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Mehmet Aktepe

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The concept of safe third country and temporary protection as
alternative protection methods to the non-refoulement principle in
the EU and Turkey?

Supervisor : Prof. Dr. Stefaan Smis

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Authorship Declaration

I hereby declare that this dissertation, submitted in partial fulfilment of the requirements for the degree of LLM (Master of Law) and the work presented in it are my own and have been generated by me as the result of my own original research. This dissertation has not been previously submitted for a degree or any other qualifications at the University of Westminster or any other institution. All direct or indirect sources used are acknowledged as references.

Mehmet Aktepe

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ABSTRACT

This dissertation presents a detailed overview of the legality of responses of various countries to the refugee crisis. Recently, this topic and burden-sharing issues have often been addressed by EU member states and various stakeholders in a lively discussion that unfortunately has not resulted in significant world-wide outcomes, since countries tend to be conservative regarding their internal security and financial power. Moreover, the arguments presented in the debate often seem to reflect one-sided views that end up returning asylum seekers to a country where they would face persecution or ill-treatment. For this reason, the dissertation aims at examination of legal aspects of the safe third country concept and temporary protection used in some circumstances to bypass the principle of non-refoulement.

The EU-Turkey Statement on 18 March 2016 enables the return of asylum seekers back to Turkey without any substantial examination of their asylum claims. This enforced return has been criticised in some aspects, and Turkey has been at the heart of the debate with respect to the safe-country label as recognised by Greece after the EU-Turkey Statement and the temporary protection status granted to protection seekers in Turkey.

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ABBREVIATIONS

APD	Asylum Procedures Directive
CAT	Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
CEAS	Common European Asylum System
CJEU	Court of Justice of the European Union Commission European Commission
ECHR	European Convention on Human Rights
ECtHR	European Court on Human Rights
ECRE	European Council on Refugees and Exiles
EU	European Union
EU Charter	Charter of Fundamental Rights of the European Union
EXCOM	Executive Committee of the Programme of the High Commissioner
HRC	Human Rights Committee
HRW	Human Rights Watch
ICCPR	International Covenant on Civil and Political Rights
LFIP	Law of Foreigners and International Protection (2013/6458)
LNTS	League of Nations Treaty Series
Member States	Member States of the European Union
NGO	Non-governmental organisation
OAU Convention	Convention Governing the Specific Aspects of Refugee Problems in Africa
QD	Qualification Directive
TEU	Treaty on European Union
TFEU	Treaty on the functioning of the European Union
UDHR	Universal Declaration of Human Rights
UNHCR	United Nations High Commissioner for Refugees
1951 Convention	Geneva Convention Relating to the Status of Refugees

1. Introduction

The number of asylum seekers has increased dramatically as a result of several reasons, such as welfare problems, wars, religious and racial persecutions; thus the non-refoulement principle has gradually gained a great importance. As a guiding rule, it has appeared in complementary fields of international law, human rights instruments and customary international law as well as conventions related to refugees.

There has been an ongoing debate and extensive discussion about the principle of non-refoulement regarding international law, human rights law and asylum law because of the EU's strict refugee policies. The Member states of the EU have often made agreements with neighbouring countries jeopardising those seeking protection in order to prevent them from access to their territories. According to a United Nations High Commissioner for Refugee database, in the Mediterranean Sea, almost 12,000 persons were lost and probably drowned in the last three years.¹

The issue of who will take responsibility for newcomers and how to share obligations and burdens has created different policy responses throughout the EU. Several EU countries has often prioritised their national interests, ignoring the solidarity of the union. The coastal EU states have mostly attempted to send protection seekers back and transfer them outside Europe. Those applications that generally do not meet international human rights criteria have been the ones most frequently rejected.

EU member states have used the safe third country concept many times in the last decade as a result of mass influx fears. This approach has given rise to serious headaches for those seeking protection as well as for the states themselves. Its legality, in terms of

¹ UNHCR Operational Portal Refugees Situation <<http://data2.unhcr.org/en/situations/mediterranean>> accessed 24/11/2017

international law and refugee law, is often argued. Some claim that the emergence of the concept leaves question marks as to whether it is especially a problematic development for the non-refoulement principle. Additionally, international law lacks common standards that regulate mass influx emergencies. Nonetheless, Article 3 of the European Convention of Human Rights (ECHR) at least provides a minimum temporary protection and interprets the principle of non-refoulement broadly. The safe third country concept is further claimed to be used as an alternative protection method to the non-refoulement principle. Therefore, with the application of this concept, a state's obligation under international law that prohibits protection seekers from being returned to countries where they would confront persecution has become more crucial.

Turkey provides a large number of migrants with temporary protection status pursuant to the EU Temporary Protection Directive and its EU-inspired domestic legal order. As a neighbouring country of Syria, it is making a tremendous effort to provide proper protection for more than three million refugees and sharing burden of the EU, even though the geographical reservation to the 1951 Refugee Convention made by Turkey and some alleged deficiencies related to non-refoulement in the asylum system of Turkey. Its policies on temporary protection status granted for migrants and the safe country recognition have however become controversial.

Upon the conclusion of readmission agreements, EU member states have turned back many irregular migrants to other non-European countries. The ongoing conflict in Syria particularly has brought about the escalating refugee crisis since 2011, so readmission agreements have become a more important topic of the EU. In this regard, a deal concluded between EU and Turkey on 18 March 2016 has opened a new era for those seeking protection, albeit one with pros and cons. The object of the deal is to lift incentives for protection seekers to search for irregular routes into Member states by using a combination of measures at the

closest possible EU border point and to cooperate closely. The real aim of the agreement is to allow Greece to send back protection seekers arriving after 20 March 2016 to Turkey recognising and treating Turkey as a safe third country in spite of the so-called human rights reports prepared by NGOs.

Taking the above points into consideration, the dissertation is split into four main chapters. In order to clarify the discussion about the safe third country concept and temporary protection, the dissertation first defines the core principle of non-refoulement and the right to seek asylum and then provides the current legal framework, to focus on the obligations of member states considering the 1951 Convention, ECHR, European Court of Human Rights (ECtHR) case law and EU law. The second chapter is devoted to the safe third country concept providing definition and development of the concept under international and EU law regarding its consistency with non-refoulement principle. The third part focuses on temporary protection, which is also presently applicable in Turkey as well as in the EU, since Turkey has been particularly at the core of the discussions about whether asylum seekers are safe and are able to reach an appropriate asylum procedures and effective protection. At that point, the regulations on refuge and asylum in Turkey are explored. As a last and concluding point, the EU-Turkey statement on 18 March 2016 will be discussed in the last chapter considering all issues arising out of the application of the safe third country concept and temporary protection.

2. Theoretical Assessment of the Legal Framework

The principle of non-refoulement has become a guiding notion in treatment of refugees since the emergence in the 1933 Convention relating to the International Status of Refugees.² Additionally, non-refoulement has appeared in complementary fields of international law, in human rights agreements, and in international customary law. This chapter includes an overview of the formation and development of the non-refoulement principle and then compares its different meanings on the basis of the 1951 Refugee Convention and general standards of human rights law. The aim of this discussion and comparison is to call attention to some contradictory and ambiguous points that have arisen from the implementation of the prohibition on refoulement. Determining the lines of the principle and clarifying its scope, content and impact might assist in assessing the consequences of the flows of refugees in the recent times.

2.1 Non-refoulement as the Centerpiece of International Refugee Law

In broad sense, non-refoulement can be described as the principle that prohibits expulsion of an individual to any territory where he or she would face persecution or a specifically defined risk. The term ‘refoulement’ originates from the French word that amounts to ‘drive back or repel’.³ Although, non-refoulement has a long history with the emergence of the notion of asylum, it was considered as an ad hoc mechanism until the twentieth century, states did not want it to have a legally binding nature in order to control their borders without any restriction.⁴ To understand its current legal importance, turning points in the twentieth century should be investigated briefly.

² Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 art 3

³ Guy S. Goodwin-Gil and Jane McAdam, *The Refugee in International Law* (3rd edn, OUP 2007) 201

⁴ Nagendra Singh, ‘India and International Law: Ancient and Medieval’, in B.S. Chimni (eds), *International Refugee Law: A Reader* (Sage Publications 2000) 82

The Arrangement of 30 June 1928 Concerning the Legal Status of Russian and Armenian Refugees⁵ referred to the principle for the first time as an international document and recommended that states ought not to return refugees to their home countries.⁶ The 1933 Convention Relating to International Status of Refugees⁷ then took a concrete step to adopt a clearer obligation toward the non-refoulement principle, referring to non-rejection at the borders. However, just eight states ratified it and three of them made reservations. Nonetheless, for refugee protection, this Convention is very crucial, as it created a model for the 1951 Convention.⁸

After the second World War, the international community needed a new strategy, since there was an impending refugee movement from the Communist Bloc. In this regard a new proposal was made by the United Nations in order to assimilate refugees effectively using a novel international regime. A process to establish the UNHCR and to prepare the 1951 Refugee Convention that includes non-refoulement principle under Art 33 in conjunction with the improvement in international asylum mechanisms was commenced. The Convention has been the most crucial step to codify legally binding refugee rights under contemporary international law.⁹ Internationally accepted description of refugees, criteria for recovery of refugees and the non-refoulement principle are regulated in the 1951 Refugee Convention with the support of the majority of the United Nations member states.¹⁰

⁵ Arrangement Relating to the Legal Status of Russian and Armenian Refugees (30 June 1928) 89 LNTS 55

⁶ art 3; “Each of the Contracting Parties undertakes not to remove or keep from its territory by application of police measures, such as expulsions or non-admittance at the frontier (refoulement), refugees who have been authorized to reside there regularly, unless the said measures are dictated by reasons of national security or public order. It undertakes in any case not to refuse entry to refugees at the frontier of their countries of origin. It reserves the right to apply such internal measures as it may deem necessary to refugees who, having been expelled for reasons of national security or public order, are unable to leave its territory because they have not received, at their request or through the intervention of institutions dealing with them, the necessary authorizations and visas permitting them to proceed to another country”.

⁷ Convention Relating to the International Status of Refugees (28 October 1933) 159 LNTS 3663

⁸ Gilbert Jaegler, ‘On the History of the International Protection of Refugees’ (2001) 83 (843) *International Review of the Red Cross* 727, 730

⁹ James C. Hathaway, *The Rights of Refugees under International Law* (CUP 2005) 91

¹⁰ Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137

Putting aside the emergence of the principle, it can be said that under the current international legal instruments, states have some obligations related to the deportation of persons in need of protection to third countries as a consequence of explicit or implicit prohibition on refoulement.¹¹ States are also entitled to control their borders and to control the border crossing as sovereign entities, yet the non-refoulement principle restricts their sovereign rights in terms of borders and their discretionary power with respect to sending protection seekers back to other countries. Besides this, as a result of this principle, persons arriving in a state's territory to seek refuge should be provided at least a piece of state's domestic asylum system.¹²

Non-refoulement is at the core of international refugee law and is still the most powerful commitment of the states to persons who are not able to return to their own country to seek protection.¹³ It is crucial to underline that making a claim on asylum by a person is not stipulated by the principle of non-refoulement, yet as a states' obligation under international law, an individual's right to seek asylum does not have to be hampered.¹⁴ Before the broad examination of the non-refoulement, I will examine the relevant aspects of the right to seek asylum in the next subchapter.

2.1.1 The Right to Seek Asylum

It is explicitly said that the refugee has a right to protection and particularly to take advantage of the non-refoulement principle, as well as his/her human rights. An individual in search of protection has the right to leave his country of origin, which means there is an essential

¹¹ Nils Coleman, *European Readmission Policy- Third Country Interests and Refugee Rights* (Martinus Nijhoff Publishers 2009) 231

¹² Jens Vedsted-Hansen, 'Non-admission Policies and the Right to Protection: Refugees' Choice versus States Exclusion' in James C. Hathaway (ed), *Human Rights and Refugee Law* (Edward Elgar Publishing 2013) 384-388

¹³ Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (CUP 2011) 44

¹⁴ Goodwin-Gill and McAdam (n 3) 357-358

right to seek asylum. This is mentioned in many international and regional law documents such as in Art 13(2) of the Universal Declaration of Human Rights (UDHR)¹⁵, Art. 12 of the International Covenant on Civil and Political Rights (ICCPR)¹⁶ and Art 2(2) of Protocol 4 of the ECHR¹⁷. On the other hand, a state is a sovereign entity that possesses rights, because it is indisputably a subject of international law with territorial integrity and political independence. Besides, a state is entitled to ensure security of population living in its borders and to organise its internal affairs, comprising the acceptance of non-citizens to its territory.¹⁸ This creates a controversy.

Magner states that the right to seek asylum is derived from the state's obligation of non-refoulement, so the principle is said to be very limited.¹⁹ Whereas Bostock assumes that the right to seek asylum is a fundamental right as a part of customary international law, since states are responsible for people living in their borders and being under their de facto control as a result of their territorial sovereignty.²⁰ Edwards evaluates the right to seek asylum on human rights grounds. She regards human rights and asylum-refugee law as sections developed out of the same legal tradition and schema, and that the right to asylum is supported by Art 12(2) ICCPR., and Art 13(2) UDHR that explicitly emphasizes the right to leave. She also considers

¹⁵ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III))

art 13(2) 'Everyone has the right to leave any country, including his own, and to return to his country'

¹⁶ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 art 12(2) 'Everyone shall be free to leave any country, including his own.'

¹⁷ Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain Rights and Freedoms other than those already included in the Convention and in the First Protocol thereto (16 September 1963) ETS 46 art 2(2); 'Everyone shall be free to leave any country, including his own'.

¹⁸ Guy S. Goodwin-Gil, 'Forced Migration: Refugees, Human Rights and Security' in Jane McAdam (ed), *Forced Migration Rights and Security* (Hart Publishing 2008) 3

¹⁹ Tara Magner, 'A Less than Pacific Solution for Asylum Seekers in Australia' (2004) 16(1) International Journal of Refugee Law 53, 53-4

²⁰ Chantal Marie-Jeanne Bostock, 'The International Legal Obligations Owed to the Asylum Seekers on the Mv Tampa' (2002) 14(2-3) International Journal of Refugee Law 279, 287

that the provision that includes the principle of non-refoulement in the 1951 Refugee Convention consolidates the right to seek asylum.²¹

As an international instrument, the UDHR especially provides the right to seek asylum and right to enjoy asylum, stating under Art 14 that ‘Everyone has the right to seek and enjoy in other countries asylum from persecution’. Goodwin-Gill and McAdam proclaim that the wording of the provision is open to discussion. It reflects uneasiness of the state in terms of containing the right to asylum, because a subjective right to cross into a state’s territory is constituted by this right.²²

UDHR does not have a legally binding effect in itself. It merely sets universal targets for state parties. Although some claims that it has been binding,²³ it can be said that the UDHR does not create an obligation that states grant asylum to persons in search of it and there is not enough state practice and corresponding *opinio juris* in the framework of the UDHR that contribute to the right to seek asylum in a state territory.²⁴ The question of whose duty to grant asylum thus remains unanswered under international law.

A right to seek asylum or enjoy asylum is not included in Art 33 explicitly. This applies to all of the provisions of the 1951 Convention as well, since neither the status of individuals claiming international protection must be determined nor any procedures for this purpose are established by the Convention. In the *travaux préparatoires* of the Convention, the right to asylum was deliberately excluded; additionally, the obligation to determine the status was also omitted. It was the preference of the states so as not to be creating a duty to grant asylum, thus

²¹ Alice Edwards ‘Human Rights, ‘Refugees, and The Right ‘To Enjoy’ Asylum’ (2005) 17(2) International Journal of Refugee Law 293, 301

²² Goodwin-Gill and McAdam (n 3) 358-61

²³ Malcolm N Shaw, *International Law* (7th edn, CUP 2014) 204

²⁴ Gregor Noll, ‘Seeking Asylum at Embassies: A Right to Entry under International Law?’ (2005) 17(3) International Journal of Refugee Law 542, 547

states, under the 1951 Convention, are not obliged to determine status.²⁵ The absence of accessible procedures for the determination of refugee status under the Convention is criticised by Costello. She claims that without such determination procedures, refugees are not protected efficiently under international legal system, since results will not be acceptable and accurate.²⁶

There is an intertwined connection between the principle of non-refoulement and the right to seek asylum. It can be inferred from Judge Pinto De Albuquerque's concurring opinion in *Hirsi Jamaa and Others v Italy*²⁷ that refugee status is declaratory so everyone must be granted such status without the need to demonstrate they have been in search of asylum yet. Another inference is that human rights violations lead to a non refoulement obligation. When the right is absolute, that duty is absolute too. Therefore, if a state prevents an asylum seeker from reaching the procedures of refugee status determination, this may amounts to refoulement.

Even though the principle of non-refoulement and right to seek asylum seem to have intertwined connection, separating them from each other is crucial, since a right to asylum is not covered by the obligation of non-refoulement. Refugees or asylum seekers might be sent back to third countries if there is no violation of the principle in Art 33. This view is said to be compatible with the sovereignty of states which normally governs the admission of non-citizens. Therefore, acceptance of refugees or any foreigners is not a state obligation.²⁸ The circumstances in which a person can not be returned is only a concern of Art 33 of the 1951 Convention. The place where one wants to escape to is not a matter of the Convention.²⁹

²⁵ Coleman (n 11) 237

²⁶ Cathryn Costello, 'The Asylum Procedures Directive and the Profileration of Safe Country Practices: Detettence, Deflection and the Dismantling of International Protection?' (2005) 7(1) European Journal of Migration and Law 35

²⁷ *Hirsi Jamaa and Others v. Italy* App no 27765/09 (ECtHR, 23 February 2012)

²⁸ Goodwin-Gill and Mcadam (n 3) 206-207

²⁹ Hathaway (n 9) 308-310

According to the 1951 Convention, states are deemed to not have any duty to carry out implementations of refugee determination procedures. Determination of refugee status, in accordance with the Convention, is a discretionary option, but this choice is often a practical requirement if a country wants to avoid violation of the non-refoulement principle.

2.2 Non-refoulement Principle under 1951 Refugee Convention

The most essential refugee right under the 1951 Convention is undoubtedly the principle of non-refoulement referred to in Art 33(1), so this subchapter seeks answers to the questions of whether the principle is limited to the measures that lead to return of refugees and who is the subject of this principle. The answers are of utmost importance as they identify the contours of the principle.

Article 33(1) of the 1951 Convention states that;

‘No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion’.

The wording, ‘in any manner whatsoever’ implies that the official definition of the article is not limited so it contains other measures such as extradition, return, expulsion and rejection that cause the return or rejection that would expose the protection seeker to the risk of persecution.³⁰ Providing conservation to those seeking refuge is the obvious aim of 1951 Convention.

According to the aims of the Convention and its protocol, if a person meets the criteria of Art 1A(2),³¹ he or she is counted as a refugee without considering their formal recognitions

³⁰ Elihu Lauterpacht, Daniel Bethlehem, ‘The Scope and Content of the Principle of NonRefoulement: Opinion’ in Erika Feller, Volker Türk, Frances Nicholson (eds.), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (CUP 2003) 87, 112

³¹ art 1A(2) ‘As a result of events occurring before 1 January 1951 and owing to wellfounded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion,

as such being in compliance with a domestic law so, the protection under the 1951 Convention is provided this person. UNHCR also addresses this issue in the Handbook on Procedures and Criteria for Determining Refugee Status.³² The Executive Committee (EXCOM)³³ has also adopted a consistent and unambiguous approach over the last few decades, emphasizing this ‘... irrespective of whether or not they have been formally granted refugee status’.³⁴

Consequently, the non-refoulement principle applies to all circumstances mentioned above since there is no limitation in relation to precautions that give rise to return of refugees that they may face the risk of persecution. Moreover, a presumption or prima facie evidence is sufficient to claim a refugee status hence it is understood that refugee status is declaratory. An individual qualifies as refugee as soon as the conditions under the Art 1 of the 1951 Convention are met. Article 33 does not require formal recognition, so as to protect a person against refoulement.

2.2.1 Indirect Chain Refoulement

Indirect chain refoulement refers to the situation where the third country returns the asylum seeker to his/her country of origin. The responsibility of states for the risk of indirect chain refoulement is especially crucial for EU countries that have a prevalent implementation of ‘safe third country’. Thanks to this concept, those seeking protection or

is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it’.

³² UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status (Geneva, 1979, re-edited 1992) para 28; ‘A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee’.

³³ UNHCR’s governing Executive Committee (EXCOM) meets in Geneva annually to review and approve the agency’s programmes and budget, advise on international protection and discuss a range of other issues with UNHCR and intergovernmental and non-governmental partners.

³⁴ Some examples are; Executive Committee Conclusion No 6 (XXVIII) Non-Refoulement (1977) para (c), Executive Committee Conclusion No 79 (XLVII) General Conclusion on International Protection (1996) para (j) and Executive Committee Conclusion No 81 (XLVIII) General Conclusion on International Protection (1997) para (i)

asylum basically are sent back to countries through which they transited before they reached the targeted country that are labelled to be safe

The UNHCR commented that Art 33 forbids indirect refoulement as well as direct refoulement to the state where persons would face persecution.³⁵ Consistent applications of the principle, in order to send persons in search of asylum to third states, can be frequently seen. However in these situations, they must not be returned to the third country where their life and freedom would be put at risk. That inference derives from the ordinary sense of the expression ‘in any manner whatsoever’ used in Art 33, as analysed in the previous subchapter. Besides, the *travaux preparatoires* of the 1951 Convention verify this interpretation.³⁶ Non-refoulement applies only to countries where persons seeking protection would confront with a real risk. This application cannot be extended to other countries that are really safe for refugees and asylum seekers.³⁷

The state where an asylum application is made is still eventually liable for ensuring the prohibition on refoulement, even if the person is transferred to a third state. What is meant by this is that, the application state can not be freed from duty by transferring its task. Although, the third state has a primary liability for direct refoulement, the first state is jointly responsible for the breach of the non-refoulement principle due to the return of persons to the third countries. This is called the principle of complicity by Legomsky. Countries might not return any individual to another one, being aware of that receiving country will be in breach of the obligations of the sending country, and in this regard, it is not important to become a party to the 1951 Convention or another human rights treaties.³⁸ Moreover,

³⁵ Conclusion No 82 (XLVII) ‘Conclusions on Safeguarding Asylum’ (1997)

³⁶ Coleman (n 11) 235

³⁷ Lauterpacht and Bethlehem (n 30) 122

³⁸ Stephen H. Legomsky, ‘Secondary Refugee Movements and the return of Asylum Seekers to Third Countries: The Meaning of Effective Protection, Protection Policy and Legal Advice Section’ (Department of International Protection UNHCR, Geneva Switzerland 2003) 5 <<http://www.unhcr.org/protection/globalconsult/3e6cc63e4/2-secondary-refugeemovements-return-asylum-seekers-third-countries-meaning.html> > accessed 20/10/2017

Legomsky discusses that transfer to the third country ought to be forbidden, when the third country fails to satisfy the international criteria such as prohibition on refoulement. Nonetheless, if the refugee standards possessed by the third country are in accordance with the international criteria, although refugee standards provided in the third country are lower than the sending country, the person ought to be allowed even if it causes to return of that person to the his or her country of origin eventually.³⁹ Contrary to the approach of Legomsky, an empirical approach is adopted by Noll that pays attention to the actual situation and exercises of the third country consistent with the interpretations of ECtHR, as will be discussed in the next chapter.⁴⁰

All in all, I partially agree with the view asserted by Legomsky, because conformity with international standards in the third country provides refugees with basic rights, yet after being transferred to the third country, condoning to return of refugees to their home countries is neither in accordance with non-refoulement nor human rights standards. However, I tend to agree with the Noll's empirical approach, since real conditions in the third country give more concrete data to prevent return of an individual to a country where there are violations of international law. Regarding only legislation in the application country by ignoring factual conditions in the third country is likely to lead to refoulement.

This point is particularly important to evaluate the connection between safe third country notion and non-refoulement principle, which is the general aim of the dissertation. However before making this examination, I will examine the non-refoulement principle in international customary law.

³⁹ *ibid* 58

⁴⁰ Gregor Noll, 'Formalism v. Empiricism: Some Reflections on the Dublin Convention on the Occasion of Recent European Case Law' (2001) 70(1) *Nordic Journal of International Law* 162

2.3 Customary International Law

The non-refoulement principle is based on the refugee law, human rights, customary international law, treaties and doctrine. Giving an answer to the question of whether the principle of non-refoulement has gained a customary norm status is very important particularly as a means to ensure that States that are not party to the 1951 Convention act in accordance with international standards. Although the existence of the principle is not admitted by some as a part of customary international law, it is view of the majority that the principle has gained this status.⁴¹

The normative nature of the principle has been reflected by several international and regional treaties as well as the 1951 Convention. The principle has been also supported by jurisprudence and the Conclusions of the EXCOM that meets annually to discuss refugee issues with UNHCR and intergovernmental and non-governmental partners and reach conclusions.⁴²

The most debatable point of the customary character of the principle is state practice, since asylum law might work effectively when the relevant standards are geographically widespread. The total number of state parties to the 1951 Convention is 145 as of 2017.⁴³ This figure corresponds to three quarters of the total number of the total UN members, 193.⁴⁴ The number of Asian states that are parties to the 1951 Convention is only ten. Countries like India, Thailand and Pakistan, who host a great number of refugees are not parties to the 1951 Convention.⁴⁵ This situation might be interpreted as the lack of 'adequate representative and

⁴¹ Goodwin-Gill and McAdam (n 3) 354.

⁴² Executive Committee Conclusion No 6 (XXVIII) 'Non-Refoulement' (1977) and Conclusion No 25 (XXXIII) 'General Conclusion on International Protection' (1982)

⁴³ States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol <<http://www.unhcr.org/uk/3b73b0d63.pdf>> accessed 15/10/2017

⁴⁴ United Nations Member States <<http://www.un.org/en/member-states/>> accessed 15/10/2017

⁴⁵ Jerzy Sztucki, 'Who is a Refugee? The Convention Definition: Universal or Obsolete?' in Frances Nicholson, Patrick Twomey (eds), *Refugee Rights and Realities: Evolving International Concepts and Regimes* (CUP 1999) 55, 77.

widespread state practice' of the non-refoulement principle. A significant number of Asian countries, whose interests were especially affected, opted for not to accede to the 1951 Convention. Therefore, Coleman claims that the principle may be regarded as a customary law limited only to America, Europe and Africa.⁴⁶

The UNHCR⁴⁷ and most authors⁴⁸ defend the opinion that there are adequate widespread and representative state practices that result in the universal customary nature of the principle. Even though the number of countries that are parties to the 1951 Refugee Convention is 145, an analysis based upon this number is not proper, because there are other instruments that have incorporated the principle apart from the 1951 Convention. The number of countries which are not bound by any international agreement, including the principle of non-refoulement, is much less than 48.⁴⁹ Lauterpacht and Bethlehem provided a list that shows the number of states not bound by any international instruments involving the principle of non-refoulement. Only 18 countries were listed⁵⁰ (currently there are 16 countries),⁵¹ so this creates a negligible objection.

⁴⁶ Nils Coleman, 'Non-Refoulement Revised Renewed Review of the Status of the Principle of Non-Refoulement as Customary International Law' (2003) 5 European Journal of Migration and Law 23, 49

⁴⁷ 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' <<http://www.refworld.org/docid/437b6db64.html>> accessed 15/09/2017

⁴⁸ Lauterpacht and Bethlehem (n 30) 141-150, Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (N. P. Engel Publishers. 2005), Volker Türk, 'The Role of UNHCR in the Development of International Refugee Law' in Frances Nicholson, Patrick Twomey (eds), *Refugee Rights and Realities: Evolving Concepts and Regimes* (CUP 1999) 153, 172, Guy S. Goodwin-Gill, *The Refugee in International Law* (OUP 2007) 134- 137

⁴⁹ The number of UN member states is 193 and the number of countries that are parties to the 1951 Refugee Convention is 145 so 48 country are not state parties to the 1951 Convention.

⁵⁰ Bhutan, Brunei Darussalam, Kiribati, Lao People's Democratic Republic, Malaysia, Maldives, Marshall Islands, Micronesia, Myanmar, Nauru, Oman, Pakistan, Palau, Saint Kitts and Nevis, Saint Lucia, Singapore, Tonga, United Arab Emirates and Vanatu

⁵¹ Saint Kitts, and Nevis and Nauru signed the 1951 Refugee Convention on 01 February 2002 and 28 June 2011 respectively.

Lastly, although some countries such as India, Thailand and Pakistan host a great number of refugees, they are not parties to the 1951 Convention but members of EXCOM.⁵² These memberships and the conclusions reached by the EXCOM indicate that these member countries are part of the discussion on refugee issues and they are ready to contribute to the application of the Convention. This situation at the same time verifies *opinio juris* and state practice.⁵³

Contrary to these arguments above, Duffy claims that the non-refoulement principle has not yet gained peremptory status in international law because of 'the existence of terrorist exceptions to the prohibition on refoulement, either through the use of a balancing test in some jurisdictions or the current practice of 'rendition' and alongside Refugee Convention exceptions.'⁵⁴

Consequently, states have incorporated the principle into key international instruments such as the 1951 Convention, the OAU Convention, the Cartagena Declaration, and the European Council Directives and even adopted it through domestic regulations. State practice is consistent with the implementation of the principle, so there is an adequate data to reach a conclusion that the principle of non-refoulement has gained a customary norm status despite the presence of opposing views.

2.4 Non-refoulement under the ECHR

The ECHR is the most important mechanism in the EU as a standard-setting and monitoring document. It has also introduced the non-refoulement principle to the field of human rights law. Limited to the purpose of the dissertation, this subchapter defines implicit non-

⁵² The list of members and observers <<http://www.unhcr.org/excom/scaf/5748082a4/list-of-members-and-observers-2017-2018.html>> accessed 15/10/2017

⁵³ Lauterpacht and Bethlehem (n 30) 148

⁵⁴ Aoife Duffy, 'Expulsion to Face Torture Non-Refoulement in International Law' (2008) 20 International Journal of Refugee Law 373, 390

refoulement covered by Art 3 ECHR, then provides an argument on inhuman or degrading treatment or punishment and finally specifies that whether indirect chain refoulement is covered in Art 3. While looking into these issues, examination of the case law of the ECtHR is crucial, because of the broad terms used in Art 3 and the absence of the forms of prohibited ill-treatment in the Convention.⁵⁵

The ECtHR has stated that if an asylum seeker or refugee is expelled or extradited to a country where there are convincing reasons for deeming that that person confronts risk of being exposed to degrading or inhuman punishment, or treatment or torture in the arrival country, it is a breach of Art 3 of the ECHR.⁵⁶ Article 3 states especially that ‘No one shall be subjected to torture or to inhuman or degrading treatment or punishment’. It establishes an absolute rule and this provision does not accept any exception or attenuation under any conditions.

An implicit refoulement prohibition is covered by Art 3 of the ECHR. This is indicated in *Soering v the United Kingdom*, in which the ECtHR confirmed the applicability of principle of non-refoulement irrespective of whether the relevant ill treatment would occur in a contracting state or another state.⁵⁷ In addition to that, the ‘real risk’ criterion was determined by the ECtHR in order to evaluate the probability of treatment in the receiving country.⁵⁸ Presence of a ‘real risk’ is seen adequate so as to raise the liability of a Convention state. Furthermore, substantial grounds for the presence of such a risk should be demonstrated, such that the scope of likelihood test is completed by the component notions of ‘substantial grounds’ and ‘real risk’. A degree of certainty is not referred to by the ECtHR as stated in the *Soering* judgement, thus it does not require a certainty or probability that he would be exposed to death

⁵⁵ Coleman (n 11) 261

⁵⁶ *Soering v. United Kingdom* App no 14038/88 (ECtHR, 7 July 1989) paras 90-91

⁵⁷ *ibid* para 90

⁵⁸ *ibid* para 91 ‘where substantial grounds have been shown for believing that the person concerned ... faces a real risk’ of ill-treatment’.

penalty or ‘death row phenomenon’.⁵⁹ The ECtHR considered the degree of risk as sufficient for a breach of Art 3.

The other relevant case that highlighted the implicit refoulement prohibition and ‘real risk’ assessment is *Cruz Varas and others v Sweden* which mainly stated that a person seeking protection might not be returned to a state where there has been ‘substantial grounds’ for believing that this person would be at risk of torture, inhuman or degrading treatment or punishment.⁶⁰ The judgement refers the notion of ‘substantial grounds’, which is one of the components of the ‘real risk’ criterion. This reference implicates the applicant’s situation and factual aspects of a judgement.⁶¹ According to the Court, established facts must support the real risk of ill-treatment.

The another point to be considered is the severity of ill treatment and its effect when implementing Art 3 inquiry. The prohibition on refoulement applies to all kinds of ill treatment, namely degrading treatment, inhuman treatment and torture. The necessity of attaining minimum severity of possible treatment is frequently affirmed in the situations of refoulement. The scope and applicability of Art 3 varies from case to case, so it is necessary to assess each treatment within its own conditions. Alleweldt argues that if the interpretation of the real risk test is made in a way that minor possibilities below a certain level can be ignored, the situation would in the long term cause that some individuals who are returned face ill-treatment and this would prevent effective protection.⁶² The ECtHR, however, utilises the real risk test so as to specify the threshold of the likelihood test.

⁵⁹ *ibid* para 94

⁶⁰ *Cruz Varas v. Sweden* App no 15576/89, (ECtHR, 20 March 1991) paras 69-70

⁶¹ *ibid* para 75 ‘In determining whether substantial grounds have been shown for believing in the existence of a real risk of treatment contrary to Article 3 (art 3) the Court will assess the issue in the light of all the material placed before it...’.

⁶² Ralf Alleweldt, ‘Protection Against Expulsion Under Article 3 of the European Convention on Human Rights’ (1993) 4 *European Journal of International Law* 360, 366.

As for the indirect refoulement, if *T.I v the United Kingdom* case⁶³ is taken as an example, even if an asylum seeker is sent back to an intermediary state where there is no direct threat of maltreatment for this person, the obligation on non-refoulement of sending state continues. T.I was a Sri Lankan national applied for asylum in the UK after leaving Germany, yet the UK claimed that Germany should be held accountable for the asylum application in accord with the Dublin Convention. T.I feared to return to Sri Lanka, in which he would be at a real risk of being subjected to treatment contrary to prohibition of torture or inhuman or degrading treatment covered by Art 3 ECHR. The Court found that if adequate guarantees were not provided by the asylum procedures in an intermediary country, the risk that the intermediary state may later send the asylum seeker to a state in which he or she encounter direct threat of maltreatment has to be considered by a deporting state, since this would lead to an arbitrary return.⁶⁴

Another issue examined by the Court in *T.I v The United Kingdom* was the evaluation of indirect refoulement in the situation of arbitrary return. Thus, if the asylum procedure of the intermediary country does not give adequate assurance that persons with fear of ill-treatment are protected and that the intermediate country maintains proper returns, an individual seeking asylum will highly likely exposed to a risk of maltreatment or genuine indirect refoulement risk because of the deportation. The Court stated that procedural safeguards were available in Germany, yet their effectiveness was questioned by the Court. The reason for this was implementations and interpretations of Art 3 by Germany. This means that it is a must for a country, bent on deportation to a third country, to consider whether an asylum seeker or refugee would encounter a real risk of being removed to another country contrary to Article 3 ECHR.⁶⁵

⁶³ *T.I. v. The United Kingdom*, App no 43844/98 (ECtHR, 7 March 2000)

<<http://www.refworld.org/cases,ECHR,3ae6b6dfc.html>> accessed 01 November 2017

⁶⁴ *ibid* paras 15-18

⁶⁵ *ibid* para 17

Consequently, an individual possibly faces two kinds of indirect refoulement risk. The first one, as seen in the *T.I* case, is the real risk that an asylum seeker will be subjected to forbidden maltreatment in the final arrival country. The second one is the additional risk that an intermediary country will return the asylum seeker to the final country of destination. These amount to an evaluation of the risks that an asylum seeker would face; thus indirect refoulement requires that these risks be assessed. The fundamental target is to evaluate whether the applicant is at risk of maltreatment in the country concerned in terms of the personal conditions of the applicant. It is a fact that when a person is exposed to any shape of ill treatment emphasised under Art 3 ECHR and that creates a ‘real risk’ in another state, it would definitely become adequate to ban return.⁶⁶

2.4.1 General Requirements for the Examination of Protection Claims under Article 3 of the ECHR

In refoulement cases, the liability of the states under Art 3 arises from the fact that a person is exposed to the risk of prohibited maltreatment and the person is not subjected to forbidden maltreatment itself.⁶⁷ The Court has reached a conclusion that procedural obligations and a comprehensive examination of legal remedies on Member States is required when assessing a protection application associated to a risk of treatment in contrast with Article 3. Thus Art 3 is analysed from the procedural point of view, it is essential that Art 13⁶⁸ is included. Art 13 states;

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

⁶⁶ *Soering* (n 56) para 88

⁶⁷ *Cruz Varas* (n 60) para 76

⁶⁸ art 13 ‘Right to an effective remedy; Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity’.

If an application submitted is declared unacceptable by the state, the applicant must be able to make objection against any subsequent decision to deport him/her in compliance with both Articles 3 and 13. An effective remedy might be described as an available and adequate method to provide redress for violations alleged.⁶⁹ Besides, it is a solution that enables the competent authority to handle the substance of the applicant's claim and provide proper relief.⁷⁰

The Court has found, in asylum procedures as well as in countries' return decisions, a number of defects within the scope of Art 3 and within the scope of Articles 3 and Art. 13 together. The inadequacies of procedural safeguards might prevent asylum seekers from benefitting from the effective protection of the non-refoulement principle.

The *MSS v Belgium and Greece* judgement⁷¹ has raised doubts on the asylum seeker's right to an effective remedy, since the decision made by the ECtHR showed that Belgium had been in breach of Articles 3 and 13 ECHR by removing MSS to Greece and not making inquiries whether there would be, in Greece, a refoulement risk or risk of breaches of Art 3. The process for transfer to Greece did not fulfil necessities, as state in ECtHR case law, of a detailed and meticulous examination of the complaint in situations where the transfer of the proceeding to another country may subject a person to treatment forbidden by Article 3. Besides this, Greece as an intermediary state was ruled to have breached Articles 3 and 13, as MSS had escaped from Afghanistan because of the Taliban's attempt against his life and he experienced many serious deficiencies in Greece. The evidence of these deficiencies was his detention and conditions of living in Greece and the risk of return to Afghanistan without any real assessment of his application or reach proper remedy.

⁶⁹ Coleman (n 11) 272

⁷⁰ *Soering* (n 56) para 120

⁷¹ *MSS v Belgium and Greece* App no 30696/09 (ECtHR, 21 January 2011)

This is why Belgium and Greece were found in breach of Articles 3 and 13, which are fundamental obligations of states. It is Coleman's view that the meticulous scrutiny involves examination of the merits of the applicant's claim, in other words the alleged risk of torture or inhuman or degrading treatment or punishment.⁷² In the judgement of *Jabari v Turkey*, the Court reiterates that Art 3 requires the sending state to make a substantive evaluation of the allegation that refoulement of the protection seeker will result in maltreatment.⁷³ In this case, the Court further ruled that Art 13 ECHR was violated. The applicant had failed to file her asylum application within five days pursuant to domestic law, so there was no evaluation by national authorities on the claim that applicant would be in danger if sent back to Iran. According to the Court, even though states have some discretion, providing a national remedy to cope with the complaint is a requirement of Art 13.⁷⁴

As a result, in the *Jabari v Turkey* and the other case law of the ECtHR, the Court generally has stated that the right to control residence, the borders and deportation of foreigners are the primary rights that state parties have.⁷⁵ It nonetheless considers the absolute nature of Art 3 and sets limits on returns that may violate Art 3 ECHR. It is a must for Member States to examine the claim in a substantive way before return a protection seeker to a risky country for them. Therefore, states can put procedural obstacles to a certain degree for protection seekers that would hinder a substantive examination.

2.4.2 Removal to a Third Country

States tend to return refugees or asylum seekers to third countries, yet it often puts them at risk of persecution, detention, torture, ill-treatment etc. That is why a rigorous

⁷² Coleman (n 11) 273

⁷³ *Jabari v Turkey* App no. 40035/98, (ECtHR, 11 July 2000) para 40

⁷⁴ *ibid* para 48

⁷⁵ *ibid* para 38 'The Court recalls that Contracting States have the right, as a matter of well established international law and subject to their treaty obligations including the Convention, to control the entry, residence and expulsion of aliens. Moreover, the right to political asylum is not contained in either the Convention or its Protocols.'

examination should be made to return an individual to an intermediary country for returns of asylum seekers to their countries of origin where they encounter risk of torture or inhuman or degrading treatment or punishment. In practice, it is seen that some of states are reluctant to fulfil this duty. In this regard, some substantive requirements are needed so that a country can be called 'safe'. The requirements are also relevant to one of main focus of this study; the 'safe third country concept', so the aim of this subchapter is to explore whether countries keep away from the duty of thorough examination under the ECHR prior to removal of the individual to an intermediary country and whether recognition of a country as safe requires an examination of the case in substance.

An issue described by Coleman at the core of the safe third country concept is the corresponding or at a minimum harmonized standards of protection between states.⁷⁶ As explained earlier, in the *T.I* judgement, the Court decided that the sending state must be assured that the intermediate country provides adequate assurance about its asylum procedure and the applicant is not sent directly or indirectly to the onward country that is also a state party to the Convention without an assessment of the risks of exposure to treatment contrary to Art 3.⁷⁷ Making a substantive examination was emphasised in the *T.I* case, yet there was no clear sign that it is mandatory. Thus, states do not have to take on a status determination under Art 3 due to the fact that protection seekers are returned to a third country.

Somali and Eritrean migrants were intercepted on the high seas and subsequently they were returned to Libya between 2009 and 2012. In response, in the *Hirsi Jamaa v. Italy* judgement, the ECtHR ruled about crucial measures to return to third countries. It is also stated that Article 4 of Protocol 4 of the ECHR, which prohibits collective expulsion, should be interpreted by purposive approach, thus establishing the main objective of the principle of non-

⁷⁶ Coleman (n 11) 275.

⁷⁷ *T.I v UK* (n 63) para 13-14

refoulement is to hinder countries from expelling migrants without assessing their personal conditions.⁷⁸ Therefore, an individual has a right to asylum claim, as is guaranteed by this provision. This claim will be examined individually, and how the protection seeker concerned arrived at the territory of the country is not important. This evaluation is concerned with whether the asylum seeker would like to submit a demand, not the essence of the claim submitted by him/her in any sense. The opportunity to request asylum ought to be provided to an individual whose entry into the country is otherwise to be rejected.⁷⁹ To conclude, restrictions should not be imposed that hinder reach the first determination procedure.

In conclusion, the push back of the applicants to Libya without examining their protection claims individually was interpreted by the ECtHR as a collective expulsion that violates Art 4 of Protocol 4 and also Articles 3 and 13 ECHR. The reason for the decision was that asylum seekers were prevented from accessing any remedy that would have given them an opportunity to gain a detailed and meticulous evaluation of their asylum claims before their return and to submit their complaints to Italian authorities. It can be seen that the Court's observation about the circumstances in Somali and Eritrea is there were extensive and heavy threats to security there.⁸⁰ Taking this fact into account alone, the applicants could claim that the return to Eritrea or Somalia would amount to refoulement.

2.4.3 Requirements of the Intermediary State to be Considered 'Safe' under the ECHR

This subchapter seeks answers to the question of does the ECHR necessitates access to asylum procedures and an assessment of factual circumstances by the third country as a necessity to consider a state safe.

⁷⁸ *Hirsi Jamaa* (n 27) para 177

⁷⁹ Tally Kritzman-Amir and Thomas Spijkerboer, 'On The Morality and Legality of Borders: Border Policies and Asylum Seekers' (2013) 26 Harvard Human Rights Journal 13

⁸⁰ *Hirsi Jamaa* (n 27) paras 148-153

When adequate safeguards that prevent an applicant from expulsion to his/her country of origin are provided, an intermediate state is regarded as ‘safe’. The importance of effective procedural safeguards that protect the asylum seeker from being sent from Germany to Sri Lanka was referred and mentioned in the *T.I* case. Additionally, the Court clearly ruled that ‘effective protection’ could also be achieved in other ways than procedural safeguards.⁸¹ Therefore, the removing state follows the obligations of indirect refoulement if it regards appropriately that the third country has provided some sort of sufficient safeguards. Besides, the investigation of the risk and evaluation of the predictable results of a recommended transfer are a duty of a sending state, if human rights reports issued by independent institutes especially indicate that the real risks were known or should have been known by this sending state, as seen in the *Hirsi Jamaa* judgement.

Lastly, to provide an effective asylum mechanism, states must ensure that those seeking protection are able to find an effective remedy in that country as a fundamental human right. This is also verified by the Court in *M.S.S v Belgium and Greece*, mentioning particularly that the importance of access to an effective remedy is an essential human right.⁸² Some inadequacies such as deficiencies in infrastructure capacity, communication and data systems for admission of applications might prevent applicants who are scared of maltreatment from access to an effective process. If there is an evidence that shows the sending state is aware of or should be aware of the situation in the third country in which there would not be a serious examination of the application, the applicant can not be removed to that third country.

Article 13 ECHR requires certain qualifications to ensure that the asylum mechanism in a country is genuinely effective. These obligations are submitted by the ECtHR admitting their variability based on the nature of the asylum seeker’s complaint. The Court specified that

⁸¹ *TI* (n 63) para 16

⁸² *MS S* (n 71) paras 173–182

those seeking asylum must be provided with a set of procedures in order to request and allowed for the form of protection they have a right to. The intermediate country must not prevent unreasonably the availability of remedies by its practices or negligence. Moreover, the intermediate country has a duty to quicken and make easier the asylum seeker's access to an effective and equitable international mechanism of protection. Protection seekers have to be further facilitated to communicate with competent authorities, to receive legal support and to obtain the information required on the procedure from the intermediate country.⁸³

In conclusion, an intermediary country requires some safeguards to protect an individual from return to his/her own country, yet in most cases it is difficult to find safeguards applicable to the applicant. In these circumstances, however, the third country might provide a safeguard in the shape of access to evaluation procedures. If the sending country is adequately confident that the third country will clarify whether the asylum seeker needs international protection and the application will be examined rigorously, the third state is labelled as safe in the framework of non-refoulement.

2.5 Conclusion

This chapter has discussed a range of obligations of states connected with the removal of those seeking protection to intermediate or third countries. The 1951 Convention has an explicit emphasis on non-refoulement and the ECHR also implicitly enshrines the principle. However the principle of non-refoulement lacks standardised implementations, so such that Art 33 of the 1951 Convention and Art 3 ECHR differ from each other in some respects. For example, Art 3 ECHR generally applies to all people, it is not important whether they are refugees, on the contrary the 1951 Convention is limited in this regard. Another point is Art 3 ECHR's absolute nature, which does not contain any exceptions. Art 33 is not said to have an

⁸³ *ibid* paras 288-319

absolute nature with its exceptions. Lastly, according to Art 33, the protection scope of the Convention is limited to those persecuted for certain reasons, yet Art 3 ECHR covers individuals subjected to torture and inhuman and degrading treatment or punishment.

In the cases of both direct and indirect refoulement, respect for non-refoulement is a must for states. Asylum seekers could be returned to a third country in compliance with the non-refoulement principle, if the third country ensures that an effective remedy will be granted there. In such a case, there is no need to substantive examination of application lodged by the protection seeker. Nevertheless, the principle of non-refoulement does not give guaranteed rights in terms of access to whole asylum system. The most essential obligation of sending country to fulfil is the examination of protection standards against expulsion attempt in the relevant third state. Additionally, in the context of the ECHR and the jurisprudence of the ECtHR, investigation of effective procedural safeguards that involves an effective remedy against rejection in the intermediate country is a duty of the sending country. The another conclusion drawn from my analysis is that an individual's removal from the third country to another one is not unfortunately hindered by international human rights and refugee law on the condition that third country respects the rules that prohibit direct and indirect refoulement.

As defined in *M.S.S, T.I. and Hirsi Jamaa* judgements,, some conditions are necessary for a country to be labelled safe and a country cannot automatically be presumed 'safe'. In such a safe country, protection seekers' access to asylum procedures and a fair and effective protection mechanism are available. In that situation, without examining the substance of the applicant's protection claim, he/she might be transfered to the third country in conformity with non-refoulement principle.

2.6 EU Law

Examining EU law which consists of primary legislation, such as treaties, and secondary legislation such as directives, decisions, and regulations, is as vital as the examination of the principle of non-refoulement and the right to seek asylum under refugee law and human rights law. In this regard, EU primary law and secondary law in the context of safe third country concept is my main focus in this chapter which discusses their scope and content, and criticism made against them in the framework of current issues.

2.6.1 Primary Law

The EU primary law contains the basic rights that must be respected by Member States, thus comprehension of the primary law enables us to understand how important it is while carrying out agreements that relate the non-refoulement principle such as the EU-Turkey statement. This subchapter examines the Treaty of Lisbon and the Charter of Fundamental Rights of the European Union, and thereafter briefly refers to readmission agreements that allow irregular migrants to be returned to a safe third country or their country of origin.

The Treaty of Lisbon⁸⁴ as a constitutional basis of the European Union amends the Treaty on the Functioning of the European Union and the Treaty on the European Union which are two of the EU's primary treaties.⁸⁵ Art 78 of the TFEU⁸⁶ lays emphasis on 'common policy on asylum', 'subsidiary protection and temporary protection' and 'compliance with the principle of non-refoulement'. Due to the direct references to 'the 1951 Refugee Convention,

⁸⁴ Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community [2007] OJ C306/01

⁸⁵ Christian Kaunert and Sarah Le'onard, 'The European Union Asylum Policy After the Treaty of Lisbon and the Stockholm Programme: Towards Supranational Governance in A Common Area of Protection' (2012) 31(4) Refugee Survey Quarterly 4

⁸⁶ Consolidated version of the Treaty on the Functioning of the European Union [2007] OJ C115/01 art 78(1) 'The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties'.

the 1967 Protocol and other relevant treaties' in Art 78, international law might be effective within the EU. The TFEU is not said to grant any novel protection other than the protection provided in the 1951 Convention. In spite of this, new tools of the EU, temporary protection and subsidiary protection, are referred to in the articles. These notions are not covered by the 1951 Convention.

The right to asylum is codified under Art 18 of the EU Charter.⁸⁷ Collective expulsion is further prohibited and non-refoulement principle is enshrined under Art 19 of the EU Charter.⁸⁸ Art 18 refers to two factors for the right to asylum. These are determination of the right to asylum and the obligation to guarantee of this right in compliance with the Treaty Establishing the European Community and by respecting the rules of the 1951 Convention. It can be easily thought that this is over broad, yet the aim of the EU Charter is consolidation of existing substantive EU rights instead of their amendment or elaboration.

Nonetheless, some claim that the right to claim a protection is recognised as a procedural right by Art 18 of the EU Charter, and can not be said to be a substantive right. Evaluating the fact that each refugee has a right to determine the status and therefore can not be sent to a third country alone would be an interpretation contrary to Article 63 of the Treaty Establishing the European Community, which assumes that refugees could be transferred by member states.⁸⁹ In terms of the notion of 'right to asylum' in Art 18, it is implied that having

⁸⁷ Charter of Fundamental Rights of the European Union [2012] OJ C326/02

art 18 'The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter referred to as 'the Treaties')'.

⁸⁸ art 19(1) 'Collective expulsions are prohibited'.

19(2) 'No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment'.

⁸⁹ Hemme Battjes, *European Asylum Law and International Law* (Leiden/Boston, Martinus Nijhoff publishers 2006) 113-114

access to asylum, which means appropriate secondary rights and permanent solutions, must be guaranteed by member states.⁹⁰

In a nutshell, Art 18 of the EU Charter has a vital influence on the application of the safe third country concept, which allows countries transfer asylum seekers to another country together with the obligations under international law, but the right to a proper solution must be secured in the intermediary state. If asylum seekers are provided with basic human rights standards, it can be assumed that a state suggests appropriate protection.

2.6.1.1 Readmission Agreements

After the entry into force of the Lisbon Treaty, a clear legal basis has existed for the EU to conclude readmission agreements through Art 79(3)⁹¹ of the TFEU.⁹² The EU has concluded readmission agreements with several countries such as Albania, Turkey, Montenegro, Sri Lanka, Macao, Serbia, Pakistan, Hong Kong, which indicates a dispersed geographical policy.⁹³ The purpose of the readmission agreements, particularly those concluded with candidate countries, prospective candidate countries and countries on the borders, is to cope with migrant pressure.⁹⁴

These agreements allow the return of irregular migrants even before they lodge asylum applications and so frequently bypass the range of rights that take effect when the application of asylum is lodged by these individuals.⁹⁵ Furthermore, respect for the status of stateless persons and asylum seekers under international law and assurance of human rights are some

⁹⁰ *ibid* 114

⁹¹ art 79(3) 'The Union may conclude agreements with third countries for the readmission to their countries of origin or provenance of third country nationals who do not or who no longer fulfil the conditions for entry, presence or residence in the territory of one of the Member States'.

⁹² Marion Panizzon, 'Readmission Agreements of EU Member States: A Case For EU Subsidiarity or Dualism?' (2012) 31(4) *Refugee Survey Quarterly* 101, 113

⁹³ *ibid* 103

⁹⁴ Gina Clayton, *Text Book on Immigration and Asylum Law* (6th edn, OUP 2014) 145-148

⁹⁵ Christina Boswell, Migration in Europe, *Paper for the Policy Analysis and Research Programme of the Global Commission on International Migration* (Hamburg, Migration Research Group Hamburg Institute of International Economics 2005) 8

concerns, when establishing readmission agreements, since in general, persons returned from the European Union are admitted by the non-EU countries, even when these people are stateless or not nationals of that country, if there has been an irregular entrance to the EU through that country.⁹⁶ However, it is a possibility that these safe third countries do not provide any genuine protection or respect for human rights. For instance, the EU-Pakistan readmission agreement is very problematic since Pakistan is not a party to the 1951 Refugee Convention and 1967 Protocol nor is it subjected to the ICCPR.

Some implementations of EU Member States are condemned and have been found that they are in breach of international obligations. For example, Italy and Libya had agreed on collaborating against irregular migration in 2000, yet this agreement was neither published nor discussed in those times.⁹⁷ Joint patrols were established to prevent irregular migrants with an agreement between these two states in 2007. Particularly from 2003 to 2009 Italy was involved in a collaborative agreement with Libya so as to collectively return protection seekers who had reached Lampedusa after a transit in Libya. A direct push back policy thereafter was commenced from 2009 and boats coming from Libya were intercepted on the high seas by Italian ships, so they were compelled to return to their territorial waters. These incidents gave rise to protests in previous years.⁹⁸

However, in *Hirsi Jamaa v Italy* case, the implementations of Italy in relation to Libyan people were condemned by the ECtHR in 2012, stating that it was a violation of Art 4 of Protocol 4, which forbids the collective expulsion of foreigners, as explained in subchapter 2.4.2, because applicants' conditions were not examined individually by the Italian authorities.

⁹⁶ Martin. Schieffer, 'Readmission and Repatriation of Illegal Residents', in Bernd Martenczuk and Servaas Van Thiel (eds), *Justice, Liberty and Security: New Challenges for EU External Relations* (VUBpress 2008) 89, 96-7

⁹⁷ Emanuela Paoletti and Ferruccio Pastore, 'Sharing the Dirty Job on the Southern Front? Italian-Libyan Relations and Their Impact on the European Union' (2010) 29 International Migration Institute Working Paper 40

⁹⁸ Human Rights Watch Reports, 'How 75 migrants were transferred by the Italian Coast Guard to a Libyan patrol boat which took them to Tripoli in June 2009' and Human Rights Watch, 'Pushed back, pushed around' (21 September 2009) <<http://www.hrw.org/en/node/85582/section/9>> accessed 18/11/2017

Remarkably, the Court indicated that ‘Italy cannot evade its own responsibility by relying on its obligations arising out of bilateral agreements with Libya’.⁹⁹ As a result of these applications, as European immigration policies harden towards persons from other countries, the EU has unfortunately gained the nickname ‘Fortress Europe’.¹⁰⁰

2.6.2 EU Secondary Law

As noted above, EU secondary law consists of binding documents such as decisions, regulations, and directives, and non-binding documents such as opinions and resolutions. Member states have to implement the directives by passing them into their national legal order, and are free to choose the implementation procedures and forms in their legal system.¹⁰¹ The Qualification Directive (QD)¹⁰² and The Asylum Procedures Directive (APD)¹⁰³ are quite crucial to address issues relevant to this dissertation, since these documents present rules on which state to take liability for a protection request and duties related to asylum mechanism.

QD defines the criteria of who qualifies as a refugee and who qualifies as persons eligible for subsidiary protection pursuant to Art 78 TFEU¹⁰⁴ and the content of protection that

⁹⁹ *Hirsi Jamaa* (n 27) para 129

¹⁰⁰ Julia Mink, ‘EU Asylum Law and Human Rights Protection: Revisiting the Principle of Non-Refoulement and the Prohibition of Torture and Other Forms of Ill-treatment’ (2012) 14 *European Journal of Migration and Law* 119, 143

¹⁰¹ Consolidated version of the Treaty on the Functioning of the European Union [2007] OJ C115/01 Art 288

¹⁰² Council Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9

¹⁰³ Council Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L180/60

¹⁰⁴ art 78(1) ‘The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties’.

78(2) ‘For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures for a common European asylum system comprising:

- (a) a uniform status of asylum for nationals of third countries, valid throughout the Union;
- (b) a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection;
- (c) a common system of temporary protection for displaced persons in the event of a massive inflow;
- (d) common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status;

comes with this status at EU level.¹⁰⁵ The APD allows EU countries to determine the measures for granting or withdrawing refugee status or subsidiary protection under the QD and additionally to determine whether those seeking protection could be returned to a safe third country liable for the assessment of international protection claim lodged by them.¹⁰⁶

2.6.2.1 Qualification Directive

‘Refugee status and subsidiary protection status’ are described as international protection mechanisms by Art 2(a) of the Qualification Directive (QD). ‘Serious harm’ is laid down as a qualification to be eligible for subsidiary protection by Art 15 QD. Therefore protection seekers cannot be returned their country of origin, if there are conditions such as the ‘death penalty or execution, torture or inhuman or degrading treatment or punishment or serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict’. Art 15 QD adopted by the EU reflects obligations in compliance with EU law and international law. The Directive also has binding effects on member states. The reason for this, the determination of suitability and status of persons with needs of subsidiary protection, is addressed in the Directive and this means going beyond the scope of the 1951 Refugee Convention with regard to international protection.¹⁰⁷

When it comes to critiques against the QD, some scholars claim that although Art 3 ECHR has an absolute nature, the QD does not involve this sort of character, since some exceptions in the 1951 Convention are still maintained to be covered by Art 21 QD.¹⁰⁸ The first

(e) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection;

(f) standards concerning the conditions for the reception of applicants for asylum or subsidiary protection;

(g) partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection’.

¹⁰⁵ Jonah Eaton, ‘The Internal Protection Alternative under European Union Law: Examining the Recast Qualification Directive’ (2012) 24 *International Journal of Refugee Law* 765, 766-7

¹⁰⁶ Mariagiulia Giuffrè, ‘Readmission Agreements and Refugee Rights: from a Critique to a Proposal’ (2013) 32(3) *Refugee Survey Quarterly* 79, 86

¹⁰⁷ Goodwin-Gil and McAdam, (n 3) 211

¹⁰⁸ Helen O’Nions, *Asylum—A Right Denied A Critical analysis of European Asylum Policy* (Ashgate 2014) 95-96

paragraph of Art 21¹⁰⁹ in fact requires member states to fulfil their duties under international law, yet the second paragraph undermines these duties, providing exceptions for the non-refoulement principle. What Art 21(1) means by referring to international obligations is that the Directive identifies that protection seekers who are left out of subsidiary protection pursuant to Art 17 might however be protected from refoulement.

As a result of this, it can be said that the intension of subsidiary protection provided by the Directive is not to contain all incidents where international law bans a country from deporting a person to his/her home country, only involves those considered necessary for international protection.¹¹⁰ It is hard to think that the absolute character of non-refoulement principle is clearly enshrined in the QD. This is a remarkable point that affects the application of STC concept, because the principle with its absolute nature may prevent removals of individuals to a safe third country where they would be confronted with death or maltreatment.

2.6.2.2 Asylum Procedures Directive

The non-refoulement principle is incorporated in the Asylum Procedures Directive (APD). The Preamble says the state should examine the application of each individual who requests international protection.¹¹¹ Nonetheless, states might conclude not to grant protection to an individual, assuming that the individual could receive protection from another state where

¹⁰⁹ Qualification Directive, art 21

1) Member States shall respect the principle of non-refoulement in accordance with their international obligations.
2) Where not prohibited by the international obligations mentioned in paragraph 1, Member States may refoule a refugee, whether formally recognised or not, when:

a) there are reasonable grounds for considering him or her as a danger to the to the security of the Member State in which he or she is present; or

b) he or she, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that Member State.

¹¹⁰ Ruma Mandal, *Protection Mechanisms Outside of the 1951 Convention ("Complementary Protection")* (PPLA/2005/02 Geneva UNHCR 2005) para 45

¹¹¹ Asylum Procedures Directive, preamble recital 25

they may have transited before crossing into the EU. States might deny access to the asylum mechanism pursuant to Art 33 APD.¹¹²

Since the APD has been adopted, it has been criticised many times. Amnesty International, for example, stated that this directive remarkably enables countries to depart from recognised human rights and refugee law since an asylum seeker in a member state might be forced to return another country that does not have basic safeguards or interprets the refugee definition in an extremely restrictive way. Therefore this will result in denial of his/her asylum claim.¹¹³ Art 33(2)(c) APD states that examination of the merits of the claim is not an obligation for member states if they could find a safe third country. Thus, when EU member states send asylum seekers subjecting them to this regulation, this means that there has not been a substantive assessment for them as to whether the foreigner has well-founded fear of persecution or faces a real risk of ill-treatment in their home countries.¹¹⁴ It is time to move on the safe third country concept. I will come to a conclusion at the end of the next chapter, combining with the issues under the EU law.

¹¹² art 33(1) 'In addition to cases in which an application is not examined in accordance with Regulation (EU) No 604/2013, Member States are not required to examine whether the applicant qualifies for international protection in accordance with Directive 2011/95/EU where an application is considered inadmissible pursuant to this Article. art 33(2) Member States may consider an application for international protection as inadmissible only if:

(a) another Member State has granted international protection;

(b) a country which is not a Member State is considered as a first country of asylum for the applicant, pursuant to Article 35;

(c) a country which is not a Member State is considered as a safe third country for the applicant, pursuant to Article 38;

(d) the application is a subsequent application, where no new elements or findings relating to the examination of whether the applicant qualifies as a beneficiary of international protection by virtue of Directive 2011/95/EU have arisen or have been presented by the applicant; or

(e) a dependant of the applicant lodges an application, after he or she has in accordance with Article 7(2) consented to have his or her case be part of an application lodged on his or her behalf, and there are no facts relating to the dependant's situation which justify a separate application'.

¹¹³ Amnesty International, The EU – Now More Free, Secure and Justice? Amnesty International's Human Rights Assessment of the Tampere Agenda, (2 June 2004) 3 <http://www.amnesty.eu/en/news/statements-reports/eu-asylum-and-migration/the-european-union-now-more-free-secure-and-just-0005/#.WIKhGN9l_IU> accessed 17/09/2017

¹¹⁴ Battjes (n 89) 397

3. The Safe Third Country Concept

This chapter generally focuses on the safe third country concept which has been applied several times by the EU Member States. Initially, I will examine the definition and scope of the Safe Third Country (STC) concept under international and EU asylum law. Some qualifications as mentioned by the Art 38 APD, Art 33 of 1951 Convention and ECtHR case law will be explored. Additionally, the concept is controversial in some its aspects in this regard, the relationship between the concept and non-refoulement principle should be explored, including whether it is compatible with human rights instruments and the 1951 Refugee Convention.

Increasing numbers of refugees and the expansion of the refugee definition has led to states seeking seek ways in which they can avoid some of their obligations under international law. A country is defined as a ‘third country’, if it is not the refugee’s home country or it is not a country where they have searched for asylum. ‘Safe’ means a state that is not in breach of Art 33 of the 1951 Convention and the non-refoulement principle to return them.¹¹⁵

The STC concept is officially recognised in the 1990 Dublin Convention¹¹⁶, and the 1992 EU Minister’s Resolution.¹¹⁷ According to the Resolution, it is agreed on by member states that the STC notion is incorporated into their domestic legal order. The impact of this implementation is to impose a liability upon member states to define whether another state existed to examine asylum claims before taking substantive examination of application of

¹¹⁵ Clayton (n 94) 384

¹¹⁶ European Union, Convention Determining the State Responsible for Examining Applications for Asylum lodged in one of the Member States of the European Communities (Dublin Convention) [1990] OJ C254

¹¹⁷ Council Resolution of 30 November 1992 on a Harmonized Approach to Questions Concerning Host Third Countries (London Resolution) [30 November 1992]

asylum seekers on. Therefore, the key point of the STC concept is that the responsibility or obligation to process asylum seeker is devolved on another state.¹¹⁸

3.1 The Safe Third Country Concept under International Instruments

The subchapter seeks an answer the question of to what extent does the STC concept take place in the international instruments. This is essential to have a deeper understanding of whether the STC concept provides protection seekers with an efficient and fair procedure for determination of their asylum and protection claims.

EXCOM Conclusion No 58, as an initiative step to define a ‘safe country’ pronounces that the protection provided by third country ought to incorporate allowance to access to its territory and remain secure there. Additionally, compliance with non-refoulement, treatment in conformity with fundamental human rights criteria and nonexistence of threats or persecution should be entailed by the protection of the third country.¹¹⁹

The 1951 Refugee Convention does not include any provision that promotes the safe third country notion. Kneebone argues that the 1951 Refugee Convention and Art 14 UDHR do not include a mandatory assignment, so that asylum seekers and persons in search of asylum can be returned to safe third countries by states freely on condition that they respect the principle of non-refoulement. In parallel with this, interception of asylum seekers and removing them to safe third countries is possible on condition that the principle of non-refoulement is not infringed.¹²⁰

¹¹⁸ Susan Kneebone, ‘The Legal and Ethical Implications of Extra-territorial Processing of Asylum Seekers: the Safe Third Country Concept’ in Mc Adam (eds) *Forced Migration, Human Rights and Security* (Hart Publishing 2008) 129, 137

¹¹⁹ Executive Committee Conclusion No. 58 (XL) Problem of Refugees and Asylum-Seekers Who Move in an Irregular Manner from a Country in Which They Had Already Found Protection (1989) paras f (i), f(ii) and g

¹²⁰ Kneebone (n 118) 137

EU Resolution adopted by the EU Ministers in 1992 laid down two criteria in relation to safe countries. The first was compliance with the 1951 Refugee Convention covering the non-refoulement principle. The second was the prohibition of torture and inhuman or degrading treatment.¹²¹

However, over time it has been understood that the concept of the STC provides fewer safeguards for asylum seekers and is open to abuse. For instance, the preamble of the Dublin Convention ensures that member states guarantee an examination of applicants' claim for asylum, yet it is not possible to see such a provision under the Dublin Regulation and APD.¹²²

The legality of the STC concept has been partly admitted by UNHCR. The mere transit via a presumed 'safe third country' could be a ground for devolvement of liability in some limited circumstances where there is an agreement between the third country and sending country. Nevertheless in such a case, a real opportunity to challenge the causes regarding the transfer of liability prior to return must be found by the asylum seeker.¹²³ Furthermore, according to the UNHCR, the return of an asylum seeker can be possible provided that the third country provides protection, at least, in accordance with fundamental human rights and prohibition on refoulement, means of living allowance and access to asylum procedures with adequate procedural safeguards.¹²⁴

However, it is further argued by Taylor that the concept of STC is such an institutionalised notion in European Law that it can regard as a customary international law

¹²¹ Sandra Lavenex, *Safe Third Countries: Extending the EU Asylum and Immigration* (Central European University Press 1999) 167-8

¹²² Kneebone (n 118) 137-138

¹²³ UNHCR, 'Provisional Comments on the Proposal for a European Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status' (Council Document 14203/04, Asile 64, of 9 November 2004) 36 <<http://www.unhcr.org/protect/PROTECTION/43661ea42.pdf>> accessed 11/10/2017

¹²⁴ Violeta Moreno-Lax, 'The Legality of the "Safe Third Country" Notion Contested: Insights from the Law of Treaties' in Guy S Goodwin-Gill and Philippe Weckel (eds) *Migration and Refugee Protection in the 21st Century: Legal Aspects* (The Hague Academy of International Law Center for Research, Martinus Nijhoff 2005) 665, 671

principle. The author regards EXCOM Conclusion No. 58 and EU Minister's Resolution in 1992 as evidence of *opinio juris* to support his argument. He claims that as the number of state practice increases, the STC concept can become a rule of customary international law.¹²⁵

I personally think that there is currently neither *opinio juris* nor sufficient state practice to label the STC concept as a customary international law and the legality of the concept is still arguable, although it has been implemented many times by EU countries. The majority of scholars state that it is not built on a strong international law foundation.¹²⁶ It is an undeniable fact that the STC concept has been approved by states which intend to hinder access of asylum seekers from their national processes and the intention of that states is also to transfer their liability to other states. It is true that the application of the safe third country is prevalent, yet it is not based on strict legal documents and notions. Article 33 of the 1951 Refugee Convention may be regarded as a mere exception that creates an inference from the limits of the negative non-refoulement obligation.¹²⁷

On the other hand, Art 31 of the 1951 Convention refers to 'coming directly'.¹²⁸ EXCOM interprets Art 31 and emphasises that if refugees have good reasons, they might cross into a country of asylum directly or indirectly and the rights of individuals ought to be considered by states. States should not have a deterrent point of view with respect to refugee protection even in the case of mass exodus. Goodwin-Gill claims that this reference could not constitute a ground for 'safe third country' implementations. Coming directly from countries where there was threat to their life or freedom is not a requirement for asylum seekers to be

¹²⁵ Savitri Taylor, 'Australians Safe Third Country Provisions, Their Impact on Australia's Fulfillment of Its Non Refoulement Obligations' (1996) 15(2) University of Tasmania Law Review 196, 206

¹²⁶ Maryellen Fullerton 'Failing the test: Germany leads Europe in Dismantling Refugee Protection' (2001) 36 Texas International Law Journal 231, 243, Goodwin-Gill (n 3).88-9

¹²⁷ Kneebone (n 118) 153

¹²⁸ art 31(1) 'The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence'.

eligible for international protection. The intention of Art 31 was to create immunity from penalties to individuals who have transited other countries for a short period of time or who could not get effective protection before arriving in the target country. The mere intention of the drafters of the 1951 Convention was that the immunity in question ought not to apply to those seeking asylum who reached protection and stayed permanently or temporarily in a third country enroute to the target country.¹²⁹

3.2 Safety Criteria under EU Law

In order to be considered safe, a state must satisfy some material criteria provided under Art 38 APD. A third country is not considered safe under Art 38 even if they have ratified relevant international law documents. That is to say, there is no explicit requirement under the Art 38 that forces the third country to be a party to certain international law instruments.

A particular protection seeker can be returned to a country considered as safe third country pursuant to Art 38(1), if competent authorities are convinced that the protection seekers will be treated in the receiving country in compliance with the five principles indicated in Art 38(1) APD cumulatively;

- a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion; and
- b) there is no risk of serious harm as defined in Directive 2011/95/EU; and
- c) the principle of non-refoulement in accordance with the Geneva Convention is respected; and
- d) the prohibition on removal in breach of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law is respected; and
- e) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention.

¹²⁹ Goodwin-Gill (n 3) 88-91

These standards indeed clearly emphasise Art 3 ECHR and non-refoulement in Art 33 of the 1951 Convention. As pointed out above, it is not necessary for the third country to ratify these conventions. It seems crucial rather to fulfil the de facto obligations set out in Art 38 APD.¹³⁰ Nonetheless, Hurwitzh worries about protection seekers returned to a third country not party to the 1951 Convention, since in such a case, they will not be highly likely to be under effective protection and will not have the opportunity to submit their claims to competent authorities and their claims will not be examined rigorously.¹³¹ Pakistan is an example for this concern as mentioned in subchapter 2.6.1.1. Moreover, the UNHCR acknowledges that the STC concept ought to be properly implemented in order not to end up with inappropriate rejection of access to asylum system or breaches of the non-refoulement principle.¹³²

The application of the STC concept requires a rigorous examination. This should be based on a case-by-case assessment that checks whether the principles under Art 38(1) APD are met and whether there is a link between the applicant and the third country. Recital 44 of the APD seeks a ‘sufficient’ link between the individual and the third country. In this sense, according to UNHCR, ‘transit alone is not a ‘sufficient’ connection or meaningful link, unless there is a formal agreement for the allocation of responsibility for determining refugee status between countries with comparable asylum systems and standards’.¹³³ Transit frequently emerges as a consequence of accidental conditions, so it does not create a significant connection.¹³⁴

¹³⁰ Coleman (n 11) 289

¹³¹ Agnès Hurwitz, *The Collective Responsibility of States to Protect Refugees* (OUP 2009) 54

¹³² Conclusion No 58 (XL) ‘Problem of Refugees and Asylum-Seekers Who Move in an Irregular Manner from a Country in Which They Had Already Found Protection’ (1989)

¹³³ UNHCR, ‘Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey as part of the EU-Turkey Cooperation in Tackling the Migration Crisis under the safe third country and first country of asylum concept’ (23 March 2016) 6 <<http://www.unhcr.org/56f3ec5a9.pdf>> accessed 15/11/2017

¹³⁴ UNHCR, ‘Comments on the European Commission’s proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (COM (2009) 554)’ (August 2010) 34 <<http://www.refworld.org/docid/4c63ebd32.html>> accessed 15/11/2017

3.2.1 Procedural Safeguards

Another matter that arises out of application of the STC concept is how the sending state ought to evaluate ‘safety’ in the third state. Art 38(2) APD provides certain procedural requirements as indicated in the footnote.¹³⁵

Therefore, the STC concept applies if there is a link between the third country and the person seeking protection, but the APD does not indicate when this link is created. The APD therefore cannot make a decision on the core question of whether or not protection seekers might be returned to safe third countries through which they only transited. On the one hand, this question does not exclude the possibility of return because of transit via a third country, on the other hand this issue is left to Member States' domestic legislation by the APD.¹³⁶

The word ‘satisfy’ used in Art 38(2) of the subparagraph (b) is not an objective criterion. If a harder or more decisive word was used such as ‘establish’ instead of ‘satisfy’, it would make the rule more objective.¹³⁷ It should be borne in mind that it is difficult to find a requirement under the APD that guarantees safety assessments will be made individually. With the ‘satisfying’ criterion, member states can make decisions on the basis of a general safety. Therefore, provided that EU member states are satisfied that the essential needs of Art 38(1) are met, they are allowed to announce a particular third state which is generally safe to send

¹³⁵ Asylum Procedures Directive, art 38(2)

a) rules requiring a connection between the applicant and the third country concerned on the basis of which it would be reasonable for that person to go to that country;

(b) rules on the methodology by which the competent authorities satisfy themselves that the safe third country concept may be applied to a particular country or to a particular applicant. Such methodology shall include case-by-case consideration of the safety of the country for a particular applicant and/or national designation of countries considered to be generally safe;

(c) rules in accordance with international law, allowing an individual examination of whether the third country concerned is safe for a particular applicant which, as a minimum, shall permit the applicant to challenge the application of the safe third country concept on the grounds that the third country is not safe in his or her particular circumstances. The applicant shall also be allowed to challenge the existence of a connection between him or her and the third country in accordance with point (a).

¹³⁶ Coleman (n 11) 289

¹³⁷ Battjes (n 89) 408

protection seekers there.¹³⁸ However, subparagraph (c) states that if the safety determination is challenged by the protection seeker on the grounds that it is inconsistent with the characteristics of his/her condition, member states must ensure that his/her case is examined individually regarding the particularities pursuant to subparagraph (c). This is especially embedded in the draft to satisfy the international legal requirements and hinder rejection of access to asylum procedures.¹³⁹

Consequently, as far as I am concerned, Art 38 has a problematic wording and hesitant approach as to whether to opt for general or individual assessments. Furthermore, I agree with Battjes that there are confusing expressions in Art 38(1). While the particular person is the main focus of Art 38(1) with regard to requirements that will be satisfied by the competent authorities, Art 38(2) that contains the procedural safeguards remains abstract.¹⁴⁰

3.3 Conformity with Non-Refoulement

The STC concept's conformity with non-refoulement is admitted by some institutions and scholars. They have opted to admit its existence and started to improve the concept instead of eradicate it. Proponents of the concept have established safeguards to ensure that the STC policies preserve against refoulement. On the other hand, others claim that its application in the EU violates non-refoulement and it contains fundamental flaws. Unlike the claims of the UNHCR and the other proponents, their point of view is that even if there are safeguards, it is certain that the expulsion process takes place. Hence, they completely oppose the concept and its modification. Their wishes are to fully eliminate it as will be explained in this subchapter.

On the one hand the principle of non-refoulement is binding on states on the other hand, several states consider the asylum process to pose a threat to their state sovereignty and

¹³⁸Coleman (n 11) .290

¹³⁹Costello (n 26) 29-30

¹⁴⁰ Battjes (n 89) 423

capability of control over the influx of non-citizens. Therefore, state sovereignty is used as a justification for limiting the access of persons seeking asylum to state's frontiers. Besides, it is further a justification utilised by states as a mechanism to send asylum seekers back outside their borders.¹⁴¹ If there is possible influx of refugees that comes from non-EU countries, state sovereignty is guarded strictly by EU member states and national concerns are given superiority rather than regional ones.¹⁴² Nonetheless, in my opinion, states should acknowledge that state sovereignty has not become dysfunctional by the application of the principle of non-refoulement. The prohibition on refoulement is an obligation of the state, not a right of asylum for the person seeking asylum. Despite the binding nature of non-refoulement principle, states keep hold of their discretion in making decisions whether to offer asylum and the circumstances under which it might be enjoyed or ended.

It is a fact that refugees do not benefit from the effective protection of their countries of origin. For this reason, the international community is responsible for providing and securing their substantive human rights. States as a part of the international community must act in accordance with international human rights standards when they control the arrival of protection seekers and their transfer to another country. Considering all these issues, Borchelt asserts that there is no consistency between the STC concept and non-refoulement.¹⁴³ I personally think this opinion is too strict and that, in some circumstances, it would be obviously disadvantageous to states. There should be a genuine balance between states sovereignty and refugee rights. Among other things, basic human rights certainly prevail over state sovereignty.

¹⁴¹ Gretchen Borchelt, 'The Safe Third Country Practice in the European Union: A Misguided Approach to Asylum Law And A Violation of International Human Rights Standards' (2002) 33 *Colombia Human Rights Law Review* 473, 504

¹⁴² Jacqueline Bhabha, 'European Harmonisation of Asylum Policy: A Flawed Process' (1994) 35 *Virginia Journal of International Law* 101, 104

¹⁴³ Borchelt (n 141) 505

3.4 Criticism and Interpretations

The STC concept has been criticised many times by scholars and human rights advocates because of the problematic issues it implicates. Determination of the safety of a third country, the issue of chain deportations and access to asylum procedures in the third country are some major problems that might cause refoulement of the protection seeker to a country where probably he/she would be confronted with persecution. This is because of, as some argue, the probability of both direct and indirect refoulement emerges as a result of the application of the STC concept.¹⁴⁴

Ratification of the 1951 Refugee Convention is not an automatic indication that a state is regarded generally as safe. This is also verified in *T.I v United Kingdom* as discussed in subchapter 2.4.¹⁴⁵ It is a possibility that states do not apply the Convention in good faith. Interpretations of states with respect to application of the Convention might be very limited. Another deficiency of the concept is the general assessment and presumption that creates refoulement. Collective return of persons to countries considered safe explicitly challenges the prohibition on refoulement since, each protection seeker is entitled to an individualised assessment as a core principle of international protection.¹⁴⁶ On the one hand, the right to seek asylum and examination of the application is provided for asylum seekers by the APD, on the other hand, the APD also allows Member States to apply the STC concept and declare that their application is inadmissible.

In addition, the European Council on Refugees and Exiles (ECRE) is concerned about the expansion of systematic application of STC concept, due to the possibility of it encouraging countries hosting a great number of refugees to adopt the concept and following EU policies,

¹⁴⁴ *ibid* 505-6

¹⁴⁵ Hathaway (n 9) 326

¹⁴⁶ Goodwin-Gill and McAdam (n 3) 392

which can lead to a limited access to protection regimes in these countries. The ECRE states that as the number of migrants increase in the world, the STC concept would shrink the area of protection.¹⁴⁷ I partially agree with this idea, since according to this view, hosting states like Turkey, Lebanon and Jordan are considered ones that must shoulder the refugee burden alone. For other states, they are deemed to only have to contribute financially; however in my opinion these other countries should both share burden of refugees by welcoming them physically and providing them with an effective refugee regime, and also contributing financially to the other hosting states.

Another discussion about individual examinations is that safety standards vary widely between countries. Thus, the individual evaluation required to fulfil the international obligations means that states should provide efficient and fair asylum procedures for individuals in search of asylum.¹⁴⁸ Furthermore, lists of safe countries made by states is seen as one of the essential flaws in the refugee law, due to their generalised assessment and absence of case-by-case determination. For this reason, changes in protection standards might demonstrate that the presumption of safe countries is a hazardous one.¹⁴⁹

Moreover, it is an undeniable fact that the application of the STC concept may cause chain deportations. Greece, for instance, invoked these rules to return refugees to Libya and Sudan, then this approach led people to return their countries of origin in 1990's in some circumstances. The similar one happened in Norway. Albanian asylum seekers were returned to Sweden, whereas Sweden had refused their claims before and Norway known that Sweden would send them to Serbia.¹⁵⁰ Readmission agreements made by several EU countries has facilitated to return protection seekers to third countries without investigation of the merits of

¹⁴⁷ European Council on Refugees and Exiles (ECRE), Debunking The Safe Third Country Myth, Policy Note 08 (2017) 2

¹⁴⁸ O'Nions (n 108) 103-104.

¹⁴⁹ Borchelt (n 141) 505-6

¹⁵⁰ Hathaway (n 9) 293

the individual claim. This implies that individuals seeking refuge in a remote state might subject to an endless sequence of deportations.¹⁵¹ However, Battjes claims that a third country cannot be trusted absolutely, yet he continues by suggesting that if all cases are examined individually, it would be too strict and possibly makes whole international obligations vain.¹⁵² I tend to agree with this view as it serves as a mediator between an generalised and individualised assessment so states can deny the examination of the merits of the claim submitted by a protection seeker on the grounds that this substantive examination is an obligation of the third country under the STC concept. Nonetheless, this safety assumption might not be valid for every case. If counter evidence is submitted by protection seeker that demonstrates the receiving state is not safe for him/her, this presumption can be refuted.

3.5 Conclusion

The APD contains some exceptions as to when an EU country is not obliged to make a substantive examination of an applicant. The STC concept in Art 38 APD authorises a country to remove a protection seeker to any presumed safe country through that he/she might have transited on the way to the country of arrival. The sending country must be satisfied that the third country will consider the asylum seeker's claim and the applicant will not be subject to persecution, refoulement, risk of torture or maltreatment.

Taking all discussed points in this chapter into account, the STC concept has both advantages and drawbacks for states. If Italy and Greece are taken as an example, it can be seen that they are dealing with a large number of refugees from mainly Syria, Iran and African countries; in this regard, it is considered to be a practical method for redistribution of asylum

¹⁵¹ Borchelt (n 141) 512

¹⁵² Battjes (n 89) 409-410

seekers. Nonetheless, for other countries in particular, those sharing a border with a country producing refugees, the STC concept would never be regarded as useful as such.

The STC concept was put forward to hinder forum shopping, and it has undoubtedly achieved this goal. Additionally, this has prevented protection seekers who want to move to a welfare state by exploiting the refugee and asylum system. The primary advantage of the concept for countries is that it could significantly decrease the numbers of applicants for asylum, so a great deal of money and time can be saved. All these advantages mentioned, however, can put the principle of non-refoulement at risk. The STC concept frequently causes an attempt by states to remove asylum seekers, since it requires fewer and less strict criteria than ones required by a safe country. The requirements to be considered 'safe' vary from country to country. I think 'safety' is, nevertheless, beyond being a party to the 1951 Convention or a procedural report that will be prepared by UNHCR or other NGOs about the third country, and so human rights violations, refugee system and its effectiveness in the third country should be carefully scrutinised. In parallel to this purpose, the reports prepared by neutral international institutions should be taken into account.

4. Temporary Protection

As will be discussed in detail in Chapter 5, the EU-Turkey Statement denoted that all EU member states consider and treat Turkey as a safe third country. Nonetheless, Turkey, at the same time, is criticised by virtue of the geographical limitation to the 1951 Refugee Convention and temporary protection status granted to protection seekers. Temporary protection in the EU as well as in Turkey is arguably claimed to be inconsistent with the principle of non-refoulement in some aspects. I will examine the geographical reservation of Turkey relevant to the recognition of being safe country, temporary protection under EU law and the implementation of temporary protection in terms of the legislation in Turkey.

States often grants refugees rights arising out of traditional refugee law and especially non-refoulement principles, but do not grant refugee status. This implementation of states gradually weakens the notion of ‘convention refugees’ posing a threat to the regime provided under the 1951 Convention. Temporary protection has become a system applied to particularly intensive refugee flows, and has provided a safeguard for persons who have not received refugee status, even though they conform to the definition of a refugee. Besides, some even claim that there is a gap in the international protection regime and individuals displaced across borders as a result of climate change should be protected under temporary protection.¹⁵³ Considering all these, it can be said that it has become a saving intermediate formula in terms of the countries that accept it, so it has created a novel category of refugees when confronted with a humanitarian disaster.¹⁵⁴

¹⁵³ Volker Türk, ‘Temporary Protection Arrangements to Fill a Gap in the Protection Regime’ (2015) 49 Forced Migration Review <<http://www.fmreview.org/climatechange-disasters/tuerk.html>> accessed 25/10/2017

¹⁵⁴ Jessica Rodger, ‘Defining the Parameters of the Non-refoulement Principle’ LLM Research Paper International Law (Laws 509) (Victoria University of Wellington 2001) paras 65-66 <<http://www.refugee.org.nz/JessicaR.htm>> accessed 06/11/2017

Temporary protection can be defined at present as a universal norm in international law. A right of refugees with respect to permanent acceptance into a state of asylum is not constituted by international documents, yet it is argued that providing refugees with some form of enduring protection should be dictated by humanitarian worries. Unless it is possible for refugees to repatriate to their home countries, states that receive asylum seekers are obliged to abstain from returning those who might be at risk of confronting persecution. Moreover, in relation to granting permanent residence, it can be said that it is not a binding obligation for the asylum state. State responsibility is also indicated, for example, in Art 34 of the 1951 Convention¹⁵⁵, in permissively wording by using the phrase ‘.. as far as possible to facilitate...’¹⁵⁶

While drafting the 1951 Refugee Convention, in order to assure the participation of states to the Convention and its protection system, there was no obvious correlation between permanent residence and the status of refugee. On the one hand states were eager to protect refugees in danger of being persecuted, on the other hand they persisted in making a decision of who ought to be accepted into their territory. They wanted to be permitted with regard to who ought to continue to live in their country and in the end who ought to be granted permanent resettlement. These determinations are all about sovereignty of states. As a result, it was concluded that states are not obliged to grant asylum under both the 1951 Convention and the 1967 Protocol.¹⁵⁷

¹⁵⁵art 34 ‘The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings’.

¹⁵⁶ Manuel Angel Castillo and James C Hathaway, ‘Temporary Protection’ in James C Hathaway (ed), *Reconceiving International Refugee Law* (Nijhoff Publishers 1997) 2

¹⁵⁷ *ibid* 2-5

4.1 Temporary Protection Directive

The Temporary Protection Directive (TPD) is a development of the EU to be able to manage an unexpected mass influx of protection seekers. In 2001, EU member states made an effort to generate a framework for coordinated action in case of large scale refugee flows.¹⁵⁸

The TPD provides a mechanism for enabling the EU to implement a transitional protection regulation across the EU in the case of ‘mass influx or imminent mass influx of displaced persons from third countries’.¹⁵⁹ According to the TPD, displaced persons amounts to ‘persons who have fled areas of armed conflict or endemic violence’.¹⁶⁰ Under TPD, temporary protection is provided for one year at the first stage and then it can be extended for another two years.¹⁶¹

TPD provides reception standards that are a blend of refugee rights provided in the 1951 Convention and the asylum seeker status. The approach of the TPD is a reflection of a hesitant character that stems from failure to recognise the granting of temporary protection because EU member states believe temporary protection is a tool that makes gaining refugee status easier. When this idea is evaluated with the implicit purpose of Member States, it is understood that they have asylum policies that aim to limit and reduce the number of those seeking asylum within the borders of EU countries.¹⁶²

The EU has created a novel model system that can be utilised in the situation of a refugee crisis. However, Durieux and Hurwitz criticise the temporary protection provided in

¹⁵⁸ Kate Akkaya, ‘Why is the Temporary Protection Directive Missing from the European Refugee Crisis Debate?’ (2015) Advanced Training Program on Humanitarian Action (ATHA) <<http://atha.se/blog/why-temporary-protection-directive-missing-european-refugee-crisis-debate>> accessed 18/11/2017

¹⁵⁹ Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L212/12, art 1

¹⁶⁰ Temporary Protection Directive art 2(c)

¹⁶¹ *ibid* art 4

¹⁶² Jean-Francois Durieux and Agnès Hurwitz, ‘How Many is too Many: African and European Legal Responses to Mass Influxes of Refugees’ (2004) 47 German Year Book of International Law 105, 149

TPD, as it needs a trigger mechanism and this is regarded as its main weakness. Art 5 TPD emphasizes that a certain flow should be specified by the Council of the EU as creating a mass influx, otherwise TPD does not become effective and applicable.¹⁶³ For instance, some have proposed to trigger TPD several times to help resolve the crisis in Syria. The reason for such calls is to make evacuation of Syrians to the EU easier.¹⁶⁴ Neither a member state nor the Commission has given a positive reaction to calls for the activation of TPD.¹⁶⁵ This silence seems notable for a few reasons. First, the extent of the situation in Syria seems to deserve the activation of TPD. Second, the directive assures an extensive group of obligations that address various critiques of national temporary protection regimes for the 1990s.¹⁶⁶

4.2 Mass Influx and Non-Refoulement

The TPD describes a ‘mass influx’ as ‘a large number of displaced persons, who come from a specific country or geographical area’.¹⁶⁷ A mass influx occurs only when both the extent and timing of the flow cause impractical procedural trouble in terms of individual determination process of refugee status, as this influx places strains on the recipient country’s economy and institutions. Goodwin-Gill and McAdam state, however, when international law is considered, refoulement of persons is not justified, regardless of the fact that the suddenness

¹⁶³ *ibid* 149

¹⁶⁴ Cynthia Orchard and Dawn Chatty, ‘High Time for Europe to Offer Temporary Protection to Refugees from Syria?’ (2014) <<https://www.opendemocracy.net/can-europe-make-it/cynthia-orchard-dawn-chatty/high-time-for-europe-to-offer-temporary-protection-to>> accessed 18/09/2017

¹⁶⁵ Hanne Beirens, Sheila Maas, Salvatore Petronella, Maurice van der Velden, ‘Study on the Temporary Protection Directive Final report’ (2016) undertaken by ICF Consulting Services Limited sponsored by EU Commission 14,16-17

<https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/asylum/temporary-protection/docs/final_report_evaluation_tpd_en.pdf> accessed 19/09/2017

¹⁶⁶ John Koo, *The European Union Temporary Protection Directive: An example of Solidarity in Law but not in Practice - A Review of Temporary Protection in the European Union (1990-2015)*, The Refugee Law Initiative (RLI), School of Advanced Study- University of London, <http://researchopen.lsbu.ac.uk/1060/1/WPS%20Special%20Edition%201st%20Annual%20Conference%5B1%5D.pdf> accessed 25/09/2017

¹⁶⁷ Temporary Protection Directive art 2(d)

of massive refugee influx may debilitate a host country's economic resources or political conditions.¹⁶⁸

There is no indication in the 1951 Refugee Convention that Art 33 can not be applied to mass exodus circumstances. According to Bethlehem and Lauterpacht, the 1951 Convention has a humanitarian function and aim, thus non-refoulement must apply if application of the principle is not explicitly excluded.¹⁶⁹ Nonetheless, showing respect for the principle of non-refoulement as a peremptory norm in the event of mass influx circumstances is an ideal that is not an easy one to follow, since admitting the obligation to accept a great number of persons might amount to a de facto suspension in terms of compelling and urgent protections included in the 1951 Convention.¹⁷⁰

The Member States' opinions and to certain extent their applications specify that there is also an ambiguous dimension of the non-refoulement principle, especially in the event of mass influx, which might pose a threat to the recipient country's security. Goodwin-Gill and McAdam highlight that many countries such as Thailand, Turkey, Macedonia and Zaire have followed security-centric policies because of their reservations to the 1951 Convention and its Protocol in relation to the security dimensions of mass exodus. Some states, since 1979, have offered to guarantee the resettlement of refugees and to contribute financially to other receiving states in order to conserve 'the so-called first asylum principle'.¹⁷¹ By reason of the fact that the Former Yugoslavian Republic of Macedonia threatened to close their frontiers, an unprecedented action was taken by the UNHCR, putting an international Humanitarian Evacuation Programme into practice for a large number of persons fleeing Kosovo. Thanks to this new strategy developed by the UNHCR altering their conventional system that aimed at

¹⁶⁸ Goodwin-Gil and McAdam (n 3) 335

¹⁶⁹ Lauterpacht and Bethlehem, (n 30) 119

¹⁷⁰ Jean-François Durieux and Jane McAdam, 'Non-refoulement through Time: The Case for a Derogation Clause to the Refugee Convention in Mass Influx Emergencies' (2004)16(1) International Journal of Refugee Law 13

¹⁷¹ Goodwin-Gil and McAdam (n 3) 336

holding persons in the area of displacement, 29 States temporarily welcomed more than 90,000 persons fleeing Kosovo.¹⁷²

This practice of states showed that states could share the burden and be in solidarity, and as a consequence they are able to hinder destabilisation, even if a vast number of refugees or asylum seekers arrive in precarious situations. However, Coleman has criticised this approach, because in his view that the admission of UNHCR's practice meant tolerance of other states of Macedonian policy and, at the same time, rejection of refugees at the frontier until they had been transferred somewhere.¹⁷³

Consequently, temporary protection status cannot be theoretically described as an attempt to relegate or reevaluate the standards or principles provided in the 1951 Refugee Convention. Instead of doing that, its intention is described as a clarification of the implementation of non-refoulement principle in certain situations and prioritisation of specific rights granted to persons entering into a country en masse.¹⁷⁴

4.3 The Duration of Temporary Protection

On the one hand, it is discussed whether the scope and content of the temporary protection contradict with the prohibition on refoulement, on the other hand, the length of temporary protection is always another controversial issue to be considered. In order to terminate the temporary protection regime, some reasonable standards are required. The security of the country of origin should be consolidated. Refugees should return in dignity to their home country and reintegration should be provided for them. However, conflicts might

¹⁷² Peter Schatzer, (International Organisation for Migration): Executive Committee Of The Programme Of The United Nations High Commissioner For Refugees, fiftieth session, UN doc. A/AC.96/SR.540 (12 October 1999) 5 <<http://www.unhcr.org/3aee6d834.pdf>> accessed 14/10/2017

¹⁷³ Coleman (n 46) 39

¹⁷⁴ Goodwin-Gil and McAdam (n 3) 341

not be settled in the short term. Hence, in this circumstances, the question of when temporary protection regime should end comes to mind.

Castillo and Hathaway note that the duration of temporary protection shall be definite and this period of time is defined as five years.¹⁷⁵ If voluntary return is not possible, the ideal offer, in this context, would be permanent settlement in the state where refugees are granted temporary protection, yet before doing that, states adjust refugee quotas, which means that they should share responsibilities and burdens with regard to permanent admission.¹⁷⁶

The maximum period adopted by TPD is three years and there are two ways to terminate the temporary protection. These are expiration of the maximum duration and a decision of the Council.¹⁷⁷ Examination of the circumstances in the country of origin is an obligation for the Council as a consequence of the non-refoulement principle. The Council has to ensure that persons under temporary protection are allowed to permanently return to a safe country.¹⁷⁸ After putting an end to temporary protection, the obligations of states in the sense of non-refoulement should be considered in accordance with Art 20 TPD¹⁷⁹ and general laws on protection and on foreigners in the member states ought to apply.

4.4 Turkish Asylum Policies and Legislation

The numbers of people who have fled Syria in search of refuge, mostly into contiguous countries such as Lebanon, Turkey, Jordan and Egypt, have reached over five million people since 2011.¹⁸⁰ In Turkey, registered refugee numbers as of September 6, 2017, as given by the

¹⁷⁵ Castillo and Hathaway (n 156) 17

¹⁷⁶ *ibid* 19

¹⁷⁷ Temporary Protection Directive arts 6(1) (a) and (b)

¹⁷⁸ *ibid* art 6(2)

¹⁷⁹ *ibid* art 20 ‘When the temporary protection ends, the general laws on protection and on aliens in the Member States shall apply, without prejudice to Articles 21, 22 and 23’.

¹⁸⁰ UNHCR, Syrian Refugee Response, Inter-agency Information Sharing Portal, <http://data.unhcr.org/syrianrefugees/regional.php#_ga=2.178691296.57107913.15073884621170384146.1493299202> accessed 07/10/2017

UNHCR database have reached over three million.¹⁸¹ As far as I am concerned, the numbers are highly likely to be much more than that, because of the non-registered people particularly coming from Syria. Turkey, Jordan, Iraq, Egypt, Lebanon as surrounding countries of Syria has shown their generosity, pursuing an open-door policy towards Syrian persons in search of protection. In the early stages of the Syrian refugee crisis, people fleeing Turkey were called guests rather than refugees. The reason for this was Turkey's geographical restriction to the 1951 Convention and Turkey's expectations about subversion of Assad's regime in the short term.¹⁸² However, the situation in Syria and other neighbouring countries did not go as expected by Turkish government thus new legislation has been adopted to address the mass influx.

4.4.1 Asylum Policies from Past to Present in Turkey

Over one and half million refugees such as Tatars, Albanians and Balkans between 1920s to the mid 1990s were welcomed by Turkey.¹⁸³ A situation of mass influx happened in Bulgaria due to the Communist regime and in 1989, over 300.000 Turks and Pomaks fled this serious persecution, and, took refuge in Turkey. They were regarded as having 'Turkish descent and culture' in accordance with a law from 1934. As a consequence of this open door policy, they had the possibility of obtaining Turkish citizenship. Turkey experienced another mass migration of 60,000 Kurds, after the Halabja massacre in Iraq, who arrived Turkey in 1988 and were hosted as guests, yet they were not protected under any official legal mechanism.

The first national regulation on asylum was adopted by Turkey in 1994 as an arrangement emphasizing national security for human rights issues. The necessity to reply to

¹⁸¹UNHCR, Syrian Crisis Situation Report August 2017 Humanitarian Results (August 2017) <http://data.unhcr.org/syrianrefugees/regional.php#_ga=2.178691296.57107913.1507388462-1170384146.1493299202> accessed 09/10/2017

¹⁸² Kemal Kirişçi, 'Syrian Refugees and Turkey's Challenge: Going Beyond Hospitality' (2014) Brookings Institution 1 <<https://www.brookings.edu/wp-content/uploads/2016/06/Syrian-Refugees-and-Turkeys-Challenges-May-14-2014.pdf>> accessed 07/10/2017

¹⁸³ Kemal Kirisci, 'Coerced Immigrants': Refugees of Turkish Origins since 1945' (1996) 34(3) International Migration 385

mass migration of refugees was determined by this regulation that allowed protection seekers enter into the territory of Turkey unless the contrary decision was taken by the government. In case of refugees entering into Turkey, authorities were required to hold refugees in camps close to the frontiers.¹⁸⁴ Because of Turkey's admission to the 1951 Convention with a geographical reservation, Turkey granted a restricted number of asylum seekers refugee status that were persons fleeing Europe. The others coming from outside Europe would be received and allowed to stay temporarily in Turkey until they were resettled in third countries.¹⁸⁵

In 2013, Turkey, however, adopted a novel EU-inspired binding legal framework so as to regulate asylum issues. The 'open door' policy followed by Turkey is reflected in the law and with this law Turkey makes an effort to provide 'respect for the non-refoulement principle', humanitarian aid and improvement of better living conditions for asylum seekers and refugees.¹⁸⁶ Despite of all these efforts, Turkey has often been the focus of debate in relation to a) its legislation and b) its reservation to the 1951 Refugee Convention.

4.4.2 Law on Foreigners and International Protection

Turkey, in 2013, introduced the Law on Foreigners and International Protection (LFIP),¹⁸⁷ which is influenced by the EU's regulations. The Directorate General of Migration Management was created as a result of this law. With establishment of this institution, a novel policy has been put into place and the rights of refugees have gained importance, civil initiatives have come into prominence and the most important change in attitudes towards refugees is that

¹⁸⁴ Regulation on the Procedures and Principles related to Possible Population Movements and Aliens Arriving in Turkey either as Individuals or in Groups Wishing to Seek Asylum either from Turkey or Requesting Residence Permission in order to Seek Asylum From Another Country, No 1994/6169 (19 January 1994) <<http://www.refworld.org/docid/49746cc62.html>> accessed 08/10/2017

¹⁸⁵ Kirişçi, (n 182) 7-8

¹⁸⁶ UNHCR, UNHCR Briefing Notes, UNHCR welcomes Turkey's new law on asylum (12 April 2013) <<http://www.unhcr.org/uk/news/briefing/2013/4/5167e7d09/unhcr-welcomes-turkeys-new-law-asylum.html>> accessed 22/11/2017

¹⁸⁷ Law of Foreigners and International Protection Official Gazette [11/04/ 2013] Law No. 6458, No. 28615

Turkey has abandoned its security-based system to a certain degree.¹⁸⁸ That law was enacted considering that irregular migration and mass exodus are affecting Turkey generally as a first country of asylum and this influx will carry on.

‘Temporary protection’ is described by the Art 91(1) LFIP as a protection regime granted by the state to aliens who have been compelled to abandon their home country, unable to turn back the state they have abandoned and have reached or entered into the Turkey’s frontiers aggregately being in search of urgent temporary protection and security. Art 91(2) states that the Council of Ministers shall issue a regulation on the application of temporary protection. This article clearly indicates that there is no detailed terms with regard to temporary protection in the LFIP. The Council of Ministers, therefore, made an effort to fill the legal gap by adopting ‘Regulation of Temporary Protection’ which came into force on 22 October 2014.¹⁸⁹

Under this Regulation, the extent of temporary protection, the duties and rights of people protected by this method, the standards possessed by individuals whose international protection claim might not be examined on an individual basis while staying in Turkey’s borders, and the probable restrictions on personal rights are specified.¹⁹⁰ The rights previously guaranteed, the principle of non-refoulement, open door policy approach, registration of migrants and enhancing the quality of living are maintained and secured under the legal system of Turkey.¹⁹¹

¹⁸⁸ M. Murat Erdoğan, ‘Syrians in Turkey, Social Acceptance and Integration’ (2014) Hacettepe University Migration and Politics Research Center 57 <<http://fs.hacettepe.edu.tr/hugo/dosyalar/TurkiyedekiSuriyeliler-Syrians%20in%20Turkey-Rapor-TR-EN-19022015.pdf>> accessed 18/09/2017

¹⁸⁹ Temporary Protection Regulation, Official Gazette of the Republic of Turkey (OG), No. 29153, (22 October 2014) 22 <<http://www.refworld.org/docid/56572fd74.html>> accessed 19/11/2017

¹⁹⁰ Burcu Togrul Koca, ‘Deconstructing Turkey’s ‘Open Door’ Policy towards Refugees from Syria’ (2015) 12(3) Migration Letters 209, 211

¹⁹¹ Şenay Özden, ‘Syrian Refugees in Turkey’ (2013) MPC Research Reports 2013/05, Robert Schuman Centre for Advanced Studies, European University Institute. 5-6 <<http://cadmus.eui.eu/handle/1814/29455>> accessed 16/08/2017

It is an undeniable fact that the Syrian crisis has affected the legislation of ‘Regulation of Temporary Protection’. The concept of ‘conditional refugee’¹⁹² has appeared as a consequence of the geographical reservation made by Turkey to the Geneva Convention.¹⁹³ Moreover, ‘temporary protection’ in the regulation does not specify a maximum duration for the regime. The overall purpose of the regulation is to strengthen refugee’s legal position as well as showing good intention and hospitality towards them as a host country.

Turkey, however faced non-refoulement-related issues in practice particularly before and at the early stages of the adoption of LFIP and was criticised in some cases by the ECtHR and NGOs.¹⁹⁴ Nonetheless, the case law in Turkey has made a tremendous progress in relation to human rights and refugee law. In Turkey, the courts have given several decisions against administrative decisions inconsistent with international human rights standards and the non-refoulement principle with regard to return of refugees. For example, H.S., a Syrian national, who entered into Turkey at an unidentifiable date was subjected to administrative detention because of the doubts that he would join the terrorist organisation in the conflict zones in Syria via Turkey after giving conflicting answers in the interview made by law enforcement officers. H.S. was ordered to be returned by an administrative decision in accordance with Art 54(1)(d) LFIP¹⁹⁵ under the scope of those ‘who pose a public order or public security or public health threat’.

¹⁹² LFIP art 62(1) ‘A person who as a result of events occurring outside European countries and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country; or who, not having a nationality and being outside the country of former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it, shall be granted conditional refugee status upon completion of the refugee status determination process. Conditional refugees shall be allowed to reside in Turkey temporarily until they are resettled to a third country’.

¹⁹³ Bülent Çiçekli, ‘Reforms Introduced by the Act on Foreigners and International Protection (AFIP) into the Turkish Law on Foreigners and Refugees’ (2016) 12(1) *Review of International Law and Politics* 75, 96

¹⁹⁴ See. *Ghorbanov and others v. Turkey* App no 28127/09 (ECtHR 3 December 2013) and Asylum Information Data Base (AIDA), Country Report: Turkey (December 2015) <<http://www.asylumineurope.org/reports/country/turkey>> accessed 25/10/2017

¹⁹⁵ LFIP art 54 (1) ‘A removal decision shall be issued in respect of those foreigners listed below who/whose:

Upon this decision, the applicant lodged an individual application to the Constitutional Court of the Republic of Turkey and stated that he was in Turkey because of his country's instability, ethnic and political situation and sectarian pressures towards Sunnis. He additionally stated that he did not engage in any illegal activity in Turkey and that he was caught when he was preparing to go to Hatay¹⁹⁶ with the intent of the trade and he would be subjected to torture and ill-treatment because of the regime in Syria if returned. The Court ruled with regard to the individual application lodged by Syrian national H.S. that the civil war in Syria and the instability associated with that country are continuing, so if deportation process is carried out at this stage, unforeseen consequences may arise. Consequently, the Court decided to cancel the administrative proceeding of returning the applicant to his country of origin.¹⁹⁷

It should not be forgotten that Turkey's neighbours are not Sweden, the Netherlands, Belgium or Switzerland. Turkey's neighbours are Syria, Iran and Iraq where terrorist organisations are currently effective, so Turkey's response towards regional developments is still security-centric unlike EU member states in some circumstances.¹⁹⁸ However, this policy

-
- a) are deemed to be removed pursuant to Article 59 of the Turkish Penal Code No 5237;
 - b) are leaders, members or supporters of a terrorist organisation or a benefit oriented criminal organisation;
 - c) submit untrue information and false documents during the entry, visa and residence permit actions; 56 Law on Foreigners and International Protection
 - ç) made their living from illegitimate means during their stay in Turkey;
 - d) pose a public order or public security or public health threat;
 - e) has overstayed their visa or the visa exemption period for more than ten days or, whose visas are cancelled;
 - f) residence permits are cancelled;
 - g) overstayed the expiry date of the duration of their residence permit for more ten days without an acceptable reason;
 - ğ) are determined to be working without a work permit;
 - h) breach the terms and conditions for legal entry into or exit from Turkey;
 - ı) are determined to have entered into Turkey despite an entry ban to Turkey;
 - i) international protection claim has been refused; are excluded from international protection; application is considered inadmissible; has withdrawn the application or the application is considered withdrawn; international protection status has ended or has been cancelled, provided that pursuant to the other provisions set out in this Law they no longer have the right of stay in Turkey after the final decision.
 - j) fail to leave Turkey within ten days in cases where their residence permit renewal application has been refused'.

¹⁹⁶ Hatay is a city located in the Syrian border of Turkey.

¹⁹⁷ *Individual Application of H.S.*, App no 2016/22512 (The Constitutional Court of the Republic of Turkey, 2 November 2016)

<<http://www.kararlaryeni.anayasa.gov.tr/BireyselKarar/Content/aa1fa49c-8f5f-4e8c-8206-b4a0c7038277?wordsOnly=False>> accessed 19/11/2017

¹⁹⁸ Gavin Hewitt, 'Paris Attacks: Impact on Border and Refugee Policy' *BBC* (15 November 2015) *BBC* <<http://www.bbc.co.uk/news/world-europe-34826438>> accessed 15/10/2017

should not cause grave human rights violations for the refugees and refoulement of refugees to countries where they would face ill-treatment.¹⁹⁹ Beside the temporary protection, as I mentioned above, the geographical reservation made by Turkey to the 1951 Convention concerns this dissertation, because it is often linked to the recognition of Turkey as a safe third country.

4.5 The Geographical Reservation

It is allowed that a government can put some limitations to the 1951 Refugee Convention on a geographical or temporal basis. Limiting the obligations to those who have fear of being persecuted as a consequence of incidents that happened before January 1, 1951 could be opted into by a state party to the 1951 Refugee Convention. It is also possible that a government limits its obligations on a geographical ground, particularly, in order to preserve just European refugees.²⁰⁰

Geographical limitations declared by Turkey, Congo and Malta applies only to individuals fleeing events that have happened in Europe. Turkey had taken advantage of this opportunity, because this is only valid for states that had made a geographical reservation to the 1951 Convention before the adoption of the Protocol in 1967. For example, even though, in 1989, Hungary acceded to the 1951 Convention and the Refugee Protocol, it was willing to maintain a geographical restriction, yet the requirement in question was not met and the attempt made by Hungary became consequently invalid.²⁰¹

¹⁹⁹ Human Rights Watch, News (3 February 2016) <<https://www.hrw.org/news/2016/02/03/france-abuses-under-state-emergency>> accessed 27/11/2017

²⁰⁰ art 1(B) of the 1951 Convention ‘For the purposes of this Convention, the words “events occurring before 1 January 1951” in article 1, section A, shall be understood to mean either:

(a) “events occurring in Europe before 1 January 1951”; or

(b) “events occurring in Europe or elsewhere before 1 January 1951”, and each Contracting State shall make a declaration at the time of signature, ratification or accession, specifying which of these meanings it applies for the purpose of its obligations under this Convention’

²⁰¹ Hathaway (n 9) 97-98

It is a reality that the geographical limitation creates a gap between international protection and protection seekers. Turkey however has adopted conditional refugee status to fill this gap. Persons who meet the conditions of the 1951 Convention yet are fleeing events outside Europe are granted conditional refugee status. Under any circumstances, Turkey provides Syrians with temporary protection.²⁰² Nevertheless, this includes some limitations on Syrians' ability to reach permanent residency status, labour market and citizenship rights, by reason of the fact that the legislation regulating the temporary protection regime does not provide a framework in which Syrian protection seekers could make long-term plans for settlement in Turkey.²⁰³ Additionally, in spite of the fact that Syrians are seen as temporary entities according to Turkish legislation, on the political side there is an alleged proposal made by the President of the Republic of Turkey to grant them Turkish citizenship.²⁰⁴ If this proposal is carried into effect, it is certain that the Turkey will take an important step beyond the 1951 Convention and non-refoulement principle.

Taking conditional refugee status granted those fleeing outside Europe, temporary protection granted those crossing the borders of Turkey en masse and the developing case law in Turkey pursuant to international human rights standards and the 1951 Refugee Convention into account, I firmly believe that Turkey is on the right path with respect to refugee-related issues despite the certain gaps in its legislation. Regarding the number of Syrian protection seekers hosted by Turkey, as far as I am concerned this gap might be a political choice to balance the internal security and refugee rights.

²⁰² Gloria Fernández Arribas, 'The EU-Turkey Agreement: A Controversial Attempt at Patching up a Major Problem' (2016) 1(3) European Papers 1097, 1101

²⁰³ Kim Ryglel, Feyzi Baban, Suzan Ilcan, 'The Syrian refugee crisis: The EU-Turkey 'Deal' and Temporary Protection' (2016) 16(3) Global Social Policy 315, 317

²⁰⁴ Erdogan offers citizenship to Syrian and Iraqi refugees, *Aljazeera* (Turkey, 7 January 2017) <<http://www.aljazeera.com/news/2017/01/erdogan-offers-citizenship-syrian-iraqi-refugees-170106195134961.html>> accessed 15/09/2017

4.6 Conclusion

There is no doubt that temporary protection provided by TPD is used as a quick humanitarian reply to en masse exodus; it is hence possible to face some difficulties while applying the mechanism. It dilutes the rights of those under this status in some aspects and strictly controls the starting and final points of protection. While ‘eligibility for temporary protection’ is often broader than the 1951 Refugee Convention, the rights given to persons might become more restricted. Temporary protection might thus be used as a part of the way of putting refugee protection out of legal position and placing it in the political and humanitarian aid areas.²⁰⁵ Today, it is seen that governments frequently follow this approach. As seen in the Syrian refugee crisis, EU countries are trying to keep immigrants away from their borders by looking politically at the situation in neighbouring countries of Syria rather than considering basic human rights and refugee law and non-refoulement principle. The EU-Turkey Statement is also one of the best examples that has been used to explain this point of view.

Following the legal and political developments about large scale influx, it is concluded that the approach by and large adopted by states has been to take on any process to recognise the right to asylum in terms of a durable solution. The same regime will predictably carry on in the near future. Non-refoulement as a peremptory norm ensures admittance and, on an individual basis, might increase an acceptable anticipation that a permanent solution will be providing. In situations of mass movements, nonetheless, this kind of treatment is not presumed. In gaining its current peremptory and world-wide structure, non-refoulement has distinguished itself from asylum with regards to a permanent solution. Non-refoulement is nevertheless the key fact that encourages admittance and protection and at the same time stresses national liability in general to create a solution. Hence, in accepting a multitude of persons seeking

²⁰⁵ Goodwin-Gil and McAdam (n 3) 343

protection and in carefully observing non-refoulement, the first country of arrival could be deemed as acting on international community's behalf. In this context, Turkey as a country of first asylum in many refugee crises has provided temporary protection status from past to present, which has been praised in some respects and at the same time criticised in some aspects.

After the EU-Turkey Statement, temporary protection and the geographical to the 1951 Convention made by Turkey has become a focal point in terms of the protection mechanism applied to protection seekers particularly fleeing Syria. The analysis of this deal is very necessary to achieve this dissertation's goal and to illustrate how international law and refugee law particularly in EU works effectively and further to observe whether minimum standards are provided to protection seekers pursuant to legal instruments.

5. The EU–Turkey Statement

On 18 March 2016, the EU and Turkey made a joint statement²⁰⁶ on return of migrants crossing from Turkey to the Greek islands via irregular ways. The aim of the statement is to hinder the access of new asylum seekers to the EU. Moreover, in order to reinforce the Statement, a new joint action plan was announced nine months after the Statement.²⁰⁷ The EU-Turkey Statement has led to remarkable political and legal controversy and has been criticised by many human rights organisations and writers, because it has been claimed to undermine access to efficient and fair asylum procedures. This chapter discusses first its scope and content, then its legally binding character, and lastly comes to a conclusion as to whether it is in compliance with non-refoulement.

This statement can be seen as a part of the Joint Action Plan²⁰⁸ between Turkey and the EU adopted on 15 October 2015 to hinder irregular migration from Turkey to the EU and decrease the number of irregular migrants. However, the number of irregular migrants did not decrease, so the EU-Turkey statement was declared as a broader agreement.

European governments have been emphasised the Statement's 'steady delivery of results'²⁰⁹, 'continued trend of progress'²¹⁰ and 'positive results'²¹¹. Furthermore, some EU countries such as Germany and Malta have urged the replication of the deal elsewhere.²¹² With

²⁰⁶ EU-Turkey Statement, Council of the European Union (18 March 2016)

²⁰⁷ Joint Action Plan on the implementation of the EU-Turkey Statement (December 2016)

²⁰⁸ EU-Turkey Joint Action Plan, European Commission (15 October 2015)

²⁰⁹ Commission, 'Press Release, Commission reports on progress made under the European Agenda on Migration' (8 December 2016) 6 <europa.eu/rapid/press-release_IP-16-4281_en.pdf> accessed 08/10/2017

²¹⁰ Commission, 'Fourth Report on the Progress made in the Implementation of the EU-Turkey Statement' COM (2016) 792 final

²¹¹ Commission, 'First VP Frans Timmermans, Press Release, Commission reports on progress made under the European Agenda on Migration' Brussels (8 December 2016)

²¹² Angela Merkel: EU's Turkey deal a model for North African countries (23 August 2016) <<https://www.politico.eu/article/angela-merkel-wants-refugee-migration-deals-with-northern-african-countries-migrants-migration-turkey/>> accessed 13/11/2017 and EU needs Turkish-style migration deal with Libya-Maltese PM, *Thomson Reuters Foundation News* (18 January 2017) <<http://news.trust.org/item/20170118162525-nyxxi>> accessed 13/11/2017

the Brussels and Paris attacks, pressure on EU leaders intensified since it was suspected that at least two of the perpetrators entered Europe by disguising themselves as refugees before the terrorist attacks of Brussels and Paris. It has been expected that the Statement will alleviate political pressure on EU governments to reduce refugee flows.²¹³ On the Turkey side, this deal has led to an expectation on the way of full EU membership due to the promised visa liberation for Turkish citizens. On the other hand, on 22 March 2016, the deal however was condemned by the UNHCR due to lack of required safeguards, adequate capacity on islands for evaluating asylum claims and proper accommodation facilities in Greece.²¹⁴

5.1 Content of and Comment on the Statement

The Statement is based on three fundamental components;

a) ‘All new irregular migrants crossing from Turkey to Greece as from 20 March will be returned to Turkey’. Greek authorities could return asylum seekers in four cases; first, when there is no an application for asylum or there is a withdrawal of an asylum application in Greece; second, when individuals choose an assisted return; third, when their application has been found unfounded; forth, when the asylum claim has been found inadmissable. This return creates a questionable point concerning international law, refugee law and EU law. The prohibition of collective expulsion and respect for the principle of non-refoulement is particularly included in the deal so as to prevent such discussions.

²¹³ Lora Chakarova and Ege Seckin, ‘EU-Turkey Deal Unlikely to be Fully Implemented or Alleviate Long-term Refugee Influx’ (2016) 8(17) Jane’s Intelligence Weekly; Coulsdon 2 <<https://search.proquest.com/docview/1778336315?accountid=14987>> accessed 20/06/2017

²¹⁴ UNHCR, ‘UNHCR Redefines Role in Greece as EU-Turkey Deal Comes into Effect 22 March 2016’ <<http://www.unhcr.org/uk/news/briefing/2016/3/56f10d049/unhcr-redefines-role-greece-eu-turkey-deal-comes-effect.html>> accessed 15/12/2017

b) 'For every Syrian being returned to Turkey from Greek islands, another Syrian will be resettled from Turkey to the EU.'

c) Departures from Turkey to Greece will be prevented.

My dissertation will focus on the first factor which is particularly relevant to the STC concept and temporary protection in Turkey and non-refoulement principle. The entire text of the Statement is provided in Annex 1.

It is the EU's promise that the EU visa requirements within the Schengen zone for Turkish nationals will be liberalised, financial assistance will be provided and one Syrian refugee coming from Turkey to the EU member states will be settled for each Syrian refugee returned from Greece to Turkey in exchange for the 'a' and 'c' elements above.

According to the European Commission's Seventh Report on the Progress made in the implementation of the EU-Turkey Statement which is the most current one, As of 4 September 2017, 8,834 Syrians were resettled from Turkey to the EU under the 'one in one out' framework. The number of migrants currently living on the Greek islands is 13,372.²¹⁵ On the islands such as Leros, Samos, Chios and Lesbos, migrants have been suffering from deteriorating challenging living conditions, lacking health and psychosocial support, worrying about the threat of violence and sexual assault.²¹⁶

²¹⁵ Commission, 'Report From The Commission to the European Parliament, the European Council and the Council Seventh Report on the Progress made in the Implementation of the EU-Turkey Statement' COM (2017) 470 final

²¹⁶ UNHCR, 'UNHCR Urges Action to Ease Conditions on Greek Islands, Briefing Notes on 08 September 2017' <<http://www.unhcr.org/uk/news/briefing/2017/9/59b24a377/unhcr-urges-action-ease-conditions-greek-islands.html>> accessed 22/10/2017

On the other hand, 1,896 migrants has been currently returned to Turkey since the date of the Statement.²¹⁷ The low number of migrants returned to Turkey is said to be due to the slow pace of the Greek asylum registration and processing. Moreover, considering the migrants whose population has been currently more than three million, it is difficult to manage refuge flows. Therefore, Turkey faces some difficulties in relation to its legislation and some implementations as discussed in subchapter 4.4.2, yet it also seems that the EU is in search of a continuous host country other than itself. For this reason, they want illegal migrants to be returned to Turkey.

I strongly criticise that while Turkey is accused by international organisations and even some EU leaders, some EU countries are ignored although they violate international human rights and refugee law by passing laws restricting refugee rights or breaching the principle of non-refoulement.²¹⁸ My argument is that EU member states should not prejudge in the matter of countries outside Europe and avoid generalising the specific incidents that have happened rarely in non-European countries. The EU as an institution should treat European and non-European countries equally. What I mean by this is that some EU countries such as Greece and Belgium or any others can sometimes be in breach of refugee rights and can not provide effective and fair asylum procedures but they are never considered an unsafe country. Turkey's minor deficiencies are looked at with a magnifying glass. This, indeed, derives from the political point of view rather than law.

Lastly, there is another ambiguity within the scope of the statement. In the *Hirsi Jamaa* case, the Court stated that states come under the obligation to give those seeking protection the

²¹⁷ European Commission 2017, Report From The Commission To The European Parliament, The European Council And The Council Seventh Report on the Progress made in the implementation of the EU-Turkey Statement, COM (2017) 470 final, Brussels, 06/09/2017

²¹⁸ European Council on Refugees and Exiles (ECRE), Belgium adopts asylum reform and announces further restrictive plans (10 November 2017) <<https://www.ecre.org/belgium-adopts-asylum-reform-and-announces-further-restrictive-plans/>> accessed 25/11/2017

opportunity to submit their claims irrespective of that they are intercepted at the frontier, aboard ships or in international waters as discussed in subchapter 2.4.2. Hence, it is not an exaggeration to say that the implementation of the EU-Turkey Statement to individuals crossing into Greece through irregular ways does not reflect the obligation ruled in the *Hirsi Jamaa* case.²¹⁹

5.2 Is it legally binding?

There has been an ongoing argument about whether this statement is an international agreement and imposes legally binding obligations on states. Before underlining this issue, I think the parties to the statement should be clarified.

It is called as mostly EU-Turkey deal, but according to the recent decision of EU General Court in 2017, the EU is not a party to the statement. Two Pakistani nationals and one Afghan national have brought the action for annulment against the EU-Turkey statement in two different cases, yet the EU General Court has noted that the deal could not be a direct case in EU Courts as although member states and Turkey held a meeting that head of states or governments and their Turkish counterpart were attended, the President of the European Commission and President of the European Council participated in this meeting unofficially. Therefore, that amounts to absence of formal attendance of the EU and it is not regarded as an act of the EU institutions.²²⁰

When it comes to whether the Statement is a treaty, Babicka argues that the statement cannot be considered a treaty in the framework of the Vienna Convention on the Law of Treaties or an international agreement within the scope of article 216 of TFEU. The reason is the form of the deal, since the exchanges between Turkey and the EU were solely incorporated into a

²¹⁹ Steve Peers, 'The final EU-Turkey refugee deal: a legal assessment' (2016) <<http://eulawanalysis.blogspot.se/2016/03/the-final-euturkey-refugee-deal-legal.html>> accessed 28/11/2017

²²⁰ Case T-192/16 NF v European Council [2017] EU:T:2017:128, Case T-193/16 NG v European Council [2016] EU:T:2017:129, Case T-257/16 NM v European Council [2016] EU:T:2017:130

statement.²²¹ Moreover, it is Arribas' view that as a consequence of not being an international agreement, it does not produce a binding effect on any of the counterparts so its violation would only result in a political outcome.²²²

Spijkerboer, on the contrary claims that the statement can be regarded as a treaty considering the amendment in EU legal instruments so as to implement the statement. He also says that both the content and text of the statement demonstrate the common decisions and commitments of the parties with regard to termination of irregular migrants and joint action points reaffirming the joint action plan in 2015, which is still being implementing.²²³

The law has been passed by Greece in order to permit migrants crossing into its borders to be sent back to Turkey²²⁴ and migrants being returned by Greece arrived in Turkey on 4 April 2016.²²⁵ These all amount that both Turkey and Greece consented to constitute mutual obligations to carry out the Statement's terms. As far as I am concerned, it is not a treaty that creates a binding effect on parties. As decided by the EU General Court, it is not an act of the EU. Besides it takes the form of a 'Statement'. If parties had intended to make it a legally binding instrument, they would have adopted a genuine agreement not an instrument called 'Statement'.

²²¹ Karolina Babická, 'EU-Turkey Deal Seems to Be Schizophrenic' (22 March 2016) <www.migrationonline.cz> accessed 26/10/2017

²²² Arribas (n 202) 1098

²²³ Thomas Spijkerboer, 'Minimalist reflection on Europe. Refugees and Law' (2016) 1(2) European Papers 551 <<http://www.europeanpapers.eu/en/e-journal/minimalist-reflections-europe-refugees-and-law>> accessed 18/10/2017

²²⁴ Greece passes asylum law needed for EU-Turkey migrants deal, *Reuters* (1 April 2016) <<https://www.reuters.com/article/us-europe-migrants-greece-bill/greece-passes-asylum-law-needed-for-eu-turkey-migrants-deal-idUSKCN0WY5AU>> accessed 20/09/2017

²²⁵ First boats carrying migrants leave Greece for Turkey, *The Telegraph* (Berlin, 05 April 2016) <<http://www.telegraph.co.uk/news/2016/04/04/greece-to-send-migrants-back-to-turkey/>> accessed 20/09/2017

6. Conclusion

Certain issues related to the theoretical aspects of temporary protection and STC concept and the practices of these in the EU and Turkey particularly on the basis of EU-Turkey Statement has been identified by this dissertation. My examination illustrates general concerns over the fact that despite the principle of non-refoulement, states return protection seekers and refugees pursuant to the STC concept without substantive examination of their claims to the countries where they are protected under a temporary protection status.

Even though the EU refugee law has a distinctive character, international law and especially the 1951 Refugee Convention frequently indicates minimum standards that shall be met by Member States while implementing EU asylum policy. The principle of non-refoulement also constitutes a specific obligation for persons in search of protection preventing return of persons when they could no longer benefit from the protection system of their country of origin and are in the asylum country where they apply for international protection.

The STC concept states that a country determined as safe is safe for all, yet when a country is in general designated safe, each asylum seeker may not stay clear from the persecution in that country. If a state does not permit a protection seeker to show why he/she ought not to be transferred a third country, this means a genuine risk of expulsion and violation of non-refoulement principle. The circumstances of asylum seekers, thus, is required to be discussed individually before they are sent to a third country. Article 33 of the 1951 Convention is a barrier that hinder persons from direct or indirect refoulement to countries in which they might face persecution for this reason; the STC concept may conflict with the principle of non-refoulement in some particular cases. It is true that states generally do not breach direct non-refoulement, but international law is bypassed somehow by the STC concept.

Turkey's position as a safe third country has been abused many times by the biased and partial reports of the institutions forgetting that it is currently hosting three and a half million refugees. The reports that show individual events as if they were the case throughout the country do not reflect the facts in most instances. It has been observed in the situation of mass influx, many EU countries have deficiencies in their asylum system resulting in human rights violations. Therefore, gross human rights violations should be taken into account if any, not minor and compensatory deficiencies to consider a country safe.

When it comes to temporary protection status, on the one hand, it generally meets states' expectations from the refugee system and provides a protection mechanism pursuant to humanitarian law norms; on the other hand, it prevents permanent settlement of persons in hosting countries. This issue gives a wide margin of discretion to the governments with respect to the limits and scope of the rights to be granted to asylum seekers, especially when temporary protection is over. In this regard, TPD provides individuals under temporary protection with a right to claim an asylum application at any time in the host state. This implies its exceptional nature, so it should not be used instead of granting refugee status.

In my view, one of the beneficial aspects of this status is easy admissibility by the population of a receiving country compared to permanent status. Moreover, states recently have realised that giving in place temporary protection as an alternative to permanent one will create a lighter burden on a country for a particular time period, consequently their cost will be less than granting permanent residence. As mentioned earlier, despite its such benefits, Turkey arguably does not set a time limit for its temporary protection system.

Although states gain considerable advantages by the temporary protection system, these circumstances are often regarded as downsides of the persons in search of asylum. That is why, several criticism is brought for temporary protection. First and foremost, granting

temporary protection status might constitute a serious danger on the 1951 Convention skipping the rights under that convention. This also covers the principle of non-refoulement. This means that the applicability of the 1951 Convention is limited to certain situations and some states could ignore their duty of non-refoulement. In spite of the fact that UNHCR and most countries have acknowledged that non-convention refugees benefit from non-refoulement, yet it is sad to see that temporary protection as a newly-emerging system lead to the abuse of the non-refoulement principle.

Another criticism might be the duration of the temporary status, as states possibly maintain an arbitrary attitude when the status granted ends. Imposing strict restrictions on time limits can pose a threat to non-refoulement, because states are deemed to be allowed to return individuals on the ground of the time limit, not on the safety standards. That is why, clarification of what rights will be granted to persons under temporary protection and providing a temporary protection system recognised by international legal system redress the balance between asylum seekers and the state interests to be protected.

From a humanitarian perspective, I strongly believe that temporary protection methods might be used as rapid reaction of states to protect those fleeing their country of origin. The number of persons entering into a country for protection is crucial at that point since it is difficult to grant refugee status and citizenship rights to all of them immediately. It is worth bearing in mind that while 28 EU member states are dealing with 1.3 million asylum seekers²²⁶, Turkey is hosting over three million asylum seekers so when these circumstances are taken into account, in the situation of mass influx, the implementation of temporary protection is seen as reasonable on condition that it is in accordance with fundamental human rights and the non-refoulement principle. European countries expect Turkey to implement an open-door policy,

²²⁶ Eurostat Statistics Explained, Asylum Statistics, <http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics> accessed 28/11/2017

yet it is evident that mentality of the most EU member states are different from what humanity imagines since according to their point of view, Turkey should keep open its eastern borders, but doors on the western borders should be closed so that Syrian refugees will not enter into European territory. The EU-Turkey Statement with the aim of burden sharing remains in limbo. On the one hand, there is a need for protection of internal security and prevention of illegal immigration. On the other hand, there is a humanistic approach that entails regarding the non-refoulement principle and human rights to access international protection and fair asylum procedures.

As a concluding observation, although there is some regional guidance such as QD, APD, TPD for both temporary protection and the STC concept, universal rules that create obligations on states have not codified yet and most states are willing to implement both methods as seen recently in the EU-Turkey deal. However, they are never alternatives to the non-refoulement principle so making the STC concept and temporary protection compatible with the principle of non-refoulement and basic human rights is crucial for international community. It is a disappointment that the EU countries, to deliver a solution for one of the greatest existing human rights problems given the number of individuals seeking protection, could not cooperate fully in order to share the responsibility and burden of refugees and come together for those putting their lives in danger in the cause of protection.

Annex 1

EU-Turkey statement, 18 March 2016²²⁷

Today the Members of the European Council met with their Turkish counterpart. This was the third meeting since November 2015 dedicated to deepening Turkey-EU relations as well as addressing the migration crisis. The Members of the European Council expressed their deepest condolences to the people of Turkey following the bomb attack in Ankara on Sunday. They strongly condemned this heinous act and reiterated their continued support to fight terrorism in all its forms.

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

In order to break the business model of the smugglers and to offer migrants an alternative to putting their lives at risk, the EU and Turkey today decided to end the irregular migration from Turkey to the EU. In order to achieve this goal, they agreed on the following additional action points:

1) All new irregular migrants crossing from Turkey into Greek islands as from 20 March 2016 will be returned to Turkey. This will take place in full accordance with EU and international law, thus excluding any kind of collective expulsion. All migrants will be

²²⁷ European Council, EU-Turkey Statement, 18 March 2016 (18 March 2016)
<<http://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/pdf>>

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

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

3) Turkey will take any necessary measures to prevent new sea or land routes for illegal migration opening from Turkey to the EU, and will cooperate with neighbouring states as well as the EU to this effect.

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

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

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

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

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

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

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



Bibliography

Table of Cases

European Court of Human Rights

Cruz Varas v Sweden App no 15576/89 (ECtHR, 20 March 1991)

Hirsi Jamaa and Others v Italy App no 27765/09 (ECtHR, 23 February 2012)

Jabari v Turkey App no. 40035/98 (ECtHR, 11 July 2000)

MSS v Belgium and Greece App no 30696/09 (ECtHR, 21 January 2011)

Soering v United Kingdom App no 14038/88 (ECtHR, 7 July 1989)

T.I. v The United Kingdom, App no 43844/98 (ECtHR, 7 March 2000)

European Court of Justice

Case T-192/16 NF v European Council [2017] EU:T:2017:128

Case T-193/16 NG v European Council [2016] EU:T:2017:129

Case T-257/16 NM v European Council [2016] EU:T:2017:130

Turkey

Individual Application of H.S., App no 2016/22512 (The Constitutional Court of the Republic of Turkey, 2 November 2016)

Treaties and Legislation

European Union

Charter of Fundamental Rights of the European Union [2012] OJ C326/02

Consolidated version of the Treaty on the Functioning of the European Union [2007] OJ C115/01

Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a

balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L212/12

Council Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9

Council Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L180/60

European Union, Convention Determining the State Responsible for Examining Applications for Asylum lodged in one of the Member States of the European Communities (Dublin Convention) [1990] OJ C254

Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community [2007] OJ C306/01

United Nations

Arrangement Relating to the Legal Status of Russian and Armenian Refugees (30 June 1928) 89 LNTS 55

Convention Relating to the International Status of Refugees (28 October 1933) 159 LNTS 3663

Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171

Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain Rights and Freedoms other than those already included in the Convention and in the First Protocol thereto (16 September 1963) ETS 46

Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III))

Turkey

Law of Foreigners and International Protection Official Gazette [11/04/2013] Law No. 6458, No. 28615

Regulation on the Procedures and Principles related to Possible Population Movements and Aliens Arriving in Turkey either as Individuals or in Groups Wishing to Seek Asylum either from Turkey or Requesting Residence Permission in order to Seek Asylum From Another Country, No. 1994/6169 (19 January 1994) <<http://www.refworld.org/docid/49746cc62.html>> accessed 08/10/2017

Temporary Protection Regulation, Official Gazette of the Republic of Turkey (OG), No. 29153, (22 October 2014) 22 <<http://www.refworld.org/docid/56572fd74.html>> accessed 19/11/2017

Official Publications

European Union

Commission, 'First VP Frans Timmermans, Press Release, Commission reports on progress made under the European Agenda on Migration' Brussels (8 December 2016)

Commission, 'Fourth Report on the Progress made in the Implementation of the EU-Turkey Statement' COM (2016) 792 final

Commission, 'Press Release, Commission reports on progress made under the European Agenda on Migration' (8 December 2016) <europa.eu/rapid/press-release_IP-16-4281_en.pdf> accessed 08/10/2017

Commission, 'Report From The Commission to the European Parliament, the European Council and the Council Seventh Report on the Progress made in the Implementation of the EU-Turkey Statement' COM (2017) 470 final

Council Resolution of 30 November 1992 on a Harmonized Approach to Questions Concerning Host Third Countries (London Resolution) [30 November 1992]

EU-Turkey Joint Action Plan, European Commission (15 October 2015)

EU-Turkey Statement, Council of the European Union (18 March 2016)

Joint Action Plan on the implementation of the EU-Turkey Statement (December 2016)

United Nations

UNHCR, 'Comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (COM (2009) 554)' (August 2010) <<http://www.refworld.org/docid/4c63ebd32.html>> accessed 15/11/2017

UNHCR Executive Committee Conclusion No 6 (XXVIII) 'Non-Refoulement' (1977)

--- Conclusion No 25 (XXXIII) 'General Conclusion on International Protection' (1982)

--- Conclusion No 58 (XL) 'Problem of Refugees and Asylum-Seekers Who Move in an Irregular Manner from a Country in Which They Had Already Found Protection' (1989)

--- Conclusion No 79 (XLVII) 'General Conclusion on International Protection' (1996)

--- Conclusion No 81 (XLVIII) 'General Conclusion on International Protection' (1997)

--- Conclusion No 82 (XLVII) 'Conclusions on Safeguarding Asylum' (1997)

--- Conclusions No 85 (XLIX) 'Conclusion on International Protection' (1998)

UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status (Geneva, 1979, re-edited 1992)

UNHCR, 'Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey as part of the EU-Turkey Cooperation in Tackling the Migration Crisis under the safe third country and first country of asylum concept' (23 March 2016) <<http://www.unhcr.org/56f3ec5a9.pdf>> accessed 15/11/2017

UNHCR, 'Provisional Comments on the Proposal for a European Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status' (Council Document 14203/04, Asile 64, of 9 November 2004) <<http://www.unhcr.org/protect/PROTECTION/43661ea42.pdf>> accessed 11/10/2017

UNHCR, 'Syrian Crisis Situation Report August 2017 Humanitarian Results' (August 2017) <http://data.unhcr.org/syrianrefugees/regional.php#_ga=2.178691296.57107913.1507388462-1170384146.1493299202> accessed 09/10/2017

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' <<http://www.refworld.org/docid/437b6db64.html>> accessed 15/09/2017

UNHCR, 'UNHCR Redefines Role in Greece as EU-Turkey Deal Comes into Effect 22 March 2016' <<http://www.unhcr.org/uk/news/briefing/2016/3/56f10d049/unhcr-redefines-role-greece-eu-turkey-deal-comes-effect.html>> accessed 15/12/2017

UNHCR, 'UNHCR Urges Action to Ease Conditions on Greek Islands, Briefing Notes on 08 September 2017' <<http://www.unhcr.org/uk/news/briefing/2017/9/59b24a377/unhcr-urges-action-ease-conditions-greek-islands.html>> accessed 22/10/2017

Documents and Reports from NGOs

Amnesty International, The EU – Now More Free, Secure and Justice? Amnesty International's Human Rights Assessment of the Tampere Agenda, (2 June 2004) <http://www.amnesty.eu/en/news/statements-reports/eu/asylum-and-migration/the-european-union-now-more-free-secure-and-just-0005/#.WIKhGN9l_IU> accessed 17/09/2017

Asylum Information Data Base (AIDA), Country Report: Turkey (December 2015) <<http://www.asylumineurope.org/reports/country/turkey>> accessed 25/10/2017

European Council on Refugees and Exiles (ECRE), Belgium adopts asylum reform and announces further restrictive plans (10 November 2017) <<https://www.ecre.org/belgium-adopts-asylum-reform-and-announces-further-restrictive-plans/>> accessed 25/11/2017

European Council on Refugees and Exiles (ECRE), Debunking The Safe Third Country Myth, Policy Note 08 (2017)

Human Rights Watch, 'Pushed back, pushed around' (21 September 2009) <<http://www.hrw.org/en/node/85582/section/9>> accessed 18/11/2017

Human Rights Watch, News (3 February 2016) <<https://www.hrw.org/news/2016/02/03/france-abuses-under-state-emergency>> accessed 27/11/2017

Doctrines

Books

Battjes H, *European Asylum Law and International Law* (Leiden/Boston: Martinus Nijhoff publishers 2006)

Clayton G, *Text Book on Immigration and Asylum Law* (6th edn, Oxford University Press 2014)

Coleman N, *European Readmission Policy- Third Country Interests and Refugee Rights* (Martinus Nijhoff Publishers, Leiden/Boston 2009)

Gammeltoft-Hansen T, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge University Press 2011)

Goodwin-Gil G S and McAdam J, *The Refugee in International Law* (3rd edn, Oxford University Press 2007)

Hathaway J C, *The Rights of Refugees under International Law* (Cambridge University Press 2005)

Hurwitz A, *The Collective Responsibility of States to Protect Refugees* (Oxford University Press 2009)

Lavenex S, *Safe Third Countries: Extending the EU Asylum and Immigration* (Central European University Press 1999)

Nowak M, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (N P Engel Publishers 2005)

Shaw M N, *International Law* (7th edn, Cambridge University Press 2014)

Book Chapters

Castillo M A and Hathaway J C, 'Temporary Protection' in James C Hathaway(eds), *Reconceiving International Refugee Law* (M. Nijhoff Publishers 1997)

Goodwin-Gil G S, 'Forced Migration: Refugees, Human Rights and Security' in Jane McAdam (eds), *Forced Migration Rights and Security* (Hart Publishing 2008)

Kneebone S, 'The Legal and Ethical Implications of Extra-territorial Processing of Asylum Seekers: the Safe Third Country Concept' in Mc Adam (eds) *Forced Migration, Human Rights and Security* (Hart Publishing 2008)

Lauterpacht E and Bethlehem D, "The Scope and Content of the Principle of NonRefoulement: Opinion" in Erika Feller, Volker Türk, Frances Nicholson (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press 2003)

Moreno-Lax V, 'The Legality of the "Safe Third Country" Notion Contested : Insights from the Law of Treaties' in Guy S Goodwin-Gill and Philippe Weckel (eds) *Migration and Refugee Protection in the 21st Century; Legal Aspects* (The Hague Academy of International Law Center for Research, Martinus Nijhoff 2005)

O'Nions H, *Asylum—A Right Denied A Critical analysis of European Asylum Policy* (Ashgate 2014)

Schieffer M, 'Readmission and Repatriation of Illegal Residents', in Bernd Martenczuk and Servaas Van Thiel (eds), *Justice, Liberty and Security: New Challenges for EU External Relations*, Brussels (Vubpress Brussels University Press 2008)

Singh N, 'India and International Law: Ancient and Medieval', in B.S. Chimni (eds), *International Refugee Law: A Reader*, (Sage Publications 2000)

Sztucki J, 'Who is a Refugee? The Convention Definition: Universal or Obsolete?' in Frances Nicholson, Patrick Twomey (eds), *Refugee Rights and Realities: Evolving International Concepts and Regimes* (Cambridge University Press 1999)

Türk V, 'The Role of UNHCR in the Development of International Refugee Law' in Frances Nicholson, Patrick Twomey (eds) 172, Guy S. Goodwin-Gill, *The Refugee in International Law* (Oxford University Press 2007)

Vedsted-Hansen J, 'Non-admission Policies and the Right to Protection: Refugees' Choice versus States Exclusion' in James C. Hathaway (eds), *Human Rights and Refugee Law* (Edward Elgar Publishing 2013)

Articles

Alleweldt R, 'Protection Against Expulsion Under Article 3 of the European Convention on Human Rights' (1993) 4 *European Journal of International Law* 360

Arribas F G, 'The EU-Turkey Agreement: A Controversial Attempt at Patching up a Major Problem' (2016) 1(3) *European Papers* 1097

Bhabha J, 'European Harmonisation of Asylum Policy: A Flawed Process' (1994) 35 *Virginia Journal of International Law* 101

Borchelt G, 'The Safe Third Country Practice in the European Union: A Misguided Approach to Asylum Law And A Violation of International Human Rights Standards' (2002) 33 *Colombia Human Rights Law Review* 473

Boswell C, *Migration in Europe*, Paper for the Policy Analysis and Research Programme of the Global Commission on International Migration (Hamburg, Migration Research Group Hamburg Institute of International Economics 2005) 1

Ciçekli B, 'Reforms Introduced by the Act on Foreigners and International Protection (AFIP) into the Turkish Law on Foreigners and Refugees' (2016) 12(1) *Review of International Law and Politics* 75

Coleman N, 'Non-Refoulement Revised Renewed Review of the Status of the Principle of Non-Refoulement as Customary International Law' (2003) 5 *European Journal of Migration and Law* 23

Costello C, 'The Asylum Procedures Directive and the Profileration of Safe Country Practices: Detettence, Deflection and the Dismantling of International Protection?' (2005) 7(1) *European Journal of Migration and Law* 35

Durieux J and Hurwitz A, 'How Many is too Many: African and European Legal Responses to Mass Influxes of Refugees' (2004) 47 *German Year Book of International Law* 105

Durieux J and Mcadam J, 'Non-refoulement through Time: The Case for a Derogation Clause to the Refugee Convention in Mass Influz Emergencies' (2004)16(1) *International Journal of Refugee Law* 1

Duffy A, 'Expulsion to Face Torture Non-Refoulement in International Law' (2008) 20 *International Journal of Refugee Law* 373

Eaton J, 'The Internal Protection Alternative under European Union Law: Examining the Recast Qualification Directive' (2012) 24 *International Journal of Refugee Law* 765

Edwards A, 'Human Rights, Refugees, and The Right 'To Enjoy' Asylum' (2005) 17(2) *International Journal of Refugee Law* 293

Fullerton M 'Failing the test: Germany leads Europe in Dismantling Refugee Protection' (2001) 36 *Texas.International Law .Journal* 231

Giuffré M, 'Readmission Agreements and Refugee Rights: from a Critique to a Proposal' (2013) 32(3) *Refugee Survey Quarterly* 79

Jaegler G, "On the History of the International Protection of Refugees" (2001) 83(843) *International Review of the Red Cross* 727

Kaunert C and Le'onard S, 'The European Union Asylum Policy After the Treaty of Lisbon and the Stockholm Programme: Towards Supranational Governance in A Common Area of Protection' (2012) 31(4) *Refugee Survey Quarterly* 1

Kemal Kirisci, 'Coerced Immigrants': Refugees of Turkish Origins since 1945' (1996) 34(3) *International Migration* 385

Koca B T, 'Deconstructing Turkey's 'Open Door'' Policy towards Refugees from Syria' (2015) 12(3) *Migration Letters* 209

Kritzman-Amir T and Spijkerboer T, 'On The Morality and Legality of Borders: Border Policies and Asylum Seekers' (2013) 26 *Harvard Human Rights Journal* 1

Magner T, 'A less than Pacific Solution for Asylum Seekers in Australia' (2004) 16(1) *International Journal of Refugee Law* 53

Ruma Mandal, *Protection Mechanisms Outside of the 1951 Convention ("Complementary Protection")* (PPLA/2005/02 Geneva UNHCR 2005)

Marie C and Bostock J, 'The International Legal Obligations Owed to the Asylum Seekers on the Mv Tampa' (2002) 14(2-3) *International Journal of Refugee Law* 279

Mink J, 'EU Asylum Law and Human Rights Protection: Revisiting the Principle of Non-Refoulement and the Prohibition of Torture and Other Forms of Ill-treatment' (2012) 14 European Journal of Migration and Law 119

Noll G, 'Formalism v. Empiricism: Some Reflections on the Dublin Convention on the Occasion of Recent European Case Law' (2001) 70(1) Nordic Journal of International Law 161

Noll G, 'Seeking Asylum at Embassies: A Right to Entry under International Law?' (2005) 17(3) International Journal of Refugee Law 542

Panizzon M, 'Readmission Agreements of EU Member States: A Case For EU Subsidiarity or Dualism?' (2012) 31(4) Refugee Survey Quarterly 101

Paoletti E and Pastore F, 'Sharing the Dirty Job on the Southern Front? Italian-Libyan Relations and Their Impact on the European Union' (2010) 29 International Migration Institute Working Paper 1

Rodger J, 'Defining the Parameters of the Non-refoulement Principle' LLM Research Paper International Law (Laws 509) (Victoria University of Wellington 2001) <<http://www.refugee.org.nz/JessicaR.htm>> accessed 06/11/2017

Ryglel K, Baban F and Ilcan S, 'The Syrian refugee crisis: The EU-Turkey 'Deal' and Temporary Protection' (2016) 16(3) Global Social Policy 315

Spijkerboer T, 'Minimalist reflection on Europe. Refugees and Law' (2016) 1(2) European Papers 551 <<http://www.europeanpapers.eu/en/e-journal/minimalist-reflections-europe-refugees-and-law>>accessed 18/10/2017

Taylor S, 'Australians Safe Third Country Provisions, Their Impact on Australias Fulfillment of Its Non Refoulement Obligations' (1996) 15(2) University of Tasmania Law Review 196

Türk V, 'Temporary Protection Arrangements to Fill a Gap in the Protection Regime' (2015) 49 Forced Migration Review <<http://www.fmreview.org/climatechange-disasters/tuerk.html>> accessed 25/10/2017

Online Resources

Akkaya K, 'Why is the Temporary Protection Directive Missing from the European Refugee Crisis Debate?' (2015) Advanced Training Program on Humanitarian Action (ATHA) <<http://atha.se/blog/why-temporary-protection-directive-missing-european-refugee-crisis-debate>> accessed 18/11/2017

Beirens H, Maas S, Petronella S, Velden M, 'Study on the Temporary Protection Directive Final report' (2016) undertaken by ICF Consulting Services Limited sponsored by EU Commission 14 <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/asylum/temporary-protection/docs/final_report_evaluation_tpd_en.pdf> accessed 19/09/2017

Chakarova L and Seckin E, 'EU-Turkey Deal Unlikely to be Fully Implemented or Alleviate Long-term Refugee Influx ' (2016) 8(17) Jane's Intelligence Weekly; Coulsdon <<https://search.proquest.com/docview/1778336315?accountid=14987>> accessed 20/06/2017

Erdoğan M M, 'Syrians in Turkey, Social Acceptance and Integration' (2014) Hacettepe University Migration and Politics Research Center <<http://fs.hacettepe.edu.tr/hugo/dosyalar/TurkiyedekiSuriyeliler-Syrians%20in%20Turkey-Rapor-TR-EN-19022015.pdf>> accessed 18/09/2017

Karolina Babická, 'EU-Turkey Deal Seems to Be Schizophrenic' (22 March 2016) <www.migrationonline.cz> accessed 26/10/2017

Kirişçi K, 'Syrian Refugees and Turkey's Challenge: Going Beyond Hospitality' (2014) Brookings Institution 1 <<https://www.brookings.edu/wp-content/uploads/2016/06/Syrian-Refugees-and-Turkeys-Challenges-May-14-2014.pdf>> accessed 07/10/2017

Koo J, The European Union Temporary Protection Directive: an example of solidarity in law but not in practice - A Review of Temporary Protection in the European Union (1990-2015), The Refugee Law Initiative (RLI), School of Advanced Study- University of London, <<http://researchopen.lsbu.ac.uk/1060/1/WPS%20Special%20Edition%201st%20Annual%20Conference%5B1%5D.pdf>> accessed 25/09/2017

Orchard C and Chatty D, 'High Time for Europe to Offer Temporary Protection to Refugees from Syria?' (2014) <<https://www.opendemocracy.net/can-europe-make-it/cynthia-orchard-dawn-chatty/high-time-for-europe-to-offer-temporary-protection-to>> accessed 18/09/2017

Özden S, 'Syrian Refugees in Turkey' (2013) MPC Research Reports 2013/05, Robert Schuman Centre for Advanced Studies, European University Institute <<http://cadmus.eui.eu/handle/1814/29455>> accessed 16/08/2017

Peers S, 'The final EU-Turkey refugee deal: a legal assessment' (2016) <<http://eulawanalysis.blogspot.se/2016/03/the-final-euturkey-refugee-deal-legal.html>> accessed 28/11/2017

Schatzer P, (International Organisation for Migration): Executive Committee Of The Programme Of The United Nations High Commissioner For Refugees, fiftieth session, UN doc. A/AC.96/SR.540 (12 October 1999) 5 <<http://www.unhcr.org/3aee6d834.pdf>> accessed 14/10/2017

News Articles

Angela Merkel: EU's Turkey deal a model for North African countries (23 August 2016) <<https://www.politico.eu/article/angela-merkel-wants-refugee-migration-deals-with-northern-african-countries-migrants-migration-turkey/>> accessed 13/11/2017

Erdogan offers citizenship to Syrian and Iraqi refugees, *Aljazeera* (Turkey, 7 January 2017) <<http://www.aljazeera.com/news/2017/01/erdogan-offers-citizenship-syrian-iraqi-refugees-170106195134961.html>> accessed 15/09/2017

EU needs Turkish-style migration deal with Libya-Maltese PM, *Thomson Reuters Foundation News* (18 January 2017) <<http://news.trust.org/item/20170118162525-nyxxi>> accessed 13/11/2017

First boats carrying migrants leave Greece for Turkey, *The Telegraph* (Berlin, 05 April 2016) <<http://www.telegraph.co.uk/news/2016/04/04/greece-to-send-migrants-back-to-turkey/>> accessed 20/09/2017

Greece passes asylum law needed for EU-Turkey migrants deal, *Reuters* (1 April 2016) <<https://www.reuters.com/article/us-europe-migrants-greece-bill/greece-passes-asylum-law-needed-for-eu-turkey-migrants-deal-idUSKCN0WY5AU>> accessed 20/09/2017

Hewitt G, 'Paris Attacks: Impact on Border and Refugee Policy' *BBC* (15 November 2015) BBC <<http://www.bbc.co.uk/news/world-europe-34826438>> accessed 15/10/2017

