	49
4.2	Whose Security?	51
4.3	Whose Justice?	53
<b>5</b>	<b>CONCLUSION</b>	<b>55</b>
	<b>BIBLIOGRAPHY</b>	<b>57</b>
	<b>TABLE OF CASES</b>	<b>65</b>

# Summary

This thesis looks at the asylum policy of Turkey, on its path to EU accession. This thesis accepts the hypothesis that a rigid nation state practice is a hindrance to the development of human rights and examines this issue in the context of Turkey. The research question of this thesis asks; is there a possibility to gain decent life conditions for refugees in Turkey? Is the EU membership/accession process a way to transform the Turkish nation-state practice to a direction where having a decent, human rights-based asylum/migration policy is possible?

The thesis begins with a glance at the historical background of asylum in Turkey and how the policy has developed from the time of the establishment of Turkey as a nation state, until the current time.

This thesis then examines the current situation of asylum seekers in Turkey; their access to asylum procedures and their access to rights. It looks at national legislation governing asylum seekers and analyses these laws in light of the international human rights law responsibilities of Turkey.

The next section examines whether the EU policy on asylum and migration, which Turkey should harmonize its legislation with, can remedy the human rights deficiencies found in Turkish asylum and refugee legislation. Furthermore, it examines related EU acquis in the field of asylum and migration, looking at issues of Europeanization and securitization of the migration/asylum field.

The final part of this thesis takes the principles contained in the Common European Asylum System, the common “area of freedom, security and justice” policy, and questions whose freedom, whose justice and whose security is being talked about.

This thesis concludes, after having analyzed the relevant policies of the EU and Turkey relating to asylum and refugees, that the EU acquis will work to partly develop the field of asylum in Turkey, however to avoid the trap of securitization, the thesis highlights the importance of Turkey taking a human rights policy over a nation state based approach.

# Preface

*There's certainly no greater pain than losing one's homeland.<sup>1</sup>*

Mounting economic and political inequalities, all around the world have led to a growing demand for migration. States are faced with a 'sovereignty versus migration' challenge and issues of asylum and migration have risen to the top of the national and international political agendas. Due to this, the international migration law regime today is under the pressure of the current political discourse and the outcomes of globalization.

Modern welfare states are fundamentally based on the citizenship link, which allows their members to enjoy numerous social rights. For others the only option to have access to these rights is trying to step into "their" territory. The movement of people all around the world is based on trying to reach decent life conditions, which, in general, are comprised of the basic rights of every individual human being. Suffering may start in the home country where an individual feels a need to leave, and it may continue on the way to a destination country, maybe at the hands of traffickers, smugglers, or officials of a third state. The ones who are 'lucky' enough to reach their destination, however, usually face a second round of this conflict.

People flee from their "hades" to reach "eden" where they hope to have a life lived in dignity. Europe as a shining model of democracy, human rights and the welfare system seems for many others like heaven - a final destination - however problems do not end even in Europe, where they are not always welcomed.

This thesis will be focusing on the place between Hades/hell and Eden/heaven called *Araf* (limbo) where, in the afterlife, people are kept before they cross to hell or heaven depending on their faith, according to Islamic believes. Turkey, between Europe and the East, is the *Araf* where refugees wait until they are resettled to third countries or sent back to their own countries. While believing that there is no hell or heaven on earth, which is symbolized by particular countries, this thesis tries to show the current conditions and potential orientation of asylum in Turkey, on its path to European Union membership.

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<sup>1</sup> Euripides, Medea

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# Abbreviations

CEAS	Common European Asylum System
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CRS51	1951 Convention relating to the Status of Refugees
CRC	Convention on the Rights of the Child
DHRI	Declaration on the Human rights of Individuals who are not Nationals of the Country in Which They Live
EEC	European Economic Community
EC	European Community
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECJ	Court of Justice of the European Union
EU	European Union
HRW	Human Rights Watch
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IHRL	International Human Rights Law
ILO	International Labour Organization
JHA	Justice and Home Affairs
MOI	Ministry of the Interior
NAP	Turkish National Action Plan for the Adoption of the European Union Acquis in the Field of Asylum and Migration
NGO	Non Governmental Organizations
OECD	Organization for Economic Cooperation and Development
PD	Procedures Directive / 2005 European Union Council Directive on Minimum Standards on Procedures for Granting and Withdrawing Refugee Status

RSD	Refugee status Determination
SIGH	Social Insurance and General Health
UNHCR	Office of the United Nations High Commissioner for Refugees
UDHR	Universal Declaration of Human Rights
QD	Qualification Directive / 2004 European Union Council Directive on Qualification and status as Refugees or Persons otherwise in Need of International Protection



# 1 Introduction

## 1.1 Conceptual Framework

The nation state, which is basically a territorial organization, based on territory, borders, nationality and national sovereignty, has been challenged on several grounds in the era of globalization. Growing demand for migration has led to increasing pressure on states, which have always been strict on this issue. Receiving states have desired to control movement under the 'sovereignty' clause, deciding who may come in and who may not, although immigrants have not always asked for permission to come in or to stay. This intruding peculiarity of migration has stood as a big challenge to state sovereignty and national security-public order has been used as an excuse to restrict the movements or the rights of people.

After the Second World War the human rights regime came to the stage and the nation state, that basically differentiates nationals and aliens in recognizing their rights, was obliged to accept those aliens'/others' rights, when they were under the state's jurisdiction or territory. With the approval of the 1951 Convention relating to the Status of Refugees (CRS51 hereafter) states also pledged themselves to the principle of non-refoulement and were committed to recognize people who flee from persecution as refugees within their territories, including the recognition of rights in the convention. So, this was one-step more into the field of sovereignty; states had to recognize the rights and the right to stay of those people in their territory, regardless of their wish. As Sassen notes, in dealing with immigration the state confronts the ascendant international human rights regime; immigrants and refugees bring to the fore the tension between the protection of human rights and the protection of state sovereignty.<sup>2</sup>

Turkey as a party to the CRS51, with the geographical limitation on it, is still struggling between the protection of human rights and the protection of state sovereignty. As a young republic (founded in 1923) Turkey first and foremost focused on building a nation and furthering national policies and paid less attention to integration with international human rights policy. Nevertheless, Turkey is a party to various conventions that fall under international human rights law (IHRL), recognizes the related supervision mechanisms and the jurisprudence of the European Court of Human Rights (hereafter ECtHR), and declares in its constitution that "International

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<sup>2</sup> Sassen, Saskia *'Losing control?: sovereignty in an age of globalization'* Columbia University Press, New York, 1996 p.64

agreements duly put into effect bear the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional.”(art.90). However, it has failed to fulfill many of those obligations it undertook in regards to both international and domestic law.

From the question of minorities to the issue of asylum, the Turkish state has had failures in practicing rights and freedoms across various fields. This thesis begins from the hypothesis that the practice of a rigid nation-state policy is a hindrance to the development of human rights in Turkey, including the migration-asylum field. Acknowledging that a human rights based approach/policy requires a comprehensive way of looking into such issues (putting the human at the center rather than nationals; creating equality regardless of ethnic origin, religion, colour, sex etc. instead of asking for national homogeneity), the thesis argues for the transformation of nation state policy as the main requirement needed to gain a democratic, egalitarian and independent asylum policy in Turkey. The human rights regime is a central transformer of this nation-state policy, since its implementation requires the handing-over of a part of sovereignty. Rather than taking one nation as superior than others, such a regime entails equality for the individual, applies the rules without any discrimination on any basis and eliminates the difference between a national/citizen and an alien within the state’s jurisdiction.

Focusing exclusively on the situation of refugees in Turkey and on the convoluted situation of the asylum and migration field, in the way that asylum seekers are usually irregular migrants at the outset, this thesis analyses migration issues in related parts of the asylum field. The impact of nation-state policy on the asylum field is clear in the restrictions, as well as in the everyday practice of the rights. Therefore, the thesis takes the human rights regime and EU accession as milestones for the potential change of rigid policy practices and for that, the thesis examines the asylum field through the lens of Turkey’s accession to the European Union (EU) and its implementation of the human rights regime, in order to observe existing and near-future changes in policy and examining in what way policies should be changed to make a meaningful difference.

In such a context, the thesis seeks answers to these questions; is there a possibility to gain decent life conditions for refugees in Turkey? Is the EU membership/accession process a way to transform the Turkish nation-state practice to a direction where having a decent, human rights-based asylum/migration policy is possible? In the search for these answers, Araf has been used as a metaphor in many parts of the thesis, not only referring

to the predicament of refugees, but also to Turkey's own position between the East and the West.

The thesis neither examines solutions nor gives advice to solve the situation, but seeks to indicate the dilemma and highlight the problem in an attempt to lay bare prospective future consequences.

## 1.2 Methodology

The study made use of a textual and descriptive research method and is mainly based on a combination of traditional library research and qualitative analysis. International law instruments, EU documents, ECtHR decisions, national regulations and academic literature are used as primary sources. Unfortunately, it is difficult to collect official data in Turkey, often due to the deficiencies of available data or lack of transparency in data sharing. However, this deficiency is balanced by the use of sources derived through libraries and electronic databases, and reports of national and international Non-Governmental Organizations (NGO) in regards to the issue of asylum-seeking and conditions of refugees in Turkey.

Considering that a historical perspective regarding the developments in Turkey's asylum/migration field is crucial to understand the current situation, a review of Turkish legislation on asylum to understand the dynamics of the legal field was conducted.

Following a deductive perspective, starting with contemporary asylum practices of Turkey and of the EU (in the third chapter), this thesis aims to show the outcomes of these practices and their compatibility with IHRL and, specifically, the CSR51. To work through such an analysis, this thesis explored case law, and reviewed documents of international human rights bodies - mainly UNHCR reports and documents - and the pertinent works of independent institutions and respected international human rights NGOs

In analyzing these problematic situations, a human rights perspective was adopted that focused on the idea of human rights and stayed independent of both Turkish and European legislation in the field. The criticism which arises in the thesis is therefore placed on both the Turkish and European legislation, using the perspective followed.

A comparison of the EU Acquis and Turkish legislation is made in some parts, in order to demonstrate the deficiencies of the Turkish asylum system, and put forth an analysis of planned changes within the Turkish system.

During the writing of my thesis, the author visited UNHCR Turkey's Second Academic Network Seminar on 'Turkey's Historical Asylum Tradition,' where experts shared their knowledge and experiences about the refugee situation. The experience gave the author an opportunity to learn about the existing situation first hand.

This thesis has tried to reflect voices from the field by using various sources which includes refugees' own statements on their situation. For such a reflection, the author regularly scanned various web sources, mostly of local NGOs, newspapers and specific reports and bulletins

### **1.3 Construction of the Legal Field – Turkish Asylum Policy at a Glance**

Historically (both before and after the foundation of the Turkish Republic) Turkey has been a transit country for migration coming from different directions. With the establishment of modern nation states, borders became crucial for national security and national integrity and migration issues rose as an essential problem both for individuals and states. In the case of Turkey, we can divide Turkish migration policy into three sections: the first era between 1923-1951: from the establishment of the Republic until the acceptance of international responsibilities; the second era between 1951-1999: after the acceptance of international responsibilities until European Union candidacy; and the third era since 1999.

With the establishment of the Turkish Republic as a transformation from a 19<sup>th</sup> century empire to a nation state, migration issues were at the top of the political agenda. According to the Lausanne Treaty in 1923, Greece and Turkey exchanged Greek orthodox and Muslim residents in their territories, resulting in more than a million Greek orthodox people being removed from Anatolia and more than two hundred thousand Muslim people being removed from Greece. As soon as those migrants stepped into the territory of the other state, they were given citizenship in line with the terms of the treaty. It is therefore plausible to say that early migrations were based on homogenizing the society, which started by extracting others and replacing them with descendants of the Muslim population.

The Settlement Law No 34/2510 of 14 June 1934 (Settlement Law hereafter) played an important role within this policy, which contained a number of problematic regulations. Briefly, only focusing on related parts, the Settlement Law made a distinction between the those who are of Turkish descent and culture and all the others. Immigrants who are of Turkish culture (muhacir) were welcomed to the country with citizenship and settled by the state, which also procured land in specified regions for them or gave them the freedom to choose their place of settlement, without providing land. The act charged the cabinet with making the decision on who is to be considered as a person of Turkish culture and made a clear exclusion that

‘anarchists, secret agents, *itinerant gypsies* and those who have been sent out from the country do not belong to Turkish culture’. The act also defined refugees as people who have come to the territory not for settlement but because of distress, however excluded them from enjoying the same rights if they are not of Turkish descent. The Settlement Act, as an example of the era’s political mentality, resulted in discrimination between people of Turkish descent and foreigners.

The First World War, the independence war of 1921-1922, and the Second World War kept migration issues vibrant for the young republic. After the Second World War, the 1951 Refugee Convention and 1967 Protocol were integrated into Turkish asylum policy, however Turkey accepted the 1951 Convention with a geographical limitation and continued it with a reservation to the 1967 Protocol. During this period, with the influence of the anti-Soviet, Cold War policy, Turkey started to accept East Europeans as refugees who wanted to flee the Soviet regime. Kirisci discusses their status in his study, “Eastern Europeans have always come in small numbers, and the West European commitment to resettle them in the West meant that they only used Turkey as a staging post. Consequently, there were never part of any of the economic, political and social problems often associated with integrating refugees. Furthermore, the fact that the costs of sheltering these refugees were often met by international agencies helped to sustain the policy.”<sup>3</sup> Thus European asylum seekers were never considered as a burden on the state.

The 1980s and 1990s constituted another break point for migration towards Turkey. During these two decades; 345,000 people, including 311,000 people deported by the Bulgarian state and 34,000 people with visas, between May and August 1989; 20,000 people during the civil war and the disintegration of former Yugoslavia between 1992 – 1997; 17,746 people after the events which took place in Kosovo in 1999; and 32,577 Meskhetian Turks exiled from their countries, arrived in Turkey.<sup>4</sup> In one way or another Turkey dealt with these influxes; some of them chose voluntary repatriation, some of them stayed and benefited from the Settlement Act<sup>5</sup> and some sort of new/extra regulations were created for specific groups, for example the Act on Admission and Settlement of Meskhetian Turks. The situation of people of Turkish descent was not

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<sup>3</sup> Kirisci, Kemal ‘The Legal Status of Asylum Seekers in Turkey: Problem and Prospects’ Int J Refugee Law (1991) 3(3): 510-528 doi:10.1093/ijrl/3.3.510, p. 516

<sup>4</sup>Turkish National Action Plan For The Adoption of the EU Acquis in the Field of Asylum and Migration (NAP) ( 2005) p.49-50

<sup>5</sup> The Settlement Act remained in effect until 2006 when it was abolished and replaced with 5543-19/9/2006 Settlement Law. The new act still reserves the Turkish descent and culture differentiation.

considered under the Refugee Convention, however, for these cases, the lack of refugee protection did not lead to substantially negative outcomes, since they were mostly able to benefit from other types of protection.

The mass influx in the 1980s and 1990s was not only from Europe. With the regime change in Iran, 1.5 million Iranians arrived Turkey between 1980 and 1991. Although Turkey discouraged the Iranians from seeking asylum formally for fear of offending the Iranian government, with the insistent asylum claims of Iranians, reconciliation between the Turkish authorities and the UNHCR office in Ankara developed and the RSD task was given to the UNHCR. Turkish authorities, in turn, allowed such individuals to reside temporarily in Turkey while their cases were handled by the UNHCR.<sup>6</sup>

From the east and south, 51,542 people during the Iran-Iraq war of 1988, 7,489 people between August 1990 and April 1991 before the Gulf Crisis and during the Gulf War, and 460,000 after the end of hostilities<sup>7</sup> came to Turkey as well. Apart from humanitarian and economic considerations, among the Iraqis there were also armed Kurdish militias (“peshmerges”) and these large numbers also represented a security concern for Turkey.<sup>8</sup> The State and the UNHCR had some divergent views on issues like the definition of a refugee and considering the Turkey’s own unresolved Kurdish question at that time, the State obviously wanted to take control of the issue. As a result Turkey introduced “Regulation No 94/6169 of 30<sup>th</sup> November 1994 On The Procedures and Principles Related to Population Movements and Aliens Arriving in Turkey Either as Individuals or in Groups Wishing to Seek Asylum Either From Turkey or Requesting Residence Permits in Order to Seek Asylum from Another Country” (hereafter 1994 Regulation) . Under Article 8 of the regulation it stated that “by keeping the obligations under international law reserved, it is essential that population movements be stopped at the border and that asylum seekers be prevented from crossing *over* the border.” In the following articles, the disarmament of these persons, procurement of shelters and related arrangements and the initiation of Turkey’s own RSD procedure were established. This 1994 Regulation is still valid with some amendments today, and it is the only reference regulation in the field of asylum; the

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<sup>6</sup> Kemal Kirisci ‘Is Turkey Lifting the ‘Geographical Limitation’? — The November 1994 Regulation on Asylum in Turkey’, *Int J Refugee Law* (1996) 8(3): 293-318 doi:10.1093/ijrl/8.3.293, p.298

<sup>7</sup> NAP, *supra note 4*, p.49-50

<sup>8</sup> Ibrahim Kaya, ‘The Iraqi Refugee Crisis and Turkey: a Legal Outlook’ Euro-Mediterranean Consortium for Applied Research on International Migration (CARIM), EUI RSCAS; CARIM Analytic and Synthetic Notes; 2009/20; Legal Module, Robert Schuman Centre for Advanced Studies, San Domenico di Fiesole (FI) : European University Institute (2009) p.6

policy in Turkey has been regulated only by the 1994 Regulations and, later and as part of the process of Europeanization, by the Implementation Directive Circular Order No. 57 on 22 July 2006 (hereafter Circular 57).

In essence, the consolidation of the legal field has been constructed upon the nation state policy and nation security. While European refugees, for various reasons, are not considered an onerous burden on the state, non-European refugees who mainly come from the Middle East (mostly from Iran, Iraq and Syria), South Asia (Afghanistan, Pakistan) and Africa (especially from Somalia, among many others) have always been considered an economic burden and a social threat to national security. The unwelcoming situation of non-conventional refugees cannot be explained however only by economic reasons, since the other examples indicated above also carried economic burdens and didn't change the course of the policy. Those coming from the East, with their ethnicity and diversity at first hand create a threat against the "homogeneity" Turkey has always wanted through its nation-state policy, despite the fact that Turkey itself is not a homogeneous country, with its ethnic and religious minorities and large Kurdish population.

## **1.4 Outline of Chapters**

Chapter Two reviews the human rights of refugees in Turkey, thereby showing procedural and social problems concisely, to give an idea about the existing situation to the reader in order to be able to understand the flaws of the system in the light of IHRL responsibilities.

Chapter Three looks at the Europeanization of the process of asylum. The Common European Asylum System (CEAS), binding instruments of the CEAS Qualification and Procedural Directives and the Dublin Regulations are reviewed. Turkey's situation on adopting these instruments and the potential impact of policy on Turkey are also discussed. Subsequently, the Schengen regime, including readmission agreements, and its affect on asylum policy, as well as possible outcomes of these policies on both Turkey and refugees in Turkey, are discussed.

Chapter Four revisits the policy of the European common area of freedom, security and justice, before concluding the thesis by asking whose freedom, security and justice this policy aims to protect. Lastly Chapter Five concludes the thesis.

# 2 Human Rights of Refugees in Turkey

As explained in the previous chapter, Turkey does not have adequate national legislation in the field of asylum and this deficiency prevents asylum seekers enjoying their essential rights. However, Turkey has ratified many UN conventions which oblige the state to supply necessary rights. This chapter will look at the human rights of refugees in Turkey provided through IHRL instruments and will do so using two approaches: procedural rights and social rights.

## 2.1 Procedural Rights

### 2.1.1 Access to Asylum for European Refugees

According to government sources 44 persons originating from European countries, namely Greece, Bulgaria, Serbia, Azerbaijan and Albania, have been granted refugee status in Turkey since its accession to the 1951 Convention.<sup>9</sup> European refugees' situation and the Settlement Act, as it has been explained above, have had an important affect on this number. However, even though they have the same religion as the non-Turkish descent European refugees example, Chechens are still waiting for a solution to their situation. As is well known, after the 1999 Chechnya-Russia conflict many Chechens fled from their country, some of whom arrived in Turkey. Despite the fact that they are recognized as Europeans in the context of CSR51, Turkey did not take a decision on their situation under the CSR51 and instead, a new type of "guest" status was created for them. Since they come from Europe, UNHCR Turkey is not entitled to evaluate their situation and even though they are entitled to apply for refugee status according to law, most of them do not apply due to the fear of losing even their "guest" status by "annoying" the authorities. The ones who have applied have been rejected either in their first application or after disputing a negative decision.<sup>10</sup>

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<sup>9</sup> UNHCR, 'UNHCR in Turkey: Facts & Figures', August 2010, Issue 02, p.17

<sup>10</sup> Amnesty International, 'Stranded Refugees in Turkey Denied Protection' (Report) (2009) Index: EUR 44/001/2009, p.12



Since there has not been any relevant RSD procedure it is not possible to say if they are refugees or not. The state where an individual seeks protection has a responsibility to identify its obligation by scrutinizing who is in need of protection.<sup>11</sup> Although Turkey applied the non-refoulement principle in the case of the Chechen refugees/asylum seekers, it failed to examine their situation under the 1951 Convention and used its political discretion by designating them under this vague status instead.

Failure to provide protection under the CRS51 prevents refugees/asylum seekers from accessing other rights in the convention. They stay in unofficial *de facto* refugee camps in poor conditions<sup>12</sup> (contrary to Art. 21 - Housing), they face severe economic hardship due to a lack of formal work permits (contrary to Art. 24 - Labour), and their children are only accepted to the schools as guest students, thus they are not entitled to receive certificates<sup>13</sup> (contrary to Art. 22 - Education), which amount to breaches of relevant articles of the Convention.

Chechens say that they cannot go back Chechnya as the regime has changed and they will be punished for the act of fleeing to Turkey or taking part in the war and they are not able to move out of the country since they lack valid or unexpired passports, among other reasons. While their movement has been restricted due to the deficiency of legal documentation,<sup>14</sup> at the same time they are the guests who can be sent back one day if the state decides that they have overstayed.

## **2.1.2 Access to Asylum at Frontiers and in Guest Houses**

### **2.1.2.1 Frontiers and Transit Zones**

Existing asylum regulations do not define the situation of asylum application at frontiers and transit zones. Domestic regulations require asylum seekers to have crossed the border and arrived in the country, before the authorities have the duty to receive their application.<sup>15</sup> The only

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<sup>11</sup> Marx, Reinhard 'Non-Refoulement, Access to Procedures, and Responsibility for Determining Refugee Claims' Int J Refugee Law (1995) 7(3): 383-406  
doi:10.1093/ijrl/7.3.383 p.392

<sup>12</sup> An overview about their living conditions can be found here:

<http://english.aljazeera.net/news/europe/2010/05/2010512174713849872.html#>

<sup>13</sup> UNHCR, *supra* note 9, p. 14

<sup>14</sup> Hammarberg, Thomas, Commissioner for Human Rights of the Council of Europe, 'Human rights of asylum seekers and refugees' (Report) (1 October 2009) CommDH(2009)31, para. 20, p.7

<sup>15</sup> *Ibid* para.44 p.12

provision related to borders in the 1994 Regulation is about movements to the borders of the country to seek asylum ‘as a group’. Therefore individuals face a lack of access to the asylum procedure due to deficiencies in regulations and the inadequate knowledge of the staff at the borders related to such regulations. Moreover, according to UNHCR, Turkish authorities do not view persons who are in the transit zone as having accessed Turkish territory and therefore they do not apply the 1994 Asylum Regulation.<sup>16</sup> This is despite the fact that in the *Amuur v. France* case<sup>17</sup>, the ECtHR stated in its decision that despite its name, the international zone does not have extraterritorial status and holding asylum seekers in this zone makes them subject to the host state’s law.

UNHCR considers that the principle of non-refoulement clearly applies to persons who seek asylum in the so-called “international area” of a State’s airport, since they are already on the territory and within the jurisdiction of that State. Failure to examine an asylum request in such circumstances would at the very least amount to “rejection at the frontier”<sup>18</sup> and UNHCR states that “The principle of non-refoulement includes non-rejection at the frontier, if rejection would result in an individual being forcibly returned to a country of persecution.”<sup>19</sup> Therefore the existing asylum situation in the transit zones and borders of Turkey consists of a violation of Article 33 of CRS51, in situations where the individual is sent back without hearing his/her claim.

### 2.1.2.2 Guest Houses

Articles 33 and 34 of the Passport Law previously provided custodial sentences or a fine for illegal entry to and exit from the country. On 14.04.2011, this act was partly changed. The custodial sentence was removed to respect international obligations and only a pecuniary punishment and deportation order for aliens who breached the law was maintained.<sup>20</sup> Until their departure or expulsion these aliens are kept under custody (or ‘administrative supervision’ as it is called) in the “Foreigners’

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<sup>16</sup> Ibid, para.41 p.11

<sup>17</sup> *Amuur v. France* (App no 19776/92) ECHR 25/06/1996

<sup>18</sup> 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, available at: <http://www.unhcr.org/refworld/docid/437b6db64.html> [accessed 12 June 2011]

<sup>19</sup> Ibid, (Conclusions) para.5

<sup>20</sup> ‘Protocol against the smuggling of migrants by land, sea and air, supplementing the UN Convention against transnational organized crime’ has been taken into consideration where migrants are discharged from criminal liability due to their irregular movement

guest-houses” which are in reality foreigners’ detention centers, based on an administrative decision from the Ministry of the Interior (MOI)<sup>21</sup>. An important problem here is that there is no possibility to challenge the legality or the length of the detention<sup>22</sup> since there is no regulation to be challenged.

Asylum seekers, as long as they apply for asylum to the designated authorities after their entry, are not detained and charged with any violation regarding their irregular entry. However, leaving the determined settlement area (asylum seekers are given determined areas to live after their application) without permission, according to Article 25 of the Law on the Sojourn and Movement of Aliens, is one of the actions resulting in the possibility of punishment with a custodial sentence, which would mean to end up again in one of those centers. The irregular situation of asylum seekers may also lead to asylum seekers ending up in those centers, if they are discovered before they have the chance to approach the legal authorities for their asylum claims.

In all of these cases, detention in Foreigners’ Guest-Houses amounts to a breach of IHRL with regards to: First, that no one should be arbitrarily deprived of his or her liberty according to the UDHR, ICCPR and ECHR. Turkey has been found in breach of Article 5 of the ECHR, as determined by case law,<sup>23</sup> due to the detention of migrants/asylum seekers in Turkey. As example of this can be seen in the case of *Abdolkhani and Karimnia v. Turkey*,<sup>24</sup> where the court stated that:

- *in the absence of clear legal provisions, establishing the procedure for ordering and extending detention was not circumscribed by adequate safeguards against arbitrariness therefore there has been a violation of Article 5 § 1 of the Convention*
- *the reasons for the applicants' detention from the detention date onwards were never communicated to them by national authorities, therefore there has been a violation of Article 5 § 2;*
- *Turkish legal system did not provide applicants with a remedy whereby they could obtain judicial review of the lawfulness of their detention, within the meaning of Article 5 § 4*

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<sup>21</sup> Helsinki Citizens Assembly, ‘Unwelcome Guests: The Detention of Refugees in Turkey’s “Foreigners’ Guesthouses”’ (November 2007)

<sup>22</sup> *Supra note 14*, para. 56, p.14

<sup>23</sup> For further relevant case law examples on Turkey please consult:

*Tehrani and others v. Turkey* (App no 32940/08, 41626/08, 43616/08) ECHR 13/04/2010

*Charahili v. Turkey* (App no. 46605/07) 13/04/2010

*Ranjbar and others v. Turkey* (App no 37040/07) 13/04/2010

*Z.N.S. v. Turkey* (App no. 21896/08) 19/01/2010

<sup>24</sup> *Abdolkhani and Karimnia v. Turkey* (App no 30471/08) 22/09/2009

By following these findings, communication of the **reasons for and length of detention** and the right to **judicial review**, which are principles enshrined in UNHCR Detention Guidelines,<sup>25</sup> show that Turkey is also in breach of its positive obligations under those guidelines. Furthermore, Guideline 5 requires procedural safeguards, clearly indicates that detention should not constitute an obstacle to asylum-seekers' possibilities to pursue their asylum application and provides that UNHCR local offices and legal counsels should have access to persons in detention centers. However Turkey is also in breach of these responsibilities: "In 2008, UNHCR attempted 393 times to interview nearly 3,400 foreign nationals arrested for illegally entering the country, including some asylum seekers. Turkey allowed UNHCR to have access to only 72 of them and UNHCR believes Turkey deported those who could not be reached without allowing them to seek asylum or refugee status."<sup>26</sup> In this way deportations can constitute a violation of Article 33 of the convention.

### **2.1.3 Two Headed System: UNHCR and MOI**

Another issue in the asylum procedure is that UNHCR and the Ministry of Interior (MOI) both deal with refugee status determination (RSD) separately. A non-European asylum seeker should apply to both MOI and UNHCR Ankara office for his/her asylum claim. It has been stated in the NAP that while a decision is made on the applications, UNHCR's opinion is also taken into consideration by MOI, that the information contained in the applicant's case is mutually shared and that the status of the applicant is collectively debated. Therefore, the decisions of UNHCR and of the MOI are parallel to one another.<sup>27</sup>

However, RSD procedures do not have to give identical decisions; UNHCR may recognize refugee status while MOI does not. In such cases, where the state, for any reason, gives a negative decision, the result is mainly a threat of deportation, as happened in the *Jabari v Turkey* case<sup>28</sup>, where the applicant was recognized as refugee by UNHCR but a deportation order was given in the meantime by the state. Here the ECtHR found that the

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<sup>25</sup> UN High Commissioner for Refugees, *UNHCR's Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*, 26 February 1999, available at: <http://www.unhcr.org/refworld/docid/3c2b3f844.html> [accessed 26 May 2011]

<sup>26</sup> United States Committee for Refugees and Immigrants, *World Refugee Survey 2009 - Turkey*, 17 June 2009, available at: <http://www.unhcr.org/refworld/docid/4a40d2b480.html> [accessed 10 March 2011]

<sup>27</sup> NAP, 2005, para.3.1.1, p.12

<sup>28</sup> *Jabari v. Turkey* (App no 40035/98) 11/07/2000

order for her deportation to Iran would, if executed, give rise to a violation of article 3 and also found a violation of article 13, due to a lack of effective remedy.

In the meantime, the state cannot be absolved from its responsibilities by relying on UNHCR decisions. In the *D. and others v Turkey* case,<sup>29</sup> UNHCR denied the applicant's claim, MOI then denied the claim as well, by relying on the decision of UNHCR and the applicant faced the threat of deportation. The ECtHR found the state responsible due to a lack of scrutiny on the applicant's situation by State authorities. In its decision, it held that the state has a responsibility, regardless of whether or not it relies on other actors and declared that Turkey would be the violation of Article 3 if the applicant were deported.

As a result, the state cannot be released from its responsibility unless it exercises its obligations with due diligence. This two headed system makes things more complicated for refugees. UNHCR decisions are not open to judicial review before the courts, except by using its own appeal mechanisms. However in the meantime, its decisions are the main route for refugees since the main aim for non-convention refugees is being resettled in a third country and the entire authority for this rests with UNHCR. The best case scenario for refugees is to be accepted by both of them, since refusal by the state brings the threat of refoulement; refusal by UNHCR brings a lack of resettlement opportunity and if the asylum seeker is not in a situation to go back to his/her country, he/she would probably remain in Turkey without legal status. In the meantime, MOI decisions are open to judicial review; the applicant can take the expulsion order to the Administrative Courts in Turkey. However another question arising at this point is whether courts in asylum cases are capable of supplying an effective remedy.

#### **2.1.4 Appeal Rights: Effective Remedy in the Light of ECtHR**

Another pressing problem in the field of asylum in Turkey is the lack of specialized courts to evaluate the situation diligently. Administrative courts are only able to evaluate deportation decisions procedurally, since an evaluation on merits requires a specific area of specialization. A major example of this, and one of the most important cases for the State, is the

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<sup>29</sup> *D. and others v Turkey* (App no 24245/03) 22/06/2006

Abdolkhani and Krimnia v. Turkey<sup>30</sup> decision, whose findings were taken seriously.

In this decision, the ECtHR stated how an effective remedy should be understood in refoulement cases. “Given the irreversible nature of the harm which might occur if the alleged risk of torture or ill-treatment materialized, and the importance which the Court attaches to Article 3, the notion of an effective remedy under Article 13 requires (i) *independent and rigorous scrutiny of a claim that there exist substantial grounds for believing that there was a real risk of treatment contrary to Article 3 in the event of the applicant's expulsion to the country of destination, and (ii) a remedy with automatic suspensive effect*”<sup>31</sup>

Turkey lacks both requirements and judicial scrutiny is extremely weak in such cases. The court further stated that “The judge *merely noted* that the applicants would be deported. However, the applicants were not notified either of the decision to deport them or of the reasons for the planned deportation. The magistrates' court *did not take statements from them regarding the risks which they would allegedly face if deported to Iraq or Iran*....The Court is struck by the fact that both the administrative and judicial authorities remained totally passive regarding the applicants' serious allegations of a risk of ill-treatment if returned to Iraq or Iran. It considers that the lack of any response by the national authorities regarding the applicants' allegations amounted to a *lack of the “rigorous scrutiny”* that is required by Article 13 of the Convention.”<sup>32</sup>

The flaws of the Administrative Court’s decision emanate principally from the lack of expertise in this field. General Turkish Administrative Courts remain under a heavy workload and judges in these courts, who are mainly integrated with national administrative law, are not sufficiently knowledgeable to sit on these cases. Violations such as these of effective remedy rights or, as a result of it, the prospective risk of refoulement will keep occurring if the designated courts are not designed for asylum cases.

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<sup>30</sup> *Abdolkhani and Krimnia v. Turkey* (App no 30471/08) ECHR 22/09/2009

<sup>31</sup> *Ibid.* Para.108 p.32

<sup>32</sup> *Ibid.* para.113, p. 33

## 2.2 Social Rights

### 2.2.1 RSD Waiting Process

UNHCR refugee status determination can take from eight months to over a year. For those who the agency recognizes as refugees, resettlement is sought in third countries.<sup>33</sup> For recognized refugees, an additional period of up to 15 months or more may be required to find a resettlement opportunity.<sup>34</sup> However such durations only exist in best case scenarios. It is a well known truth that even early interviews for RSD have been scheduled months after the first application by UNHCR due to its immense workload. To understand the overburden on the office, we can look at the developing numbers of persons of concern to UNHCR:

Table 1: Persons of Concern (PoC) to UNHCR Turkey as of 31 December 2009<sup>35</sup>

	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
PoC to UNHCR	7,949	8,312	7,648	5,892	5,943	6,962	7,217	8,852	12,145	18,209	16,337
Resettled Refugees	1,844	2,334	2,615	2,818	2,935	2,292	1,262	1,609	2,667	3,832	6,038
Recognized Refugees	2815	3103	3472	3301	2490	3033	2399	2633	6956	11103	10350
Asylum Seekers	5134	5209	4176	2591	3453	3929	4872	6219	5189	7106	5987

Increasing numbers, quality and complexity of asylum applications and the task of resettlement puts a great deal more work onto the office than it can cope with. As stated above, since the point is resettlement for refugees in Turkey, they see UNHCR has having full responsibility although MOI also has its RSD procedure. CRS51 says nothing about procedures for determining refugee status and leaves it to States the choice of means as to implementation at the national level.<sup>36</sup> However, in the case of Turkey there have been two RSD procedures, neither of which, in any case, shorten the length of the proceedings.

However, acceleration of the RSD process is problematic; the state is primarily dependent on UNHCR's decision and does not have an independent procedure; while UNHCR as a mandated international organization is working under a heavy burden. Therefore it is hard to say

<sup>33</sup> United States Committee for Refugees and Immigrants, *World Refugee Survey 2009 - Turkey*, 17 June 2009, available at:

<http://www.unhcr.org/refworld/docid/4a40d2b480.html> [accessed 10 April 2011]

<sup>34</sup> UNHCR Global Appeal 2011 Update, 'Restoring Hope Rebuilding Lives', (2011) available at: <http://www.unhcr.org/ga11/index.html#/home> [accessed 13 May 2011] p.267

<sup>35</sup> UNHCR, *supra note 9*, p. 12

<sup>36</sup> Goodwin-Gill, Guy S. & McAdam, Jane, *The refugee in international law*, 3. ed., Oxford University Press, Oxford, 2007 p.54

that it is neither UNHCR's nor the State's responsibility directly, but in this situation, practically all the accusations by asylum seekers are directed at UNHCR:

*"First you must know: we are all losing time, and we are aging. Waiting for such a long time makes us hopeless and aimless. Nobody came to the city of Van for fun. Everyone came because of problems in Iran. Life was better in Iran, but we faced death and violence if we stayed. It is hard enough starting from zero. We lose hope and power, and the main problem is the UNHCR."*<sup>37</sup>

*"I have no husband but three children. After two years we have lived in Van, we were denied refugee status. We waited two more years for the second interview. They closed our case seven months ago. There is no hope, no future. Why must we wait seven years to get negative results? The children are depressed, the UNHCR is bad and unjust--nobody cares."*<sup>38</sup>

In this case the only solution would be if Turkey were solely put in charge of the RSD procedure and criticisms could be directed at them as state party. The length of RSD procedure is a problem for many countries, however since Turkey is not a destination country for the refugees, the length of stay becomes much more important for them.

## **2.2.2 Access to Rights**

Since the waiting time is notably long in Turkey, the social rights of refugees during this long waiting process come into question. Here we are mainly talk about non-European refugees due to the fact that the CSR51 is not applicable to their situation. However this section will try to invoke jointly the CSR51 and IHRL responsibilities.

### **2.2.2.1 Residence Fees**

Asylum seekers are required to pay residence fees, which need to be renewed every six months. Recently, the amount for each person in the family is has been around TL306/€150 (for every six month period) plus an extra TL135/€66 single payment for a residence permit booklet. The legal basis of the fee is the Act of Fees, law number 492 , which also provides, according to Article 88(d), that persons who are able to prove that they cannot afford may be exempt from payment. With Circulate n.2010/23, determination of these exemptions has been left to Foreigners' Police

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<sup>37</sup> Helsinki Citizens Assembly, 'Refugee Voices Bulletin' (Spring 2010), available at: <http://www.hyd.org.tr/?pid=803>, Mehrad, an Iranian refugee who lives in Van, p.9

<sup>38</sup> Ibid p.9-10, *Amina, an Iranian refugee who lives in Van*



Departments in the refugee cities and, in practice, according to Amnesty International and the Human Rights Research Association,<sup>39</sup> exemptions are only rarely granted due to this discretion the authorities have. Moreover, having an identity card (a foreigners ID) depends on having a legal residence permit, and to benefit from health, education and social support is required to have such an ID, as we will see below.

### 2.2.2.2 Freedom of Movement

Once an asylum seeker has been registered with the MOI, (s)he is allowed to live in one of the 32 designated “satellite cities” while their application is being process, with movement to another city being subject to prior authorization by the Foreigners’ Section of the Police. As stated in Section 2.1.2.2 above, unauthorized movement is a breach of the law. Article 26 of CRS51 provides that each Contracting State shall accord refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory. Asylum seekers reside in Turkey lawfully, however they are not called refugees due to the restriction and hence only called asylum seekers. However, asylum seekers, whose application is accepted by UNHCR or MOI, are basically refugees who are waiting for resettlement to a third country. From this point of view, logically, there shouldn’t be any different treatment between refugees and asylum seekers on recognition of the rights in CRS51, including freedom of movement. However if the restriction is raised as an obstacle to the applicability of the article, we can also look at IHRL responsibilities.

The UDHR, ICCPR and Article 2 of Protocol No. 4 of the ECHR<sup>40</sup> provide freedom of movement and residence. Although the ICCPR and ECHR allow for restrictions in cases of national security, public order, public health or morals or the rights and freedoms of others, in the case of Turkey no national security or other reasons are employed to explicitly restrict their movement and to justify the restriction, rather it is obvious that the main

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<sup>39</sup> Amnesty *supra note* 10 and Human Rights Research Association ‘6 Aylık Dönemde Sığınma Hakkı Alanında Yaşanan Gelişmeler’ (*Developments in right to asylum field within the six months period*) available at: [http://www.multecihaklari.org/dosya/MHKRRapor/IHAD\\_Siginma\\_hakki\\_izleme\\_raporu\\_Ocak-Haziran-2010.pdf](http://www.multecihaklari.org/dosya/MHKRRapor/IHAD_Siginma_hakki_izleme_raporu_Ocak-Haziran-2010.pdf)

<sup>40</sup> Article 12 of the ICCPR; Article 8 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICPMW); Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination Article 10 of the Convention on the Rights of the Child; Article 13 of the Universal Declaration of Human Rights; Article 5 of the Declaration on the Human Rights of Individuals Who are Not Nationals of the Country in Which They Live

concern of the state is to take control over these groups and to monitor them.

Moreover, in the case of nonpayment of a resident permit fee, an exit permit to leave the country is not issued until the payment is made along with the interest payments specified. As a result, such restrictions are in breach of freedom of movement, residence and the right to leave, which is covered under all IHRL instruments that have been mentioned.

### **2.2.2.3 Access to Education**

Turkey is obliged to ensure the right to education under the ICESCR and the CRC; and all children between 6 – 14 years are constitutionally obliged to attend primary school, which is provided freely. For children of refugees or minor asylum-seekers, the right is granted but practicing it depends on again obtaining necessary residence permits<sup>41</sup> to enroll in schools. Furthermore, for those enrolled, language is a major problem. Parents are often reluctant to send their children to school where they face discrimination and language barriers<sup>42</sup> or, in some cases, families consider attending Turkish schools unnecessary because their stay in Turkey is only temporary.<sup>43</sup> Although the right is legally guaranteed, the practical situation of accessing this right still shows that there is a breach in implementing the state's positive obligation.

### **2.2.2.4 Access to Healthcare**

Under the international law regime<sup>44</sup> everyone is entitled to the enjoyment of the highest attainable standard of physical and mental healthcare, including refugees and asylum-seekers. According to the 2006 Circular, asylum applicants and refugee-asylum seekers are obliged to fundamentally cover their health expenditures themselves, although if this is not possible they are referred to the Social Solidarity Fund. The Fund, which is administered through the governor of each province, has a long procedure that, in practice, prevents them applying. However, as a new development,

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<sup>41</sup> Amnesty International, *Supra note 11*, para.4.2.3 p.21

<sup>42</sup> OMID Advocates for Human Rights, 'Report on the Situation of Iranian Refugees in Turkey: Post June 12th 2009 One Year Later' (Report) (June 2010) p.19

<sup>43</sup> Frantz, Elizabeth *Forced Migration and Refugee Studies American University of Cairo* 'Report on the Situation of Refugees in Turkey: Findings of a Five-week Exploratory Study December 2002 – January 2003' para.8.5 p.36

<sup>44</sup> ICESCR Article 12; CERD Article 5(e)(iv); CEDAW Articles 12 and 14(b); CRC Articles 24 and 25; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families Article 28.

Law No. 5510 on Social Insurance and General Health (SIGH) states that stateless person and asylum seekers are covered by SIGH and that the required payment for premiums will be met by MOI for those who cannot pay the fees. However, this regulation excludes asylum applicants who are waiting for the determination of their status, and only the asylum seekers who are recognized can be a beneficiary. According to the numbers which are taken from UNHCR in 2008, which is the year when the law was enacted, only 322 people were accepted as ‘asylum seeker’ while there were 12.750 people whose situation was at different levels in the RSD process.<sup>45</sup> In this situation, those asylum seekers whose applications were still in the RSD process would not be covered under SIGH.

The ICESR, Article 12, charges states with recognizing the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. Migrants and asylum seekers are one of most vulnerable groups that need more attention in order for them to enjoy the right. The Committee on the Elimination of Racial Discrimination, in its General Recommendation N° 30 (2004) on non-citizens, and the Committee on Economic, Social and Cultural Rights, in its General Comment N° 14 (2000) on the right to the highest attainable standard of health, both stress that States parties should respect the right of non-citizens to an adequate standard of physical and mental health by, *inter alia*, refraining from denying or limiting their access to preventive, curative and palliative health services. The Special Rapporteur on Health has also stressed that sick asylum-seekers or undocumented persons, as some of the most vulnerable persons within a population, should not be denied their human right to medical care.”<sup>46</sup> Based on this, we can say that excluding asylum seekers, whose application is in process, from the scope of SIGH is inconsistent with a state’s responsibility under the right to health. Therefore excluding asylum seekers from the protection is a breach of IHRL/ICESCR.

### **2.2.2.5 Access to Social Support**

Turkey does not supply any financial support for refugees/asylum seekers during their stay in the country regarding their need for shelter (housing)

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<sup>45</sup> Joint Press Release by Amnesty International Turkey, Helsinki Citizens Assembly, Association for Solidarity with Refugees Human Rights Agenda Association (04.04.2008) available at:

<http://www.multeci.org.tr/index.php/basn-acklamalar/63-ortak-basin-aciklamasi-04042008-yeni-sosyal-sigortalar-ve-genel-salk-sigortas-yasa-tasars-ve-snmaclar-mdba-012008>

<sup>46</sup> OCHR, WHO ‘*Right to Health*’ Fact Sheet No 31 p. 20 available at: <http://www.ohchr.org/Documents/Publications/Factsheet31.pdf>

and subsistence assistance, but rather refers them to Social Solidarity and Assistance Foundations, which are organized under provincial governorates, do not have a duty to provide and have limited funds for only limited numbers of asylum seekers. UNHCR offers some limited amount of financial support but it is far from being adequate.

Although there is no explicit obligation under IHRL to providing social support, according to the ICESCR, everyone has right to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions." (article 11.1)

To have decent living conditions for refugees/asylum seekers in Turkey, they have to be supported due to their special situation, as they are usually faced with poverty and economic hardship. Asylum seekers tend to have far from adequate standards of living; to be able to pay rent many usually live together in houses of an inadequate standard. For those reasons, while the lack of social support for asylum seekers does not directly breach the ICESCR, the combination of all the existing conditions means that Turkey is in breach of the right to an adequate standard of living for asylum seekers.

### **2.2.3 Sentenced to Informality: Access to Work**

The right to work is integral to the right to live in dignity. Due to their length of stay in the country and lack of social support, the right to work for refugees in Turkey gains greater importance to sustain a decent life.

*"I know that I should think about how I will spend my day, but all I can is to think of what will I eat. I am a strong man but no one employs me, or rather they do not have permission to offer me a job. My friends and I sleep during the day and we wake up at night, because each of us has only one meal a day. If I do not move during the day, I lose less energy. That is how I live."*<sup>47</sup>

There is no legal barrier for the right in Turkey; Article 27 of the 1994 Regulations states that: "Within the general provisions [of the law], possibilities for education and work, limited to their period of residence in our country, are to be accorded to refugees and asylum seekers." The general regulation of this field is found in Law No 4817 of 27<sup>th</sup> February 2003 and in the Work Permits of Aliens (Act 4817 hereafter), where it is required that a certain time be spent in residency in the country to gain a

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<sup>47</sup> Helsinki Citizens Assembly, 'Refugee Voices Bulletin' (Spring 2008), available at: <http://www.hyd.org.tr/?pid=671>, W.S, a Sudanese refugee, p.2

work permit, despite that fact that under Article 27, it is stated that persons who are accepted as a migrant, refugee and migratory according to the Settlement Act 1934, can be guaranteed a work permit regardless of the prescribed time.

In 2010, however, the implementation of regulations of that code was amended and the residence permit duration has been removed from requirements. It is stated that necessary measures shall be taken to expedite work permit procedures of asylum seekers. While this is a favorable change for refugees, other barriers to the right are still present. Work permits that are subject to another fee issued independently of their residence permits. Furthermore, they need to have a job offer for a position which cannot be fulfilled by Turkish citizens, as they are referred to by Act 4817 as aliens and there is no exception for asylum seekers from those requirements. Therefore, for asylum seekers the right to work is practically inaccessible. As a result, asylum seekers who are in serious need of work to sustain their lives are working informally, which means that they work without social security and that they face labour exploitation, including through long work hours, work demanding physical strength and lower pay.

Article 17 of CRS51 requires the most favorable treatment to refugees and indicates that "restrictive measures imposed on aliens or the employment of aliens for the protection of the national labour market shall not be applied to a refugee". In the present situation in Turkey, the unwelcoming nature of Act 4817 towards aliens in the national labour market is directly applicable to asylum seekers as well. In such a situation, if the restriction is an excuse on recognition of the recognition of the right, we can look at other IHRL instruments.

The right to work has been recognized as an essential human right by human rights instruments such as the UDHR (Art.23) and ICESCR (Art.6.1)<sup>48</sup>. Likewise ILO Convention No. 122 (Employment Policy Convention) Article 1(2) provides that each member shall ensure "work for all who are available and seeking one". Thus, the right to work for asylum seekers has enough legal ground in the IHRL conventions that Turkey has ratified. By preventing the enjoyment of this right in practice, Turkey is in violation of its responsibilities.

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<sup>48</sup> UDHR provides that "everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment; and ICESCR provides in article 6(1) for the "right to work, which includes the right of everyone to the opportunity to gain his living by work."

Moreover, in the case of employment they can find protection under the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) where the term "migrant worker" refers to a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national (Article 2). In addition, they can find protection under the Declaration on the Human Rights of Individuals who are not Nationals of the Country in Which They Live (DHRI), which is an informative instrument for their situation, as it is stated that aliens lawfully residing in the territory of a State (asylum seekers reside lawfully) shall also enjoy the right to have safe and healthy working conditions, to fair wages and equal remuneration for work of equal value without distinction of any kind (Article 8).

It is hard to find official data on the working conditions of refugees/asylum seekers due to their invisibility and the characteristics of informality. Nevertheless it is predictable that access to work, labour conditions and exploitation at work worsen when a worker's vulnerability is more obvious. At this point some testimonies can be looked at of homosexual/transgender persons, whom require further attention due to their special situation and attitudes against them by society:

*"One day I found a job at a local factory. I had dressed like a man because I thought I would be more easily accepted. The job was really hard work and it involved a lot of lifting. The second day I went into work, I forgot to take off my earring and I was fired. The supervisor called an employee to escort me out. This man actually took out a knife, held it to the side of my head and threatened to cut off my ear. I was escorted out of the factory with a knife pointed to my back."*<sup>49</sup>

*"I worked in a restaurant for four months when I first came to Isparta. But when the boss realized I that I am gay he fired me. Now I work as a sex worker in Egirdir and Isparta. I have to work because I have no money and I have to survive somehow."*<sup>50</sup>

As stated above, not only the right to work but essential human rights in the workplace, such as personal security, health etc. are also protected by CMW and DHRI, and asylum seekers are able to be protected under these documents as well. Informality is not a choice, but the only option for asylum seekers. An official in the Directorate of Security of Van (which is

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<sup>49</sup> A joint publication of Helsinki Citizens' Assembly – Turkey Refugee Advocacy and Support Program & ORAM - Organization for Refuge, Asylum & Migration, 'Unsafe Haven: The Security Challenges Facing Lesbian, Gay, Bisexual and Transgender Asylum Seekers and Refugees in Turkey' (Report) (June 2009) p.24

<sup>50</sup> Ibid. p.25

the state bordering Iran) and has the satellite city with the greatest number of resident refugees and asylum-seekers, confirmed to Amnesty International that no asylum-seekers registered in Van had obtained permission to work.<sup>51</sup> Therefore, the constant failure of the due diligence practice of state responsibility has instituted a breach of the abovementioned IHRL, since asylum seekers are left to informal market conditions without any protection.

## 2.3 Perspective

In this chapter, the existing situation in Turkey was attempted to be shown concisely and will be elaborated on with the Europeanization process of asylum in the following chapters. The abundance of ratified conventions and other human rights instruments give adequate grounds to supply rights and freedoms to refugees in Turkey and the importance of the restriction largely loses ground as an excuse to deny rights.

When we look at Turkey and its ratifications of UN Conventions, we see that they mainly took place after the 1980s, with concentrated ratification in the 2000s, thus it might be possible to say that the concept of human rights has only lately developed in Turkey. (ICESCR 2003, ICCPR 2003, CERD 2002, CEDAW 1985, CRC 1995, CMV 2004 and various ILO conventions.) It might be said that the human rights regime for Turkey is a recent issue. This can be a true statement but it cannot be an excuse.

In Turkey, almost all basic rights have been recognized at the national level, however, as we have seen in the examples, refugee/asylum seekers' rights are only partly recognized and their enjoyment of the rights are furthermore restricted by other regulations. Partial recognition of the rights shows us the unwillingness to accept refugees or asylum seekers as individuals equal with nationals in the territory. Asking for a residence permit, referring them to the Working Act for Aliens, which provides the same treatment for refugees/asylum seekers as aliens, and controlling their right to movement, show us that refugees/asylum seekers are still considered aliens instead of people in need of protection and that the state wants to control them using its sovereignty.

The willingness of Turkey to be a member of the club of modern and democratic states has put the state on the crux of a dilemma of whether to prioritize human rights or sovereignty. On the one hand, ratified IHRL

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<sup>51</sup> Amnesty, *supra note 10*, para. 4.2.4 p.22

conventions show the intention of the state to become a part of the developed world but hesitancy, on the other hand, keeps it behind.

However, as a party to IHRL treaties, the state has to recognize the rights of the 'others' who are staying in its territory lawfully and whose rights are derived from the inherent dignity of the human person.<sup>52</sup> Then we refer once more to our first research question; is there a possibility to gain decent life conditions for refugees in Turkey? We see the answer is not positive when we look at the existing situation and it will not be positive unless the policy of the state is transformed to human rights based policy.

At that point, EU candidacy comes to the stage as an important phenomenon, since it is a main dynamic pushing the country on the implementation of its responsibilities arising from IHRL. Thus, we will be looking to the future course of the EU candidacy/membership process in the next chapters in order to see if it will lead Turkey to comply with IHRL responsibilities fully and if the conditions of refugees will change with the adoption of the EU Acquis.

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<sup>52</sup> ICESCR, preamble



# **3 Europeanization & Securitization: Asylum on the path to EU membership**

Since the ratification of the Amsterdam Treaty,<sup>53</sup> the EU has worked on the establishment of a common “area of freedom, security and justice” under its Justice and Home Affairs (JHA) policy. In this chapter, the main pillars of JHA will be analyzed. In tandem, and in accordance with the Common European Asylum System (CEAS) and the Schengen regime, Turkey will also harmonize its legislation within the field of asylum/migration. This chapter will investigate the results of implementation of those regimes through adopting the relevant *acquis* and their effects on Turkish asylum policy.

## **3.1 Europeanization of Asylum**

EU candidacy is a decades-long story for Turkey. It signed an agreement with the European Economic Community (EEC) in 1963, applied for full membership in 1987 to the European Community (EC), and in 1999, following the Helsinki summit, was declared as a candidate country. Since then, Turkey has been waiting for the final decision, in its own limbo, where it will be decided if Turkey belongs to the European club or not. After being nominated for EU candidacy, Turkey has also been tied to commitments to harmonize its legislation with the EU *Communautaire*, including asylum and migration laws. Europeanization as a metaphor refers to that process and is what will be looked at below.

### **3.1.1 Partial Europeanization – Changes in Turkey**

In Chapter 1 it was explained that the legal structure in Turkey has been developed based on the security concerns of the state, which perceives aliens or persons of non-Turkish descent as a threat to security. However in the post-1999 period, although security concerns remain, it can be said that

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<sup>53</sup> Signed on 2 October 1997 and entered into force on 1 May 1999 Amsterdam Amending the European Union, Treaties Establishing the European Communities and Certain Related Acts

democratization has affected the focus of the asylum system, the results of which are summarized below.

Turkey has participated in various projects in order to develop its asylum and migration policies. In cooperation with UNHCR, it coordinated “The Project for Developing an Asylum System in Turkey” in which a number of personnel working in the field of asylum received training, while Turkey also engaged in other capacity-building projects within the field of asylum and migration with European partners.<sup>54</sup>

In 2005, NAP was declared a national plan to align Turkish legislation on asylum and migration with the EU Acquis, which foresees the gradual lifting of restrictions in order to fulfill the burden sharing conditions and includes mention of the preparation of a draft bill in the field of asylum, based on such needs.<sup>55</sup>

Within this process of change, the importance that the ECtHR has had is indisputable. The State took into consideration areas where it had faced multiple condemnations by the Court and made partial changes based on those decisions. An example here is the change in the prescribed five-day maximum period for refugees to declare their situation to the authorities found in the 1994 Regulation, which was amended after the Court’s negative decisions on this issue in many cases, for example in *Jabari v. Turkey* where it was stated that “the refusal to consider her asylum request for non-respect of procedural requirements could not be taken on appeal”<sup>56</sup>. This period was first changed from five to ten days in 1999 and after, with the adoption of Circular 57 in 2006, it was clearly stated that asylum authorities are required to accept applications without prejudice even if the applicant “failed to apply within a reasonable time period” and “cannot provide any reasonable excuse.” So the 2006 Circular is also an example of progress in this field.

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<sup>54</sup> Examples that are stated in NAP: Project on Supporting Turkish Authorities Responsible for Migration in the Field of Asylum which is jointly undertaken by the Turkish Ministry of Interior and German Ministry initiated in 2003; Asylum-Migration Twinning Projects; Project for Increasing Police Capacity in the Fields Pertaining to Refugees/Asylum Seekers The Representation of International Catholic Migration Commission (ICMC) to Turkey, the UK Embassy and the Turkish Ministry of Interior in 2004; Project for Country of Origin and Asylum Information System under the contract of TR02-JH-03, Asylum-Twinning Project.

<sup>55</sup> During the implementation stage of the HLWG project entitled “Supporting Turkish Authorities Responsible for Migration in the Field of Asylum” and within the framework of TR02-JH-03, Asylum-Migration Twinning Project; experts from Denmark, the Netherlands, Sweden, Federal Republic of Germany, the UK and Turkey analyzed existing Turkish legal arrangements in the field of Asylum and the loopholes therein. The findings of such analysis were used in the formulation of the draft bill on asylum.

<sup>56</sup> *Jabari v. Turkey* (App no 40035/98) ECHR 11 July 2000

In 2006 another change was made; the former Settlement Act was abolished and replaced with the New Settlement Act, although the priority for persons of Turkish descent and culture still stands. Nevertheless, unlike the former act, the New Settlement Act does not refer to persons of Turkish descent as refugees, rather it keeps silent on refugee issues; settlement no longer has any relationship to refugee status.

Furthermore, the Asylum-Immigration Legislation and Administrative Capacity Developing and Implementing Office was established on 15.10.2008 under the direction of the Ministry of Internal Affairs to work in the asylum and migration field.<sup>57</sup>

However, in 2009 and 2010, the ECtHR decided that Turkey was in breach of the convention due to insufficient detention conditions of refugees and lack of effective remedies.<sup>58</sup> The necessity of legal regulation within the field emerged as an urgent need and eventually a first “Draft on Aliens and International Protection Law Proposal”<sup>59</sup> (the Draft hereafter) was released in 2011.

### **3.1.2 CEAS – Turkey and Draft Bill**

The CEAS basically starts with the creation of harmonized legal frameworks on asylum in each member state, where identification, procedural safeguards and a minimum level of benefits are commonly available for persons seeking asylum. The 2004 European Union Council Directive on Qualification and status as Refugees or Persons otherwise in Need of International Protection<sup>60</sup> (hereafter Qualification Directive/QD), and the 2005 European Union Council Directive on Minimum Standards on Procedures for Granting and Withdrawing Refugee Status<sup>61</sup> (hereafter Procedures Directive/PD) are the main pillars of the CEAS, which are based

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<sup>57</sup> Official link of the Office: <http://gib.icisleri.gov.tr/>

<sup>58</sup> Abdolkhani and Karimnia v. Turkey and the other relevant decisions Please see the following link to find all relevant case law in the field about Turkey: [http://gib.icisleri.gov.tr/default\\_B0.aspx?content=1053](http://gib.icisleri.gov.tr/default_B0.aspx?content=1053)

<sup>59</sup> Draft can be found on the official web site : [http://www.icisleri.gov.tr/default.icisleri\\_2.aspx?id=5851](http://www.icisleri.gov.tr/default.icisleri_2.aspx?id=5851)

<sup>60</sup> European Union: Council of the European Union, Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted, 19 May 2004, 2004/83/EC, available at: <http://www.unhcr.org/refworld/docid/4157e75e4.html> [accessed 25 April 2011]

<sup>61</sup> European Union: Council of the European Union, Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, 2 January 2006, 2005/85/EC, available at: <http://www.unhcr.org/refworld/docid/4394203c4.html> [accessed 25 April 2011]

on the CRS51. Since the directives are regulated in line with the CRS51, adopting those as a first stage can provide coherence with the CSR51 for Turkey. Therefore, firstly it will be investigated as to whether the draft bill complies with the two directives and secondly, to what extent these directives can solve the problems that have been identified.

### **3.1.2.1 Qualification Directive**

The QD designates common criteria for the identification of persons who are qualified as a refugee and who are qualified for subsidiary protection and subsequent rights coming from being persons in need of international protection. It aims to ensure that a minimum level of benefits is available for these persons in all Member States.<sup>62</sup> The QD is partly followed in the Draft under the ‘International Protection’ part, which provides for “subsidiary protection status” and criteria of qualification for it. However, the Draft remains silent on qualification for protection under the non-refoulement principle and omits criteria on how to assess asylum applications, how to assess facts and circumstances of the application; persecution, serious harm etc. despite the fact that these are all contained within the Qualification Directive.

The Draft also keeps the distinction between European and non European asylum seekers, referring to them as “refugees” and “conditional refugees” respectively. Furthermore, while QD also recognizes that employment, education, social welfare, health care and accommodation rights in equivalent conditions with nationals must be given soon after acceptance of status, the Draft maintains the same hesitancy on recognizing social rights as before, by stating that state ‘may’ supply allowances; refugees ‘may’ benefit from social assistance and services; premiums to benefit SIGH can be demanded from refugees/asylum seekers fully or partly; and, most importantly, the Draft subsumes conditional refugees’ right to work, to Act 4817, which means that the same problems with this act mentioned above will remain. Although the Draft recognizes working rights for refugees and subsidiary protection beneficiaries, it reserves the power to limit this right if predicted economic or sectoral situations require such restrictions. Additionally, unlike the QD, the Draft still reserves the right to limit the movement of refugees, using the grounds of ‘public order or public security.’

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<sup>62</sup> Article 6 of the Directive’s reasoning part

### 3.1.2.2 Procedures Directive

The Procedures Directive establishes minimum standards on procedures in Member States for granting and withdrawing refugee status and regulates procedural safeguards in a comprehensive way. Parallel to the PD, the Draft seeks to correct many ongoing flaws of the Turkish legislation, through providing: the right to make applications at the frontiers; the right to be informed in a language that applicant can understand and the right to have interpretation; appeal rights and the right to stay in the country during the appeal process; the possibility to benefit from judicial assistance free of charge; the right to access an attorney, UNHCR and a legal representative during “administrative supervision”; judicial review and a time limit for “administrative supervision,” which are the main safeguards contained within the PD. Furthermore, the Draft generally follows the PD defining the concepts of first country of asylum and safe third country, inadmissible applications and withdrawal of refugee status, among others.

What is missing in the Draft, that is required by the PD, is; a well regulated procedure for interviews; requirements for the examination of applications; requirements for a decision by the determining authority; and criteria regarding the collection of information on individual cases. In some sections, the Draft mentions applications at borders, but there is no specific part on asylum procedures at borders and transit zones.

Consequently, by looking at the changes, we can say that the State is willing to regulate the area but still tries to eschew some issues. The deficiency on qualification and procedural issues might be interpreted as the state still not wanting to take sole responsibility for RSD, with the Draft indicating to the EU that Turkey will develop the field, but will only adopt parts that it is ready to change. Accordingly, there is not enough regulation on the RSD process and there are not fully fledged social rights, rather it is somehow a promise for progress. However and despite the deficiencies, the Draft can be largely welcomed as a starting point for progress in ‘democratization.’

So far as it has been looked at, compliance with the directives of the EU Acquis also brings compliance of the state with IHRL obligations and generally with the CSR51. However, is it possible to say that the CEAS complies with the IHRL and CRS51 as a whole? To find the answer, in the next section, the Dublin system as a part of the CEAS will be analyzed.

### 3.1.3 Dublin System – IHRl Responsibilities and Turkey

The Dublin Regulations charge Member States with the responsibility to examine asylum applications in line with an EU standard, based on the idea that each member state should supply the same level of protection to asylum seekers as a part of the CEAS. As Madeline has stated, ‘The Regulation implies that all Member States are considered ‘safe’ by the other Member States. Thus the presumption is made that asylum claimants may be sent back or onwards to another Member State, where they will have an opportunity to have their claims examined fairly.’<sup>63</sup> Under this system, however, external border states are under face a heavy burden due to an unequal distribution of responsibility. As a result, external border states, who are generally new members (with the enlargement of the land borders of the EU) or who are on the main inroads towards the EU (sea borders) have been faced with a set of new problems, which are highly open to the possibility of human rights violations.

Article 33 of the CSR51 prevents states from expelling or returning a refugee to the frontiers of territories where his/her life or freedom would be threatened, from which it can be conceived that the prohibition does not exclude the returning of persons to any country where he/she will be in safety. However, the determination of safety is highly debatable. Despite the Dublin Regulations, member states still implement a variety of reception practices and have far from a common interpretation of the refugee definition and a common approach to granting international protection.<sup>64</sup> For instance, in Greece it 2007, out of a registered 25,113 new asylum claims, eight were granted refugee status, corresponding to a recognition rate of 0,04 per cent at first instance, while refugee status was granted on appeal in 138 cases, corresponding to a recognition rate of 2,05 per cent.<sup>65</sup> Rejected asylum seekers are faced with the threat of deportation, which in this case means refoulement. Concerning Iraqi asylum-seekers, who generally cross from Turkey into Greece, in the same year 5,474 of them lodged an asylum application, but none were granted refugee status or

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<sup>63</sup> Garlick, Madeline, *The EU Discussions on Extraterritorial Discussions on extraterritorial Processing: Solution or Conundrum?* (September 2006). *International Journal of Refugee Law*, Vol. 18, Issue 3-4, pp. 601-629, 2006. Available at SSRN: <http://ssrn.com/abstract=1098664> or doi:10.1093/ijrl/eel014, p.607

<sup>64</sup> The Dublin II Regulation a UNHCR Discussion Paper, p.12  
[http://www.en.refugeelawreader.org/index.php?option=com\\_content&view=article&id=81&Itemid=207](http://www.en.refugeelawreader.org/index.php?option=com_content&view=article&id=81&Itemid=207)

<sup>65</sup> UN High Commissioner for Refugees, *UNHCR Position on the Return of Asylum-Seekers to Greece under the "Dublin Regulation"*, 15 April 2008, available at: <http://www.unhcr.org/refworld/docid/4805bde42.html> [accessed 21 June 2011] Para.11, p.4

subsidiary protection at first instance; 3,948 applications were rejected at first instance while the rest remained pending for review at the end of 2007.<sup>66</sup>

Sending asylum seekers back to their countries from EU countries that have a dysfunctional asylum system, obviously leads to a breach of article 33 of the CRS51 or article 3 of the ECHR. As is well known, the standards on fundamental rights in the Union are quite high and any sort of restriction on the given rights can lead to a conflict of norms. Due to this, the Dublin System has already been challenged by national, international or union level judicial mechanisms, the results of which will be shown below.

### 3.1.3.1 Responsibility under the Dublin System in ECtHR decisions

While the court dismissed the application in the case of T.I. v. the United Kingdom (UK)<sup>67</sup>, it did discuss the issue of responsibility under the Dublin System, in this case in the context of sending a Sri Lankan national from the UK back to Germany, following the to Dublin Regulation. The court stated that :

*“..the indirect removal in this case to an intermediary country, which is also a Contracting State, **does not affect the responsibility** of the UK to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention. Nor can the United Kingdom rely automatically in that context on the arrangements made in the Dublin Convention concerning the attribution of responsibility between European countries for deciding asylum claims. Where States establish international organizations, or mutatis mutandis international agreements, to pursue co-operation in certain fields of activities, there may be implications for the protection of fundamental rights. **It would be incompatible with the purpose and object of the Convention if Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution.**”*

While it established that responsibility means that for the court, in the case of M.S.S. v. Belgium and Greece<sup>68</sup> where the applicant, an Afghan national, left Kabul and arrived in Belgium via Iran-Turkey-Greece, but was sent back to Greece according to the Dublin System, the Court found a violation.

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<sup>66</sup> Ibid, para.13, p.5

<sup>67</sup> T.I. v. The United Kingdom, Appl. No. 43844/98, Council of Europe: European Court of Human Rights, 7 March 2000, available at: <http://www.unhcr.org/refworld/docid/3ae6b6dfc.html> [accessed 13 May 2011]

<sup>68</sup> M.S.S. v. Belgium and Greece, Application no. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011, available at: <http://www.unhcr.org/refworld/docid/4d39bc7f2.html> [accessed 13 May 2011]

*“Article 3 (prohibition of inhuman or degrading treatment or punishment) of the ECHR with Greece both because of applicant’s detention and living conditions in Greece and Belgium. A violation of Article 13 (right to an effective remedy) taken together with Article 3 was detected for Greece because of the deficiencies in the asylum procedure followed in the applicant’s case. A violation of Article 3 by Belgium was also detected both because of having exposed the applicant to risks linked to the deficiencies in the asylum procedure in Greece and because of having exposed him to detention and living conditions in Greece that were in breach of Article 3. Furthermore, a violation of Article 13 taken together with Article 3 by Belgium was again established because of the lack of an effective remedy against the applicant’s expulsion order”<sup>69</sup>*

Here we can see that there is a brake on the system. As the EU countries/EU has tied to a high level of human rights protection – the ECHR - as was stated in the beginning; it has restricted its sovereignty partly. Any attempt at indirect or direct avoidance of responsibility under the human rights regime is eventually put back on to the state.

### **3.1.3.2 Sovereignty clause – Suspension of Dublin Returns**

The UK always stands as a good example to for a closer examination, both due to its advocacy on policy issues and its leading national and international case law. In the House of Lords decision of Regina v. Secretary of State For The Home Department, ex Parte Adan and Aitseguer (19 December 2000), the court held that Somali and Algerian asylum applicants could not be returned to France and Germany on safe third country grounds, as both states do not grant protection to those groups who are in fear of non-state agent persecution. Moreover, the UK Border Agency decided to suspend the return of asylum seekers to Greece on 20 September 2010, pending the result of a case that has been referred to the Court of Justice of the European Union (ECJ) from the UK Court of Appeal where NS vs. SSHD and others (formerly known as the Saeedi case) challenged the decision of the UK to remove the applicants to Greece under the Dublin system.<sup>70</sup> The UK has decided to process 1300 asylum applications itself for which Greece could have been held responsible under the Dublin System, rather than wait (potentially 2 years) for that case to be resolved by the ECJ.<sup>71</sup> Article 3(2) of the Dublin Regulation gives enough legal grounds to

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<sup>69</sup> Press release of the decision, issued by the Registrar of the Court no. 043, 21.01.2011

<sup>70</sup> ECRE Weekly Bulletin, 23 September 2010, available at:

[http://www.ecre.org/files/ECRE\\_Weekly\\_Bulletin\\_23\\_September\\_2010\\_0.pdf](http://www.ecre.org/files/ECRE_Weekly_Bulletin_23_September_2010_0.pdf) p.2

<sup>71</sup> Ibid p.2



practice a 'sovereignty clause' by states, through stating that each Member State may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in this Regulation. Not only the UK, but also Sweden, Belgium, Denmark, Finland and Germany have stopped returns to Greece under the Dublin system, with UNHCR having called on states to suspend returns to Greece and use the sovereignty clause.

### **3.1.3.3 Turkey - Dublin Relationship**

Turkey is neither a safe third country nor a first country of asylum according to the Procedurals Directive definition, however it will become one with the adoption of the QD and PD and the lifting of the limitation. Turkey is also a candidate country and is not a party to Dublin Regulation. However this special examination of the Dublin System has been given, in order to see the potential future situation for Turkey. Burden sharing is the main point of resistance of Turkey for not lifting the restriction, although, within the EU, migration and asylum related issues are more burden shifting than sharing. Greece therefore stands as a model for Turkey; as the main transit route is Turkey rather than Greece, it will not be hard to predict that Turkey's situation will not be better than Greece's, unless the Dublin Regulations are fundamentally reformed. Consequently, we can say that the adoption of the EU Acquis does not bring mere democratization; as well as leading to greater compliance with IHL norms, it might also lead to conflicts with these norms as well.

## **3.2 Securitization Process**

The Schengen regime has also been developed under the common "area of freedom, security and justice" policies of JHA, together with the CEAS<sup>72</sup> and has played an important role in combating irregular migration. Securitization as a metaphor refers to the process of how the EU is rebuilding its borders at the union level against migration, while abolishing internal ones; 'political actors have developed a common understanding of security threats based on the idea that a safe inside should be more effectively protected from an unsafe outside.'<sup>73</sup>

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<sup>72</sup> Stefano Bertozzi 'Schengen: Achievements and Challenges in Managing an Area Encompassing 3.6 million km<sup>2</sup>', Justice and Home Affairs, CEPS Working Documents, 07 February 2008, p.6

<sup>73</sup> Florian Trauner, Imke Kruse, '*EC Visa Facilitation and Readmission Agreements: Implementing a New EU Security Approach in the Neighbourhood*' (23 April 2008) ISBN-13: 978-92-9079-781-4 p.2, citing Monar, J. (2001a), "*The Dynamics of Justice and Home*

As Kirisci has stated, “The policies included in the Schengen *acquis* include the listing of third countries whose nationals are exempt from or must be in possession of visas, external border controls and cooperation between the border control services, rules on free movement of persons, visa policy, extradition and readmission agreements, security standards for travel documents, anti-drugs policies, judicial cooperation in criminal matters, Schengen Information System (SIS), etc.”<sup>74</sup> In this section attention will be called to Turkey’s situation regarding its integration with the Schengen policy, particularly in issues relating to; border controls, adopting the EU negative visa list and readmission agreements. Such an investigation will enable the making of predictions about the near future of the refugee situation within Turkey.

### **3.2.1 Dilemma: EU Negative List, Schengen Visa and Turkey**

The policy of externalization of border controls requires that candidate countries adopt the EU’s visa regime and implement its border controls. Turkey, as one of the candidates, committed to adopt the Schengen *acquis*, however many challenges arise as a result of this.

To begin with a prime example of one of these challenges; Turkey needs to reconsider its border controls and visa implementation towards other countries’ nationals, which requires imposing visas on citizens of countries on the EU’s negative visa list,<sup>75</sup> however Turkey itself is one of the states on the list. Furthermore, Turkey has good relations with some countries who are already on the list and, apart from economic concerns, historical and cultural ties and the existence of minorities which spread across other territories, all exist as strong reasons to keep the borders flexible. Although Turkey has tried to harmonize with this list, it is resisting with regards to some countries with whom the state has strong ties; including, *inter alia*, Iran, Bosnia, Georgia and Turkic republics.

Additionally, as a signatory to the European Agreement on Regulations Governing the Movement of Persons between Member States of the Council of Europe (1957), Turkish citizens did have the possibility to travel freely

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*Affairs: Laboratories, Driving Factors and Costs*”, Journal of Common Market Studies, No. 39, pp. 747-764.

<sup>74</sup> Apap, Joanna and Carrera, Sergio and Kirişci, Kemal. (2004) *Turkey in the EU Area of Freedom, Security and Justice. CEPS EU-Turkey Working Papers No. 3, 1 August 2004.* [Working Paper] p.2

<sup>75</sup> Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement.

without visas to Europe. However, “subsequent to the military intervention in Turkey in September 1980, a number of countries started the practice of demanding visas from Turkish nationals. This coincided with an increase in asylum demands from Turkish citizens. The expectation on the part of the Turkish authorities that members of the Council of Europe would revert to the practice of visa-free travel for Turkish nationals once the military in Turkey returned power to civilian authority in 1983 did not occur.”<sup>76</sup> Turkey has also signed the Agreement on Establishing an Association Between the European Economic Community and Turkey (1963) (Ankara Treaty) and its additional protocol (1970) for the aim of promoting trade and economic relations between the Contracting Parties.<sup>77</sup> According to this agreement, Turkish nationals can enter contracting parties’ territory without a visa requirement for the aim of work or service provision, however in practice this provision is ignored. The ECJ has accepted in some cases<sup>78</sup> that Turkish nationals do not need a visa when the visit is for the aim of trade.<sup>79</sup> Moreover according to the Turkish newspapers<sup>80</sup> the Munich Administrative Court has recently given a judgment stating that Turkish nationals who come for tourism can enter Germany, according to the Ankara Treaty. However Turkey remains on the negative list.

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<sup>76</sup> Apap, Joanna and Carrera, Sergio and Kirişci, Kemal, *supra note 52*, p.26

<sup>77</sup> Signed at Ankara, 12 September 1963, between The King Of The Belgians, The President Of The Federal Republic Of Germany, The President Of The French Republic, The President Of The Italian Republic, The Grand Duchess Of Luxembourg, The Netherlands and The Council Of The European Economic Community And The President Of The Republic Of Turkey.

<sup>78</sup> Case C-228/06 *Mehmet Soysal and Ibrahim Savatli v Bundesrepublik Deutschland* [2009] ECR I-01031 OR Joined Cases C-317/01 & C-369/01 *Eran Abatay and Others and Nadi Sahin v Bundesanstalt für Arbeit* [2003] ECR I-12301

<sup>79</sup> Declaring that: ‘Article 41(1) of the Additional Protocol to the EEC-Turkey Association Agreement, which provides that the Contracting Parties are to refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services, is to be interpreted as meaning that it precludes the introduction, as from the entry into force of that protocol, of a requirement that Turkish nationals such as the appellants in the main proceedings must have a visa to enter the territory of a Member State in order to provide services there on behalf of an undertaking established in Turkey, since, on that date, such a visa was not required.

<sup>80</sup> C Özcan, ‘Vize duvarını yıktık’ *Hurriyet* (Istanbul 11 February 2011) <<http://www.hurriyet.de/haberler/gundem/824351/vize-duvarini-yiktik> > accessed 14 May 2011

The Turkish national applicant, who took a flight to Turkey from the USA with a transfer at Munich airport couldn’t catch the transfer flight because of a delay and wanted to stay in a hotel until the next flight in the following day, was refused since the hotel was outside of the airport and she took that situation to the Court by claiming that it is contrary to the Ankara Treaty.

Being on the negative visa list and seeing the examples of the former candidate countries Romania and Bulgaria, who were exempted from visa requirements before their acceptance or the current examples of Macedonia, Serbia and Croatia, who have also been exempted, creates disbelief towards the Union and possible future membership in Turkey. This distrust creates a hesitancy or slowness of adopting the acquis, particularly when the issue is burden sharing with the EU, as it is in lifting the restriction. The impact of this situation on asylum policy will be clarified in the coming sections.

### **3.2.2 The nexus of the Irregular Migration-Schengen Regime, Asylum and Turkey**

The EU has imposed the Schengen regime as an integral part of combating irregular migration and, as a main transit country, Turkey is critical in the border control regime. Thus, in this part, at the linkage between irregular migration and border controls will first be looked at. There is quite a strong correlation between irregular migration and asylum, due to the irregular movement situation of asylum seekers. Therefore, this issue will be looked at again, through the lens of Turkey.

#### **3.2.2.1 Irregular Migration-Border Controls Relation**

It is estimated by the Organization for Economic Cooperation and Development (OECD) that between 10 and 15 per cent of Europe's 56 million migrants have irregular status, and that each year around half a million undocumented migrants arrive in the EU.<sup>81</sup> Irregular migration, which arises mainly due to the lack of jobs or lack of adequate living conditions, forces people to cross lands to have access to jobs, money and relatively better living standards, despite the fact that opportunities in destination countries are not that favourable, due to their 'illegal' and 'informal' status.

The informal economy is highly widespread and, as the global economy becomes more competitive and companies seek to reduce costs further, it is more likely that the market for irregular migrant labour will continue to expand, especially in countries where the formal labour market is highly regulated.<sup>82</sup> Thus, the need for cheap labour creates its own market and

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<sup>81</sup> Global Commission on International Migration (GCIM), 'Migration in an interconnected world: New directions for action' (Report) (October 2005) <

<http://www.gcim.org/en/finalreport.html>> accessed 14 May 2011, p.32

<sup>82</sup> *ibid.* para.23, p.37

raising the borders against migration while developing the need for migrant workers occurs as a paradox. Research conducted by the ILO shows that the absence of regular and legal opportunities for labour migration is a prime factor in the growth of irregular migration, trafficking and smuggling of human beings. Since irregular migration is growing within each country of the global labour market, many governments tacitly tolerate the presence of migrant workers in irregular status to sustain large informal economies, while officially they wish to be seen as “combating” or “fighting” irregular migration.<sup>83</sup>

As long as distressing situations causing persons to wish to leave the country exist, economic and political disparities between states or regions are large and there is available room in the market for the labour of migrants, tightened borders will not help to reduce migration. Instead, the lack of possibilities of legal/regular movement creates more demand for smugglers, or exposes migrants to dangerous journey conditions or human trafficking. The International Centre on Migration Policy Development estimates that some 2,000 migrants die each year while trying to cross the Mediterranean from Africa to Europe<sup>84</sup> and the US State Department estimates that every year, between 600–800,000 women, children and men are trafficked in every region of the world.<sup>85</sup>

Sovereignty and security versus migration issues puts the attention on the borders while the distress that urges people to move is for the most part ignored. If distressing situations continue to exist, borders will not help to prevent movement other than making a class of people illegal. Taking these numbers into consideration, the welfare states need to reconsider their policy of combating irregular migration, human trafficking and smuggling. As one official of the European Commission expressed:

“There is a big misunderstanding in the EU. Visa policy has nothing to do with illegal migration or trafficking in human beings. It is like the link between prohibition and drinking beer. Once you forbid alcohol at all levels, all beer drinkers become criminals. If you are limiting or suppressing the possibilities for something that is basic, like beer drinking or going to Paris for a weekend, then people invent things to be nonetheless able to do it. And they will find a way. So the EU’s visa policy is not helping a bit to reduce

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<sup>83</sup> ILO ‘International labour migration: A rights-based approach’ (2010) ISBN 978-92-2-119120-9 (ILO ) pg: 35

<sup>84</sup> GCIM, *supra note 81*, para.9 p.34

<sup>85</sup> *Ibid*, para.10 p.34

the number of criminals or economic illegal immigrants, because they are already there.”<sup>86</sup>

### **3.2.2.2 Irregular Migration - Asylum – Borders Relation**

Asylum seekers are potential illegal/irregular migrants since there are no extraterritorial possibilities of access to asylum unless asylum seekers come to the frontiers (which also does not guarantee the situation). It might be almost impossible for a person who is persecuted by his own government to obtain a visa or even a passport or to expect that person to complete the visa procedure and to be guaranteed one, considering their situation.<sup>87</sup> In such a case, the only alternatives left are paying smugglers, crossing dangerous borders or using forged documents.

If we turn back to the example of Turkey, as a source country/transit country for irregular migration, it is required to implement rigid visa and border regimes to cope with the problem (irregular migration) at its source, since it is surrounded by economically or politically unstable countries, while Turkey itself is one of the refugee and migrant sending countries. Turkey has long land borders, many of them crossing mountainous terrain and long sea borders in the Black Sea, the Aegean and the Mediterranean. Due to these geographical reasons, it is not possible to take strict control over every land and sea border, even if Turkey applies the Schengen regime strictly. I would like to show a survey result which has been held among irregular migrants in 2003 by the International Organization for Migration (IOM) in Turkey. Although it is not updated, it still helps us to get a better understanding.<sup>88</sup>

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<sup>86</sup> Florian Trauner, Imke Kruse, ‘EC Visa Facilitation and Readmission Agreements: Implementing a New EU Security Approach in the Neighbourhood’ (2008) [CEPS Working Documents](#), p.9

<sup>87</sup> L. Westra, ‘Environmental Justice and the Rights of Ecological Refugees’ Earthscan 2009, p. 50

<sup>88</sup> Ahmet İçduygu, ‘Irregular Migration in Turkey’ IOM 2003 p. 29: “In order to reflect the composition of irregular migrants in Turkey, as recorded by the Bureau for Foreigners, Borders and Asylum at the Directorate of General Security of the Ministry of the Interior, the sample survey included 53 irregular migrants selected on the basis of national and ethnic origin, time of arrival, gender, age, length of residence, marital status, schooling, employment, occupation and manner of entry. Accordingly, the sample contained 13 Iraqis (26%), 13 Iranians (26%), seven Afghans (14%), 12 from African countries (26%), three from European countries (6%) and two from other countries (4%). The sample therefore largely reflects the actual composition of irregular migrants in Turkey.”

TABLE 2 : REASONS FOR TARGETING TURKEY (in percentages)

	Iran	Iraq	Afghanistan	Africa (various)	Other
Adjacent Country	76.9	84.6	14.3	0,10	20,00
Low Travel Cost	15.4	61.5	57.1	20,00	40,00
Presence of UN Agency	38.8	15.4	42.9	0,00	0,00
Low Cost of Living	0,00	46.25	28.6	30,00	20,00
Relatives	30.8	23.1	0,00	0,00	20,00
Friends	0,00	38.5	0,00	20,00	60,00
No Visa Requirements	0,00	7.7	0,00	0,00	0,00
Familiarity	15.4	46.2	0,00	0,00	40,00
Onward Migration	0,00	23.1	14.3	20,00	40,00
Work	7.7	23.1	0,00	20,00	60,00
Ease of Border Crossing	46.2	30.8	42.9	0,00	40,00
Ease of Obtaining Visa	0,00	0,00	0,00	8.3	0,00
By error	0,00		0,00	45.5	0,00

These countries/regions are also the main refugee sender countries/regions to Turkey and Turkey does not require visas from Iran nationals. As far as we can see from the table, none of them desired to come to Turkey for visa reasons. In the meantime, as we already know, many of the refugees flee from Iran to Turkey safely and legally through obtaining valid documentation, and it can be seen that the static presence of UN agencies is much more important. Thus the main concern in applying visa sanctions is that asylum seekers who are benefiting from legal movement conditions might be exposed to illegal entry conditions, where their life might be in danger and access to asylum conditions could worsen.

Visa sanctions and failures in border management in combating irregular migration have also brought another securitization policy, which is embodied in readmission agreements.

### 3.2.3 Readmission Agreements

According to Coleman, a third country national entering a neighbouring state without required documentation indicates that a transit state has failed to adhere to its obligation. This, in turn, would create an obligation on the part of transit states to correct this by readmitting third country nationals who have entered neighbouring states via their territory. Such penalization

of a failure to control migration by way of an obligation to readmit persons is reflected in contemporary readmission agreements.<sup>89</sup>

Readmission agreements are not recent policies for the EU countries as there have been mutual and bilateral agreements between European states and third countries previously. However, the competence shifted to the EC after the Amsterdam Treaty and the EC received the mandate to negotiate readmission agreements with non-member countries on the member states' behalf.<sup>90</sup> According to these EC readmission agreements, contracting parties commit to accept back not only their nationals but also third country nationals, who passed through their country. Readmission agreements are the main legal sources to oblige states to accept third country nationals back since there is no such formal obligation under international law. Thus, it is hard to conclude these agreements with third countries; states exchange the benefits through accepting irregular migrants back and having visa facilitation agreements with the EU. The EC and Turkey started negotiations in 2002 and according to the Council of the EU, the negotiations were finalized in 2011 but an agreement has not been signed yet.<sup>91</sup>

Nevertheless, the EC also encourages third countries to sign readmission agreements with other third countries including neighbouring countries. In Turkey's example, Turkey has already signed agreements with Greece, Syria, Kyrgyzstan and Romania and is negotiating further agreements with Belarus, Bulgaria, Egypt, Kazakhstan, Libya, Lebanon, Macedonia, Sri Lanka, Russia, Ukraine and Uzbekistan.<sup>92</sup>

As has been stated in the previous part, asylum seekers mainly end up in a situation of irregular migration. The main concern about their situation here is that they might be subject to readmission agreements before they find a chance to approach authorities or will be sent back from a country where there no functioning asylum system exists, since rejected asylum seekers will be subject to a readmission policy.

After signing the agreement, the main sending country for Turkey will be Greece due to its proximity. Greece that "continues to have the lowest

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<sup>89</sup> Coleman, Nils, *European readmission policy: third country interests and refugee rights : Immigration and asylum law and policy in Europe*, Martinus Nijhoff, 2009 p.43

<sup>90</sup> Florian Trauner, Imke Kruse, *supra note 63*, p.10

<sup>91</sup> Council of The European Union, Council conclusions on EU-Turkey Readmission Agreement and related issues 3071st Justice and Home Affairs Council meeting Brussels, 24 and 25 February 2011, [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/jha/119501.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/119501.pdf) accessed 14 May 2011

<sup>92</sup> Apap Joanna and others, *supra note 74*, p.10



recognition rate of refugees among EU member states (very close to ‘zero’),<sup>93</sup> will be sending back rejected asylum seekers. How are these people going to be saved from the risk of refoulement? What do readmission agreements contain for the protection of refugees or fundamental human rights?

These agreements only contain the ‘non-affected’ clause which is that “an agreement shall be without prejudice to the rights, obligations and responsibilities of the Community, the Member States and the contracting state arising from International Law and, in particular, from the European Convention of 4 November 1950 for the Protection of Human Rights, the Convention of 28 July 1951 and the Protocol of 31 January 1967 on the Status of Refugees, and International instruments on extradition.” There is no explicit reference to the principle of non-refoulement or human rights responsibilities except this small reminder.

In Turkey’s case, there have been two possible extremely negative results for the refugees situation after readmission. First of all, Turkey does not have a functioning asylum system and since refugees will all be accepted as irregular migrants, it is highly possible for the system to ignore their asylum applications after they arrive to Turkey (especially for those who have already been rejected). Secondly, the feasibility of accommodating newcomers in increasing numbers might lead to inhuman detention/reception conditions and, as Turkey has bilateral readmission agreements with countries outside the EU, it could result a passing of refugees from one country to another, with the asylum system or reception conditions getting weaker and weaker from West to East.

Through exchanging migrants for visa facilitation (facilitation for some particular groups of the state, for example students, businessmen/women), neither Turkey nor the EU has emphasized the possible human rights consequences. Turkey and Greece already have a dysfunctional readmission agreement (2001) and, according to a Human Rights Watch (HRW) report,<sup>94</sup> Turkey does not want to readmit migrants, while Greece, on the other hand, under the heavy burden of the Dublin System wants to avoid newcomers. Both countries want to push the responsibility onto each other and, according to the report and interviews in it, Greece returns migrant boats in the sea with push-backs to Turkish waters. Therefore it can be concluded by reference to the title of the report, the readmission system,

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<sup>93</sup> Carrera, Sergio and Guild, Elspeth ‘Joint Operation RABIT 2010’ – FRONTEX Assistance to Greece’s Border with Turkey: Revealing the Deficiencies of Europe’s Dublin Asylum System’ (November 2010) CEPS, ISBN 978-94-6138-067-8, p.4

<sup>94</sup> HRW, ‘Stuck in a Revolving Door Iraqis and Other Asylum Seekers and Migrants at the Greece/Turkey Entrance to the European Union’ (November 2008) 1-56432-411-7

as a whole, is a revolving door for the migrants. They will be sent back one way but will return again through another.

### 3.3 Perspective

In this chapter the possible outcomes of the implementation of the CEAS and Schengen acquis, the problems Turkey will encounter in harmonizing its rules with the acquis and to what extent this has been achieved in the adoption process until now, have been shown. Although empirical data is lacking, since the implementation of these regimes is fairly new in Turkey, the former experiences of other countries and the ongoing situation have provided enough grounds to be able to read possible outcomes.

European Union membership has always been perceived as a part of democratization and progressiveness towards the idea of human rights by Turkish society and, although standards on rights and freedoms are high in the Union, when migration is the issue, security concerns are ahead of human rights concerns. The progress of establishing a fair asylum system and the struggle to get closer to the European asylum system by partly adopting directives is gladly welcomed though and gives hope concerning prospective outcomes of the Schengen acquis and Dublin system.

As Kirisci stated, the securitization of immigration issues in Europe and the pressure put on Turkey to combat illegal transit migration jeopardizes the improvements made in Turkish asylum policy. This could otherwise lead inadvertently to a paradoxical situation whereby the EU on the one hand assists in a significant improvement in Turkey's asylum practices, but on the other hand undermines those gains as potential asylum seekers risk being deported without having their case fairly heard.<sup>95</sup>

There exists a significant resemblance between the EU and Turkey in the general perception of refugees/migrants as a source of threat and insecurity. The main difference is that the EU distinguishes between the asylum seekers and the migrants, while Turkey generally perceives them in the same way. Migration is already a security issue for the Turkish Republic and has been since its beginning, it is therefore highly possible that the securitization of

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<sup>95</sup> Kirisci Kemal, *'Reconciling refugee protection with efforts to combat irregular migration: the case of Turkey and the European Union'* GCIM (Global Commission on International Migration) Global Migration Perspectives No. 11 October 2004 p.12

migration issues on the path to EU membership might trigger the emergence of a nation state policy from many parts in the country.

Firstly, the expectation of building rigid borders with other countries brings a large dilemma for the state, which is trying to come out of its own nation-state shell. Rebuilding borders with others without opening the ones with the Union will lock the country within itself. Fortress Turkey unlike Fortress Europe will be isolated and keep alive its rigid nation state policy.

Secondly, Turkey has been hesitating on lifting the restriction on the CSR51 without the guarantee of membership and is afraid of turning into a buffer zone and accepting the EU's unwelcoming migrants and refugees. It would not be wrong to say that the restriction has been kept by the state as an internal border to force the EU and other countries to share the responsibility via resettlement and to prevent asylum seekers seeing Turkey as a destination. Migration issues therefore have become more and more of a leverage issue in the hands of states, by using them against each other, for example in how Turkey uses its policy on the restriction and how the EU uses it in readmission policy.

In any case, between these responsibility shifts and benefit-exchange situations, a human rights perspective has been missing once again.

# 4 Overview: Human Rights v. Sovereignty

This thesis has looked at ways for Turkey to turn its policy in the field of asylum/migration to a human rights based policy. All the concerns Turkey has had on nation building or on furthering national interest has been thought as being subject to change through the EU accession process towards a more human rights oriented approach, as the union has strong ties to human rights based policies. However, when the issue of asylum/migration is looked at, it is clear that there have been many barriers within the EU for asylum seekers based not on human rights, but on securitization, barriers legally regulated under the common “area of freedom, security and justice” policy. Therefore, before concluding, we should look at a number of questions arising under this policy:

## 4.1 Whose Freedom?

Freedom is an extremely extensive word that can be discussed from many different aspects. However in this thesis’ context, it can be taken as freedom of movement, which also consists of living free from persecution or inhuman treatment for asylum seekers, encompasses access to protection in the territory of a third country and the ability to access a third country.

A defining prerogative of the nation-state is its right to determine who may or may not enter and remain in its territory.<sup>96</sup> The right to leave is enshrined in the ICCPR and fourth protocol of the ECHR, but the right to enter a third country remains a problem. As Noll has also stated, in Article 33 of the CSR51 (refoulement) or Article 3 of CAT (expel, return ("refouler") or extradite), the mere wording of the provisions does not allow for a clear cut interpretation for the situation of a person who presents herself/himself at the border of the territory of a contracting party.<sup>97</sup>

The right to leave will not protect asylum seekers alone if it cannot be combined together with the ‘right of entry’. The ‘right of entry’ mainly

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<sup>96</sup> Brouwer, Andrew, Kumin, Judith, "Interception and Asylum: When Migration Control and Human Rights Collide", (2003)21 *Refuge: Canada's Periodical on Refugees*, 6-24 p.8 available at: <http://www.unhcr.org/4963237d0.html>

<sup>97</sup> Noll, Gregor, *Negotiating asylum: the EU acquis, extraterritorial protection and the common market of deflection*, Martinus Nijhoff, Diss. Lund : Univ.,The Hague, 2000

challenges the nation state's sovereignty and, while nation states keep that right in their hand, they are partly prevented from using it arbitrarily due to the principles of human rights on refoulement/expulsion/return of the person to a territory where his life will be in danger.

In the context of Turkey however, by keeping its restriction on the convention as a virtual border for those who have accessed the territory, by refusing to accept applications at the borders and transit zones and by banning the movement of asylum seekers within the country and charging residence fees, a clear answer to our question is given; the freedom is not, at least, asylum seekers' freedom.

On the path to EU accession, firstly with the adoption of the directives, transit zones and the border situations there will be in a better situation for asylum seekers. For that reason, Turkish asylum policy will be improved towards a more human rights based approach in the case of access to asylum procedure and the RSD procedure of the state.

However, through pre-entry condition visas, interception measures and post-entry conditions; the Dublin system and readmission policies, asylum seekers are prevented from accessing protection fully, as has been explained in the previous chapters.

While seeing that EU legislation is much more advanced in a human rights asylum policy than Turkish, it has also been shown that there are some more or less similar concerns in the EU and Turkish approaches, which in general prevents the development of human rights.

Therefore in the first round of contention between human rights v. sovereignty, freedom is not unconditional in the contemporary practice of migration policies but also sovereignty is not either, due to the contemporary practice of human rights. In this case, it is not a total freedom for asylum seekers to enter a third country, but it is not a total freedom for the state either to decide who can be sent back arbitrarily. We expect abolishment of borders for those who are need in protection; at least for the ones who have managed to come to the borders, to the territory or who are intercepted at some point of their journey via a third country; there should be accessible efficient asylum system which will enable them to move out of their Hades. The EU accession process goes some way towards achieving this, however we cannot say that it is a total transformation of the policy and we therefore cannot say that the freedom is the freedom of the refugee.

## 4.2 Whose Security?

As has been discussed during the thesis, it the state's - the nation's - security, which is not defined in any paper, neither in EU documents nor in Turkish and thus has a flexible and wide application to all issues within the discretion of the decision authorities. Asylum and migration has always stayed as a security concern for Turkey despite the reasoning for doing so changing. For the EU it is also a security issue; although we are not able to define the EU as one nation but as a superior entity, the common European Union national identity and common benefits of the union and its nationals have been protected from the 'migration threat'.

But what can migration threaten? Kicinger distinguish which values, protected as components of security, might be threatened by international migration and its consequences: social stability; demographic security; cultural identity; social security system and welfare; state philosophy; internal security.<sup>98</sup>

All of these reasons have, at least once, been employed by Turkey; as was discussed earlier, migration has been a threat to national homogeneity and therefore demographic security and cultural identity (if the Settlement Act is recalled), it has been a threat due to the Kurdish question and therefore internal security; and, as usual, it has been perceived as a threat for the welfare of the state.

Here policies developed in the name of security concerns have mainly been discussed, but how far states can go in the name of security concerns, since it is not defined, raises the question of what is the limit of those security concerns, where does it start and where does it end? It seems that there is no limitation on that; it might be employed in any situation by a state, but it cannot be justified in each case. The only limitation on security issues is the human rights regime and the ability to use security concerns may fail, when it collides with the essential rights of individuals. To see it closer;

In the *Chahal v. UK* case<sup>99</sup>, the court ruled that the UK could not return Karamjit Singh Chahal, an alleged Sikh militant, to India in reliance on diplomatic assurances against torture from New Delhi, no matter what

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<sup>98</sup> Anna Kicinger, 'International Migration as a Non-Traditional Security Threat and the EU Responses to this Phenomenon' Central European Forum For Migration Research CEFMR Working Paper 2/2004 p.2

<sup>99</sup> *Chahal v. UK* (App no 22414/93) 15/12/1996

crimes he was suspected of or his status in the UK.<sup>100</sup> The UK argued that his presence was a threat to national security (under counter-terrorism policy) and also stated that he will be safe back in his country since they had a diplomatic assurance. However the court stated that the Convention prohibits, in absolute terms, torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4 (P1, P4), Article 3 makes no provision for exceptions and no derogation from it is permissible even in the event of a public emergency threatening the life of the nation.<sup>101</sup>

However the UK couldn't accept the decision and tried to be a party to other relevant cases of the court to be able to change the decision. For that, the UK intervened in *Saadi v Italy* and *Ramzy v. Netherlands* cases<sup>102</sup>, to argue that the right of a person to be protected from ill-treatment abroad should be balanced against the risk he posed to the deporting state. However the court took the serious risk of ill treatment against applicants more important than their threat against national security.

Nevertheless, in the case of *Mamatkulov and Abdurasulovic v. Turkey*<sup>103</sup>, Turkey extradited two Uzbek asylum seekers to Uzbekistan under a diplomatic assurance, although there had been an issued ECtHR decision not to extradite them as an interim measure as indicated by the Court under Rule 39 of the Rules of Court. (This case has taken its place in Turkish legal history as the second case where Turkey didn't follow a ECtHR decision, following the *Loizidou* case<sup>104</sup>)

Therefore, while the principle of the rule of law is mainly followed by EU countries and regional law instruments have been accepted as superior to their national law, which means that they have partly handed over their sovereignty, we are still seeing resistance at some points to accept that in Turkey.

Then in the second round of contention of human rights v sovereignty, when we ask whose security; it is the individual's security for the human rights

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<sup>100</sup> HRW, 'Not the Way Forward The UK's Dangerous Reliance on Diplomatic Assurances' (Report) 2008 ISBN: 1-56432-387-0, p.21

Available at <[http://www.hrw.org/en/node/75603/section/7#\\_ftn52](http://www.hrw.org/en/node/75603/section/7#_ftn52)>

<sup>101</sup> *Chahal v. UK*, *Supra note 99*, para. 79

<sup>102</sup> *Saadi v. Italy* (App no 37201/06) 28/02/ 2008

*Ramzy v. Netherlands* (App no 25424/05) 20/10/2010

<sup>103</sup> *Mamatkulov and Abdurasulovic v. Turkey* (App no 46827/99 and 46951/99) First Section 06/02/ 2003, Grand Chamber 04/02/ 2005

<sup>104</sup> *Loizidou v. Turkey* (App no 15318/89) 18/12/1996

regime but the nation's or national's security for the states and the whole issue rests on how much the state respects its responsibility under the human rights regime.

### 4.3 Whose Justice?

In the final declaration of the G8 summit of 2009 it is stated under the 'Human Trafficking, Illegal Migration, Integration of Legal Migrants' section that:

'We reaffirm our common commitment to combat illegal immigration and migrant smuggling, **which feeds the transnational criminal organizations** and hampers the integration of legal migrants. We express concern over the current international financial crisis, which threatens to increase the migratory pressure towards the more industrialized countries. To address this situation it is necessary to strengthen international co-operation, taking stock of our previous considerations and experiences and improving the means of prevention and fight against **them**.'

'Them' as a word at the end of the sentence, refers to both the illegal migrants and migrant smugglers equally. Illegal migration cannot feed transnational criminal organizations, only the policies which make one person leave a country, which prevents the person from using legal ways to enter another country and which calls these persons illegal, can feed the transnational criminal organizations, as has been partly discussed under the irregular migration part. Thus, that expression itself is discriminatory by creating a 'them' and 'us' binary and creating a paradox by seeing illegal migrants as the source of the problem while in the meantime fighting criminal organizations to save them. So, if we are looking for justice, it is mainly justice for all humanity by accepting everyone's equality, however creating a 'them' and 'us' leaves the question remaining; whose equality?

In the case of Turkey, as has been explained, from the right to movement to access to many social rights, asylum seekers are first discriminated in regards to Turkish nationals, then discriminated in regards to Turkish descendent migrants and then discriminated in regards to migrants from other European countries. However, the restriction itself is not interpreted as being discriminatory, since the state having a discretion on recognizing the right is respected in international law, as has been stated in *A.G. and others v. Turkey*<sup>105</sup> where an Iranian applicant invoked Article 14 of the

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<sup>105</sup> *A.G. and others v. Turkey* (App no 40229/98-First Section Decision)



Convention in conjunction with Articles 3 and 8, saying that the policy of the State on non-European asylum seekers constituted discrimination on the grounds of race and national origin. In its decision, the Court observed that *the essence of the applicant concerns the manner in which the respondent State implements its asylum and refugee policy*, since there is no right to asylum under the Convention or its Protocols and since there is no independent existence of Article 14, there was no violation.

So, it is still the nation state's discretion to decide who will be equals in the case of providing asylum rights. However, for the EU, asylum seekers' rights are recognized equally after they are accepted as refugees within the country. Therefore we see the possibility of improving justice for accepted asylum seekers through providing rights with the adoption of the EU acquis.

Consequently, in the third round of the contention: whose justice? It is still the nation state's justice and justice not for everybody, as long as the difference between 'them' and 'us' stays valid.

## 5 Conclusion

“Human rights were created for the people who, after (the Second World War) fleeing persecution, and thus becoming stateless, had nothing left but their humanity. Arendt emphasizes that directly after the construction of this ideal universal human right, the human for whom the rights were intended was immediately surrendered to the authority of countries. The idea of universal human rights was immediately linked to the power of the nation state; it is the nation state that determines who has the right to have rights and who does not.”<sup>106</sup>

During this thesis, the idea of the right to have rights has been played out; rights are being subsumed by the authorities of countries, who decide who has the rights. We have seen this in the example of Turkey; the idea of sovereignty is still strong and the rights of asylum seekers are still struggling to have a place in the national regulations or become real instead of on paper only.

In this thesis, we have seen that, for Turkey, the sovereignty clause as a main part of nation state policy is still quite strong and we have looked towards EU accession to be able to see if there is a possibility to transform this. What has been found is that EU policies will lead Turkey to democratize its asylum policy, in accordance with the CRS51 to some extent, however EU policy is not completely compatible with IHRL due to the developing policy of shifting the responsibility (with the Dublin system inside the EU and the readmission system outside of the EU) and the developing situation of not welcoming migrants, including asylum seekers.

While looking for asylum seekers' *Araf* in the country, we found other *Araf* situations of Turkish state in between the policies: an unwelcoming situation against Turkish nationals from the EU while expecting Turkey to adopt the EU acquis; a raising of borders between the union and Turkey while expecting Turkey to do the same towards its neighbors; the imposing of a security based migration policy on the country while also expecting a human rights based asylum regime from the country.

Globalization claims to shrink the nation state's ability to be a nation state, which is true, but it has also led to the development of regional organizations that can bring their powers to create stronger regimes to deal

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<sup>106</sup> Ernst Van Den Hemel 'Included But Not Belonging. Badiou And Rancière On Human Rights' *Krisis Journal for contemporary philosophy*, 2008, Issue 3, 16-30, p.17

with the effects of globalization; a nation state handing over its powers to a superior power, which means that states sacrifice their power in order to gain more power. In Turkey's case, as not a part of either Europe or the East completely, this shrinking power of the nation state is turning Turkey more inside itself and making it stick to a nation state policy. In this case, distrust over the possibility of membership is creating much more unwillingness to hand over part of its sovereignty without having guarantees of membership.

In between all these situations, by turning back to our research questions: we see that the possibilities of gaining decent life conditions for refugees in Turkey is somewhat improved through the path of EU accession, but there is a lack of complete compatibility with IHRL responsibilities when complying with the EU *acquis*. There is a way to transform the Turkish nation state practice towards a direction where it is possible to have a decent, human rights based asylum/migration policy but, in the meantime, there is also the possibility of a Turkey isolated from both the EU and neighboring states, adhering to its nation state policy more tightly. The migration and asylum fields are already exposed to being merely an exchange of interests for states, as is the case in readmission agreements, and we see that Turkey will be ready to accept Dublin returns, if it becomes a member state, but we do not see where the human rights of asylum seekers stand in those policies.

Turkey and refugees in Turkey are one step away from their Eden but also one step away from their Hades. The prospect is that Turkey will take its step towards Eden, by championing the human rights regime over the nation state, whether the EU accession process alone will lead to this is, however, debatable.

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