universität wien

MASTER THESIS

Titel der Master Thesis / Title of the Master‘s Thesis

„The Implication of EU-Turkey deal for the Rights of Refugees regarding the principle of non-refoulement “

verfasst von / submitted by

Emran Kakar

angestrebter akademischer Grad / in partial fulfilment of the requirements for the degree of

Master of Arts (MA)

Wien, 2021 / Vienna 2021

Studienkennzahl lt. Studienblatt / Postgraduate program code as it appears on the student record sheet:	UA 992 884
Universitätslehrgang lt. Studienblatt / Postgraduate programme as it appears on the student record sheet:	Master of Arts in Human Rights
Betreut von / Supervisor:	**Dr. Rene Kuppe**

Acknowledgment:

Thank you, the University of Vienna, specially, Master in Applied Human Rights, by giving me the opportunity to learn and grow in life.

This thesis would not have been possible without constant support of my family and friends. So, I would like to start by thanking my mother who is an inspiration in my life, a bright light who I always look up to, my father, who has been my backbone and my brothers, who constantly brings the best out of me. I wholeheartedly thank all of you.

A special thank goes to these special people in my life:

Wais Jalalzai, the one who I share the most embarrassing and proud moments with.

Nikola Planojevic, Partner in Crime. Never Change.

Most of all, I would like to dedicate these last few words of thank you to the one and only, Dilan Badikanli (Dilam). Without you, this paper would not have been completed, nor my life. Thank you for being in my life, short or long. Thank you for giving me Refuge in your heart, I find my solace in you.

LIST OF ABBREVIATIONS

APD Procedures Directive (2013/32)

CAT Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

CEAS Common European Asylum System

CJEU Court of Justice of the European Union

Commission European Commission

ECHR European Convention on Human Rights

ECtHR European Court on Human Rights

ECRE European Council on Refugees and Exiles

EU European Union

EU Charter Charter of Fundamental Rights of the European Union

EXCOM Executive Committee of the Programme of the High Commissioner

HRC Human Rights Committee

HRW Human Rights Watch

ICCPR International Covenant on Civil and Political Rights

LFIP Law of Foreigners and International Protection (2013/6458)

NGO Non-governmental organisation

Refugee Convention Geneva Convention Relating to the Status of Refugees

QD Qualification Directive (2011/95)

TEU Treaty on European Union

TFEU Treaty on the functioning of the European Union

UDHR Universal Declaration of Human Rights

UNHCR United Nations High Commissioner for Refugees

VCLT Vienna Convention on the Law of Treaties

Table of content

To what extend does the implementation of the EU-Turkey deal comply with principle of non-refoulement and the rights of refugees under international human rights Standards?

1. Introduction

1.1 Rationale

The topic of Refugees and their Rights has in the last decade shifted from realms of protection matter to the domains of divergence of responsibility around the globe and in Europe. As one of the strongest, if not the only, advocate of all Human Rights for all, Europe failed to stand true to its values when faced with an unprecedented number of people arriving at its shores as a result of instability in Middle East by 2015.

In response to such an immediate Humanitarian crisis, European Union Member states "signed off" their responsibility and hide behind the mercy of another intermediate country i.e., Turkey. By declaring Turkey as a "safe," European member states unfortunately created a buffer zone of responsibility between Greece and Turkey, where refugees are treated as an incentive for the political gains.

In this tread off the only winner is the reigning political party of Erdogan. This became clear, by Turkey opening borders to Europe in 2020. The deal with the Sultan did not pay off as European countries have hoped for since everyone under Sultan's regime is nothing more than means to reach his goals. In this game of cat and mouse the first and last casualties were Refugees caught between two countries denying taking responsibility to provide protection.

By the end of 2020 coupled with global pandemic, Refugees are facing more and more obstacles to gain access to Asylum and substantiate their claim both in Turkey and Greece due to the existence of the Deal.

1.2 Aim and Structure

This paper's primary concern is the compatibility of EU-Turkey deal with the principle of non-refoulement and the right to seek asylum. Although political and interdisciplinary approaches will cover various aspects that the deal truly is affecting, due to the limitation imposed by the research question, I will mainly focus on the legal examination of the deal. Due to the nature of the research, I will refer to, but not limited to, the primary sources of international law when assessing the scope and content of non-refoulement.

Thus, this paper will examine, *to what extend does the implementation of the EU-Turkey deal comply with principle of non-refoulement and the rights of refugees under international human rights Standards?*

To achieve this goal, firstly we will examine the scop and content of principle non-refoulement enshrined in Refugee Convention, European Convention of Human Rights and EU Legislation in chapter 2. Thereafter, we will investigate the content of the EU-Turkey deal in Chapter 3 to fully grasp what has been promised and delivered under the agreement. In Chapter 4, the legal and de facto situation will be under analysis of this paper. For Turkey to be a "safe" third country it needs to meet minim threshold according to Asylum procedure Directive. We will also give reference to reports by local and International Organization located in Turkey and to understand if Turkey is holding true t tis words promised under the Deal. Greece plays a major role in facilitating the return of the migrant and refugees to Turkey so it stands to reason that some aspect of its implementation of the Deal will be given due consideration in Chapter 5.
Lastly, in Chapter 6 we will draw a conclusion derived from all the mentioned chapter and the answer to our research question and conclude whether the EU-Turkey Deal operates within the legal standards of international law.

CHAPTER 1

2. Theoretical Framework of Non-refoulment and right to seek asylum

In order to answer the question of this thesis, we need a legal framework that identifies rights and duty within series of international human rights law and refugee law regarding non-refoulment and right to seek asylum. These rights are essential for protection seekers who are returned to a third country so we will examine both non-refoulment and right to seek asylum in each chapter to have better overview of their scope and content. Chapter 2.1 will deal with the scope and content of non-refoulment in international and refugee law and, in the same manner chapter 2.2 will examine the right to seek asylum in international and regional legal regime. However, due to the nature of this thesis first we need to identify primary sources of the law codifying these rights and only there after an examination of each right.

The rights of refugees can be found either in United Nations Convention relating to the statues of refugees also known as refugee convention and general standards of human rights law[1]. We will now navigate through each of convention and EU legislation in subchapter.

2.1 Refugee under United Nations Convention Relating to The Status of Refugees

The Geneva convention also known as the cornerstone of international legal order for protection of refugees[2] adopted in 1951 and amended by additional protocol of

[1] Hathaway, J. C., The Rights of Refugees under International Law, Cambridge, Cambridge University Press, 2005 p. 154.
[2] UN High Commissioner for Refugees (UNHCR), *UNHCR Note on the Principle of Non-Refoulement*, November 1997.

1967 relating to the status of refugees. This convention in according to its article 1 (A) refugee is a person who "*As a result of events occurring before* 1 January 1951 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 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".[3] This was amended by Protocol of 1967 relating to the status of refugees removing the geographical and temporal limitation of definition of 1951 which emphasized *"events occurring before 1. January 1951".*[4] This means that everyone who falls under the definition of article 1(A) is refugee irrespective of their country or any date. To put it more simply a person is a refugee when a) he is outside of his nationality or how when he/she doesn't have nationality is outside of his formal habitual residence a) having well-founded fear of being persecuted c) due to race, religion\ion, nationality, membership of particular social group or political opinion. Furthermore, well-founded fear although having the nature of being subjective that's to say that the fear of persecution is personal and individual most of the time has to be grounded in objective sense[5]. And it depends on the true narrative of claimant story and reliable sources that the objectivity of well-founded fear is established.

2.1.1 The principle of non-refoulment under Geneva convention

The principle of non-refoulment is one of the most important protection mechanisms in international law against return or expulsion of asylum and refugees to

[3] Convention Relating to the Status of Refugees, (adopted 25 July 1951, entered into force 22 April 1954) 189 UNTS 137, Amended by Protocol to the Status of Refugee adopted 31 January 1967 (entered into force 4 October 1967) 606 UNTS 8791. Article 1 (A).
[4] Ibid.
[5] Immigration and Refugee Board of Canada, *Interpretation of the Convention Refugee Definition in the Case Law*, 2019, https://irb-cisr.gc.ca/en/legal-policy/legal-concepts/Pages/RefDef05.aspx, (Accessed 15 March 2021).

either a third country or country or origin where they will be in danger of described ill treatment. The French word, "*refouler"*; which means to expel or drive back[6] has become the cornerstone of international law and human rights law for protection of asylum seeker and refugees. This principle is imbedded in various legal instruments, treaties and has become part of international customary law[7]. It means that regardless of whether a country has ratified the convention or not but due to the nature of non-refoulment as part of customary international law they are bound by it and cannot refoul individuals seeking refuge[8].

Furthermore, it imposes limitations on state sovereignty regarding the entry of aliens and their subsequent return to a third country. This further implies as it will be covered later in the thesis that states have to afford asylum procedure for protection seekers. In other words, states cannot deny protection seekers access to seek asylum without their claims examined while at the same time it need to be mentioned that non-refoulement in itself does not imply the right to seek asylum[9].

Under Geneva convention this right is articulated in article 33 (1) of Geneva convention as such:

"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"[10].

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[6] G. Goodwin-Gill and J. McAdam, *The International Refugee Law, New York*, Oxford University Press Inc., 2007, p. 201.

[7] Ibid, p. 354.

[8] Executive Committee of the High Commissioner's Programme, *Note on international protection,* UN High Commissioner for Refugees (UNHCR), 13 September 2001, A/AC.96/951, para 16.

[9] G. Goodwin-Gill and J. McAdam, 2007 p.357-358.

[10] Convention Relating to the Status of Refugees, Article 33 (1).

However, the right to non-refoulment and the protection provided by it is not absolute. This is evident from art. 33(2) which allows refoulment when certain conditions are met. These conditions are when there are "reasonable grounds" that a refugee is "a danger to the security of the country" or the refugee "having been convicted by the final judgment of a particularly serious crime, constitutes a danger to the community of that country". The article weaver between interest of the individual seeking protection and the interest of that specific country. The "reasonable grounds" also suggests a proportionality measurement between these two interests[11].

It has to be mentioned that aright article 33 (1) has different wording with regards persecution in article 33 (1) as "*his life or freedom would be threatened"* compared to article 1 "*well-founded fear of being persecuted"* It has nonetheless been interpreted in the same manner[12]. Otherwise, then it would mean only a section of refuges whose "life or freedom" is threatened is protected by article 33 (1) and others are not which is not the case and supported by jurisprudence. In the same spirit article 33 (1) has to be read in conjunction with article 1 of the convention in order to benefits from its protection. Among many other requirements laid down in article 1 for recognition of refugee one of the essential is to be "outside" of country of origin. This requirement is also applicable for article 31 (1) of non-refoulment[13]. Which means rights and benefits embedded in the Refugees convention cannot prevail anyone as long they find themselves within jurisdiction of their own country.

[11] S. Lauterpacht, and D. Bethlehem. "The Scope and Content of the Principle of the Principle of Non-Refoulement: Opinion. In E. Feller, V. Türk, & F. Nicholson (eds.), The Refugee Protection in International Law: UNCHR's Global Consultations on International Protection, Cambridge, Cambridge University Press, 2003, pp.138-139.

[12] Hathaway, J. C., The Rights of Refugees under International Law, 2005, pp. 305-306.

[13] Ibid, p. 307.

It was thoroughly discussed in European Roma Rights Centre case [14] and this line of reasoning was presented by the court:

"Article 33 concerns refugees who have gained entry into the territory of a Contracting State, legally or illegally, but not to refugees who seek entrance into this territory. In other words, Article 33 lays down the principle that once a refugee has gained asylum (legally or illegally) from persecution, he cannot be deprived of it by ordering him to leave for, or forcibly returning him to, the place where he was threatened with persecution, or by sending him to another place where that threat exists, but that no Contracting State is prevented from refusing entry in this territory to refugees at the frontier…"[15]

Furthermore, protection provided by non-refoulement in Geneva convention do not only applies to refugees but also to asylum seekers or anyone who fulfils the criterion of refugee[16]. This is also supported by UNHCR concept of that refugee or refugee hood is declaratory rather than constitutive[17]. This is because once an individual fulfils the criterion laid out in the article 1 of RC is automatically a refugee and a formal recognition is based on many technicalities which sometimes can hinder various rights of within the Conventions to be exercised. For example, if formal recognition was meant to be a requirement, then asylum seekers could be returned to their country of origin due to them not being officially recognized by a state as refugee.

According to the Convention as we have discussed, states are prohibited for sending individuals back to frontiers where their lives would be threatened but can or is it allowed

[14] United Kingdom: House of Lords (Judicial Committee), UKHL 55 (2004), *Regina v. Immigration Officer at Prague Airport and Another, Ex parte European Roma Rights Centre and Others*, 9 December 2004.

[15] Ibid, p.14, para. 17.
[16] G. Goodwin-Gill and J. McAdam, 2007, pp. 233-234.
[17] Executive Committee Conclusion, *General Conclusion on International Protection* No. 81 (XLVIII) and *Safeguarding Asylum* No. 82 (XLVIII), 1997.

for states to send refugees to any other places where they face no such persecution. It will be discussed in the next chapter.

2.1.2 Indirect refoulment

The act of explosion or rejection of protection seeker from its territory can facilitated by various means and measure by states. In one of many forms' states have sent back protection seekers not to their country of origin from where they have fled due to the fear of persecution but to an intermediate country to lodge new application for protection. Retuning or sending asylum seekers to an intermediate country or to any other county where they face similar persecution does not absolve the sending states from its duty under the Convention[18]. UNHCR has also emphasized that the responsibility on third state, that they should not send refuge to where their life or freedom would be threatened[19]. The support for such reasoning is coming from the interpretation of phrase "in any manner whatsoever" which is also grounded in *travaux préparatoires*[20] . As delegating of an obligation is not the same as nullifying of it otherwise state will have legal pathway to undermine the convention. In a very elaborate and precise wording in a judgment in UK concerning the return of Sri-lanker asylum seekers back to Germany the house of lords expressed their opinion on this matter as:

"Suppose it is well known that country A, although a signatory to the Convention, regularly sends back to its totalitarian and oppressive neighbour, country B, those opponents of the regime in country B who are apprehended in country A following their escape across the border. Against that background, if a person arriving in the United Kingdom from country A sought asylum as a refugee from country B, assuming he could establish his well-founded fear of persecution there, it would, it seems to me, be as much a breach of article 33 of the Convention to return him to country A as to country B. The one course would effect

[18] Hathaway, J. C., The Rights of Refugees under International Law, pp. 322-323.
[19] UN High Commissioner for Refugees UNCHR, *Global Consultations on international protection*, 31 May 2001, p.12, para 50 (c).
[20] Hathaway, J. C., 2005, pp. 322-323.

indirectly, the other directly, the prohibited result, i.e., his return "to the frontiers of territories where his life or freedom would be threatened'[21]*."*

In addition, UNHCR countless time has stated that states are still responsible for removal of the asylum seekers even in case of removal to an intermediate country[22]. Although, the intermediate country is primarily responsible for the refoulement of the asylum seekers, the sending states, is jointly culpable as well[23]. This is further supported by Legomsky as he in his "complicity principle" that a country who is state part to convention may not send asylum seekers while knowing that the intermediate country is not a safe, irrespective if that state is party to one or many Human Rights Conventions including the Refugee Convention[24]. With this we can fairly assume that the principle of non-refoulement can be breaches by states regardless of if the asylum seekers was sent directly or indirectly to territory where there is risk of persecution.

However, the Refugee Convention does not preclude removal of individuals to another intermediate country or first country of asylum as long as that country is considered to be safe[25]. All that said a state cannot absolve itself by diverting responsibility to another state. The state which originally sends back asylum seekers remains still responsible of the act of refoulement if the second states send the asylum seeks back to the country of origin. This line of reasoning was formidable in the case of T.I vs United Kingdom[26] and many other cases where there was suspicion that the same amount of protection was not or could not be

[21] United Kingdom: House of Lords (Judicial Committee), UKHL 36 (2002), R v. Secretary of State for the Home Department, ex parte Thangarasa; R v. Secretary of State for the Home Department, ex parte Yogathas, 17 October 2002, p.19.

[22] UN High Commissioner for Refugees (UNHCR), *Advisory Opinion in the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, p 10.
[23] S. Lauterpacht, and D. Bethlehem. *The Scope and Content of the Principle of the Principle of Non-Refoulement: Opinion*, 2003, p. 122.
[24] S. H., Legomsky, ´Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries, The Meaning of Effective Protection´, *International Journal of Refugee Law*, vol. 15 no. 4, 2003, p. 568.
[25] Hathaway, J. C., 2005, p. 323-324.
[26] European Court of Human Rights, *T.I v. United Kingdom No 43844/98*, 7 March 2000.

afforded by intermediate state and thus the first state would be in violation of non-refoulment if it sends back the asylum seekers. On the other hand, the asylum seekers can be in eternal loops of being send back from country to country as long as each and one of them respect and provide protection against refoulment to the country of origin and thus, this action has been mentioned by many scholars as "chain-refoulment[27]".

With this we can conclude that Refugee convention does not prohibit indirect refoulement to an intermediate country or safe third country as long as there is evidence or in other words guarantee for respect for principle of non-refoulement.

Then the question becomes what kind of procedural safeguards has to be in place in the intermediate country in order for the sending country to not be responsible for the eventual breach of non-refoulment. For this we will need to focus and do a comparison of direct refoulement and indirect refoulment in upcoming chapter to find what are the differences when examining whether to send a person back to the country of origin and to the intermediate safe country.

2.2 The principle of non-refoulment under ECHR

The principle of non-refoulement enshrined in the Refugee convention is not an absolute right and under certain conditions it can be revoke and refugees can be sent back to their country of origin, however as we will see here the Refugee convention is not the only convention mentioning this right. Refuge convention specifically deals with the rights conferred to refugees only and the application of rights thus only relates to the small portion of people under the convention. However, there are other international human rights conventions which includes similar rights but not conditioned to only specific groups of

[27] Costello C., ´The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection?, *European Journal of Migration and Law*, vol. 7, no. 1, 2005, p. 47.

people but people in general even the ones falling outside of the refuge convention. Among others we can mention, International Covenant of Civil and political rights (ICCPR), Convention against Torture (CAT) and European Convention of Human Rights (ECHR). These are among the bulks of Convention that deals with rights of individuals and set standards for the state party to oblige by. Some of the rights mentioned in these covenants has achieved the level of *jus cogens* or in other words rights which are absolute in its nature where there can be made no derogation from it.

In the same manner we can derive from various human rights conventions the protection from non-refoulement for individuals not necessarily qualifying as a refugee but where there is a risk of serious harm if returned. Thus, states party to mentioned conventions are to refrain from returning individuals where he/she runs risk of facing ill-treatment. By ill-treatment we mean any measure taken by states which harms its subjects by methods of torture, arbitrary loss of life or inhuman or degrading treatment. This prohibition can be deduced from articles 7 of ICCPR[28] article 3 of CAT[29] and article 3 of ECHR[30], which means if the requirements of each of these provisions are met then return or *refoul* of those individuals regardless of if he/she is refugee will be breach the principle of non-refoulement. Additionally, we will also cast light on the prohibition of collective expulsion enshrined in ECHR Protocol 4 article 4.

As for the self-imposed limitation of this paper and to focus particularly on one of these rights we will in the following mainly focus on the prohibition of non-refoulement deduced from articles 3 of EHCR.

Article 3 of ECHR reads as following:

[28] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.
[29] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.
[30] European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14., (adopted 4 November 1950, entered into force 3 September 1953) ETS 5.

"No one shall be subjected to torture or to

inhuman or degrading treatment or punishment"

In the cases of *Soering* and *Chahal* the European Court of Human Rights (ECtHR) has emphasized that article 3 of ECHR is non-derogatory and absolute[31]. This means that states bound by treaty are prohibited or limited in their action plan to return not only refugees but anyone where there is risk of torture, inhuman or degrading and punishment.

In the following we will discuss the personal scope and content of article 3 of ECHR and to explore the meaning of terminologies such as inhumane or degrading, punishment, whether or not it implicitly includes the principle of non-refoulement. Additionally, whether we can also find limitation or obligation on states with regards to indirect refoulement.

2.2.1 Scop and content- ECHR article 3

Reading the article 3 there is no mention of any prohibition of refoulement, and its only main concern seems to be prohibition of torture, inhuman and degrading treatment, or punishments. To this regard we will look into two very famous cases which has laid down the foundation for implicit inclusion of the principle of non-refoulement within the scope of article 3 of ECHR.

The first emerging case is Soering vs United Kingdom and the second is Chahal vs United Kingdoms. The Soering case was about a German national who if found guilty in USA on charges of murder he would be sentenced to death[32]. He opposed his extradition to USA claiming it would breach his rights under article 3 of ECHR by experiencing the "death row phenomenon"[33]. In this case ECtHR indeed confirmed an implicit prohibition of principle of non-refoulement stating that *"where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment[34]"*. Thus, an extradition of Soering to USA would breach article 3 of ECHR. Furthermore, it also confirmed the absolute nature of

[31] G. Goodwin-Gill and J. McAdam, 2007, p. 310.
[32] European Court of Human Rights, *Soering v. United Kingdom, No. 14038/88*, 7 July 1989.
[33] Ibid. para 56.
[34] Ibid, para 91.

article 3[35], and the applicability of prohibition of torture regardless of whether it happens within the state party to the convention or outside of it[36].

In the Second case of *Chahal vs United Kingdom* courts confirmed its decision of *Soering* case and by doing so, the court created precedent of inclusion of non-refoulment within the scope of article 3 of ECHR and it goes to show the fact that the protection provided by article 3 does not depends on the action of applicants[37].

2.2.2 Inhuman or degrading treatment or punishment

In order for the applicants or the person in concerns to benefit from the protection provided by the article 3 of ECHR the persecution or the form of the punishment needs fall within the scop of the article and also the likelihood of such punishment.

One of many concluding remarks in Soering case was that there has to be a "real risk" of persecution[38] if extradited. Furthermore, the article lays out three additional criterions as from of ill-treatment or punishments such as, torture, inhuman treatment, and degrading treatment which non-refoulement is applicable on all of them. It goes without saying that among ill-treatments mentioned in the article torture has to be distinguished due to its characteristic as it causes "serious and cruel suffering"[39]. When it comes to the other two types of ill-treatments there is not one concise meaning, and mostly any definition attached to it has been established by the European Court of Human Rights. From top to the lowest, torture is the most severe kind of punishment then its inhuman and at last its degrading. In the Soering case the court nonetheless explained the distinction between "inhuman" and degrading" treatment as following:

Treatment has been held by the Court to be both "inhuman" because it was premeditated, was applied for hours at a stretch and caused, if not actual bodily injury, at least intense

[35] G. Goodwin-Gill and J. McAdam, 2007, p. 312.
[36] European Court of Human Rights, *Soering v. United Kingdom, No. 14038/88*, 7 July 1989. para 91.
[37] G. Goodwin-Gill and J. McAdam, 2007, p. 312.
[38] European Court of Human Rights, *Soering v. United Kingdom, No. 14038/88*, 7 July 1989, para. 88, 91.
[39] European Court of Human Rights, *Selmouni v. France*, 28 July 1999, para. 96.

physical and mental suffering", and also "degrading" because it was such as to arouse in [its] victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance […]. In order for a punishment or treatment associated with it to be "inhuman" or "degrading", the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate punishment […].[40]"

That being said, the court further stated that what constitute as "degrading" treatment cannot be specified generally and it all depends on the circumstances of the case, for instance the length of that action, the manner, the execution and etcetera[41]. Additionally, not all sort of maltreatment falls within the scope of the article 3 either, and it has been established that the ill treatment or the punishment, it must attain "certain level of severity[42]. How and when the threshold is met varies from case to case and it also in the same manner as "degrading" and "inhumane" terminologies it has to be established from case-to-case bases and no general understanding or definition can be given.

To summarize, so far, we have established, to fall within the scope of article 3 of ECHR there has to be a "real risk" of one or more ill-treatments that must attain "certain" level of severity. Once it has been proved that there is "real risk" of maltreatment article 3 of ECHR cannot be derogated from, regardless of applicant action, status, nationality, and the protection have extraterritorial applicability.

In the next section we will discuss whether states can relief itself partially or completely from duty to respect principle of non-refoulement under article 3 of ECHR, by sending person of concerned to a third country.

[40] European Court of Human Rights, *Soering v. United Kingdom, No. 14038/88*, 7 July 1989, para 100.
[41] Ibid, para 100.
[42] European Court of Human Rights, *Ireland v. United Kingdom*, 18 January 1978, para. 162. *See also*: *Soering v. United Kingdom*, para.100; *Selmouni v. France*, para. 100.

2.2.3 Indirect Refoulement

In the same manner where we derived the absolute prohibition against refoulement by state party to the ECHR, we also have to refer to extensive case-law of ECtHR to established whether we can also find prohibition against indirect refoulement.

The prohibition of indirect refoulment can be deduced from T.I vs UK case law of ECHR, where the court strongly confirmed that the principle of non-refoulement still persist even when sending an individual to another state or intermediate state[43].

The case was about Sri Lankan individual who contested his removal from UK to Germany under Dublin regulation. The court argued that

"*the indirect removal in this case to an intermediary country, which is also a Contracting State, does not affect the responsibility of the United Kingdom to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention. Nor can the United Kingdom rely automatically in that context on the arrangements made in the Dublin Convention concerning the attribution of responsibility between European countries for deciding asylum claims".*[44]

After establishing that there is UK bears still responsibility for sending the applicant back to Germany under article 3. Court went further to assess whether United Kingdom had assessed whether Germany [45]provided guarantees for not sending individuals fearing maltreatment contrary to article 3 to their country of origin. After analyzing Germany asylum procedure and laws for asylum the court concluded that United Kingdom has not breached or act contrary to its obligation under article 3 and that Germany had sufficient procedural safeguards for the applicants.

[43]European Court of Human Rights, *T.I v. United Kingdom No 43844/98*, 7 March 2000.
[44] Ibid, p. 15.
[45] Ibid, para 14-18.

To summarize, there are two elements that sending state has to consider in order to respect the obligations stemming from article 3 of ECHR. Firstly, the sending state has to consider the existence of real risk of ill-treatment contrary to article 3 of ECHR in applicants' country of origin. Secondly, assessments of risk of onwards removal of the person of concerned from intermediate country to his or her country of origin. What exact weight needed to be given to

each assessment in cases of direct or indirect refoulement of the person of concerned will be discuss under the light of subchapter of "Right to Asylum".

2.3 Right to Seek Asylum

After a lengthy discussion of principle of non-refoulement under Refuge Convention and Human Rights law we now turn to the Right to Asylum. We will be applying the same framework for this subchapter by first establishing for readers the substantial definition of this right before diving deeper into the Refugee convention and Human Rights law whether such rights actually can be derived from mentioned sources. By the right to seek asylum as we explained in the introduction, we mean the right to have one claims examined.

Right to seek asylum is intrinsically connected to the right of individuals to leave its country of origin in order to seek protection elsewhere, based on the arguments that "A state may not claim to own its national or residents" [46]. Universal Declaration of Human Rights (UDHR) has mentioned this right in article 13(2) as *"everyone has the right to leave any country, including his own."* Additionally, this right is also enshrined in both regional and international legal instruments among others Article 12 of ICCPR and Article 2(2) Protocol 4 of ECHR. It seems however that this right is without any limitation just by

[46] Boed, R., ´The state of the Right of Asylum in International Law, *Duke Journal of Comparative & International law*, vol 5 no.1, 1994, p. 6.

reading words of UDHR 13(2) but in article 12 of ICCPR this right is restricted for the favor of *'necessary to protect national security, public order (order public), public health or morals or the rights and freedoms of others',*[47]. This was implemented as to prevent individuals from leaving their country of origin because of legal proceedings and other state duties. It has to be noted that right to leaves one's own country does not automatically means to be admitted to a country of ones choosing[48]. This line of reasoning was also supported by ECtHR that right to leave one's own country does not correlate a duty on other states to admit[49]. Now we turn to the main question whether we can in the same manner find right to seek asylum.

UDHR was the first international instrument recognized this right as one of the fundamental rights of individuals. Article 14 reads as following:

"Everyone has the right to seek and enjoy in other countries asylum from persecution"[50].

From just reading it, one would assume that everyone has the right to "enter" (seek asylum) in as well as the right to stay there (enjoy asylum). However, it has to be noted that UDHR is non-binding, and this right cannot be enforced for the advantage of asylum seekers fleeing from persecution. However, many argues that it has become part of customary law, Hemme Battjes argues that there has not been any support for such claims as neither state practice, nor opino juris of UDHR[51] can confirm such understanding of this article.

The reasoning behind such reluctant to accept such obligation to give individuals right to seek asylum and to enjoy asylum can be summed under two words "State Sovereignty". By

[47] G. Goodwin-Gill and J. McAdam, 2007, p. 381.
[48] G. Goodwin-Gill and J. McAdam, 2007, p. 382.
[49] European Court of Human Rights, Napijalo v. Croatia, Application No. 66485/01, para. 68.
[50] UN General Assembly, Universal Declaration of Human Rights Res. 217 A (III), 10 December 1948, art. 14.

[51] H. Battjes, European Asylum Law: and its Relation to International Law, Amsterdam, Vrije University Press, 2006, p. 8.

accepting the binding nature of this rights means that states have to grant and also allow entrance to aliens seeking protection[52] which will undermine states' rights to allow or deny such activities based on its own state interests. The original text of UDHR article 14 proposed by commission of Human Rights was substantially different and it read as following: *"*Everyone has the right to seek and *be granted*, in other countries asylum from persecution".[53] This was later changed to "enjoy asylum" as states did not wish to come close to and avoid completely the obligation of granting asylum to everyone who sought protection[54].

Excluding the two factors from article 14 of UDHR that there is no such right or claim to the right to enter a state or to stay or enjoy asylum then how can state be sure that by expelling individuals there no such violation of non-refoulement. The point being that although asylum seekers cannot rely on article 14 of UDHR for any recourse, they still have other rights which are as important if not more as the right embedded in article 14 of UDHR. That right being to not be "refouled" to frontiers where the would-be refugee faces harm of freedom or life mentioned in refuge convention and other legal instrument.

The principle of non-refoulement put limits to states sovereignty to no reject or send people of concerned to where they face persecution, and by doing so obliges states to have some mechanism of sorting or assessments of those who fear persecution and those who do not[55]. To further elaborate on obligation stemming from principle of non-refoulement one of the judges in the case of Hirsi Jamaa and Others v. Italy said the following.

"*The non-refoulement obligation has two procedural consequences: the duty to advise an alien of his or her rights to obtain international protection and the duty to provide for an*

[52]G. Goodwin-Gill and J. McAdam, 2007, p. 358.
[53] UN General Assembly, Commission on Human Rights Res A/C/285, 3rd Session, 16 October 1948.
[54] G. Goodwin-Gill and J. McAdam, 2007, p. 359.
[55] European Court of Human Rights*, Hirsi Jamaa and Others v. Italy No. 27765/09*, 23 February 2012.

individual, fair and effective refugee status determination and assessment procedure, with an evaluation of the personal risk of harm"[56].

Logically and legally this argument resonates with the principle of non-refoulement on many points. First, we already mentioned that the protection provided by non-refoulement also extended to the would-be refugees since refugeehood is declaratory which does not depend on state´s recognition [57] and expulsion of individuals without prior determination of their actual situation in their country of origin would constitute breach of this principle. In other words, states can never know whether they are in breach of non-refoulement when sending individuals back to their country of origin unless they assess and debunk persecution on case-by-case basis.

This, however, does not preclude states to send individuals to third countries. Legomsky, points this our very clearly in the following manner: "whether or not the Declaration or any other sources create a right to *apply* for asylum *somewhere*, no international instrument establishes an absolute right to receive a decision on the substance of an asylum claim *by the county of one's choosing.* To put the point another way, no rule of international law establishes a per se prohibition on diverting asylum applicants to third countries[58]. In other words, this means that states can send asylum seekers to other states for their status determination and that states in the same manner can send that person to the "fourth" states and so on and so forth.

Sending a person to a third country has certain string attached to it. As we have previously established its totally in cohesion to send individual to third states, but the sending states has to guarantee and remains responsible for the further expulsion of that individuals form the third country. Firstly, the sending states need to make sure that the receiving states does

[56] Ibid, p. 71.
[57] UNHCR Handbook on Procedures and criteria for determining refugee Status under 1951 Convention and the 1967 Protocol relating to the status of refugees, HCR/IP/4/Eng/REV.1, Reedited, Geneva, January 1992, UNHCR 1979. par. 28. (Continuing with UNHCR Handbook).
[58] S. H., Legomsky, 2003, p. 613.

not harm the person of concerned. Secondly, also that the receiving states respect the principle of nonrefoulment and does not send individuals to his country of origin where he or she faces persecution.

So far, we have established there is no right of people to be "granted" asylum, a right to "enter" any country of ones "choosing". Now we turn to next chapter where our quest to find whether there is a "rights to seek asylum" in Refugee Convention or not, and what it entails for the asylum seekers.

2.3.1 Right to seek asylum under the Refugee Convention

Firstly, there need to be two distinctive discussion taking place. The discussion of whether obligation stemming from Refugee Convention in case where a state receives an applicant and another discussion when the receiving state contemplate sending the applicants to a third state. Each of the subchapter will deal with mentioned discussion.

2.3.1.1 Obligation on the first states under article 33 of Refugee

Without further ado, neither article 33 of Refugee Convention or any other article stipulate a "right to asylum" as in admittance of applicants or "enjoy" asylum. And the principle enshrined in article 33 is only concerned with where the person of concerned is sent back to not from where he or she have escaped[59]. In the same manner states can return applicants as long as they respect and fulfill their obligation of non-refoulement. As we have previously established states has no obligation under international law and also under Refugee Convention to admit refugees or any other aliens for that matter[60]. This is in line with states sovereignty principle as they are the power holder regarding this matter.

[59] United Kingdom: House of Lords (Judicial Committee), UKHL 55 (2004), *Regina v. Immigration Officer at Prague Airport and Another, Ex parte European Roma Rights Centre and Others*, 9 December 2004, para. 13–17.

[60] Goodwin-Gill, & McAdam (2007) p. 206-207.

Furthermore, Refugee convention do not stipulate a right to "seek" asylum either[61]. There is no such article in the Convention which obliges state party to undertake a status determination of an applicant's when its lodge in that country or any procedural layout for it[62]. It is well known that the scope of article 33 cover individuals that fulfill the refugee definition, but it includes individuals who are also asylum seekers in their initials states this is due to the fact that refugee status is declaratory[63]. By accepting that refugeehood is declaratory rather than constitutive has many believe that this implies an implicit duty of member states to undertake a status determination of applicants seeking protection. This is due to the fact that if a state does not undertake determination of applicant's statues and reason of their flee and thus sends the protection seekers back it can never be sure whether its committing refoulement or not, until the opposite is shown to be the case[64]. As Coleman states that "*Status determination under the*

Geneva Refugee Convention is a discretionary choice" and further add that Refugee convention obliges states to undertake examination of the claim *only* when contemplating return[65].

The drafter of the Convention in the *Travaux Préparatoires* left out not only the "right to asylum" but also duty on the states to take status determination of the applicants[66]. Thus, states hold the power and the mechanism to decide whether or not to examine applicant's case on its merits or not, and as we said sometimes it may become a necessity to avoid breaching refoulement, but it has never been the right of refugee under the Convention.

[61] N. Coleman, *European readmission policy: third country interests and refugee rights*, Boston, Martinus Nijhoff publishers, 2009, p. 236.

[62] Ibid, p. 236.
[63] UNHCR Handbook, para. 28.
[64] N. Coleman, *European readmission policy: third country interests and refugee rights*, 2009, p.237.
[65] N. Coleman, 2009, p. 237.
[66] Ibid, p. 237.

2.3.1.2 Obligation on the first states under article 33 of Refugee Convention for contemplating return to a third state

As we have established that a state may return without any examination of his claim to a third country as long they respect and oblige by the principle of non-refoulement- additionally the third country can also expel or send the applicant to a fourth country, and as Coleman puts it elegantly this issue into words that *"Protection seekers may be subjected to a chain of expulsions, treated as if a refugee for the purposes of Article 33(1) GC by every State, but without consideration of the merits of the protection claim anywhere"*[67]*.(* We will in the upcoming chapter discuss what amount of consideration is required to assess the substance of the claim under ECHR when expelling an applicant to a third country).

However, each state must make sure as we discussed earlier regarding indirect refoulement that the receiving state or the third country is safe and would not send applicants to the "frontiers" of territories where they life would be threatened.

Now the question becomes how or what criteria is needed to qualify a country as safe according to the Refugee Convention. In this regards UNHCR has outlined couple of requirements as assurance that the sending states has to take under consideration before expelling an applicant to a third country. Before outlining all the necessary requirements UNHCR also insisted that

'*no asylum seeker be returned to a third country, under a safe third country provision or a readmission agreement, unless the third country will provide a fair refugee status determination (or provide effective protection without such a determination)*[68]*.'*

In other words, safety cannot be assumed automatically and generally, a very serious point regarding the EU-Turkey deal which we will later come back to.

[67] Ibid, p. 238.
[68] S. H., Legomsky, 2003, p. 654.

This means wherever a country has unfair or unjust refugee determination procedure a sending state must not send applicants to that country because such unfair or unjust processes will in return not uphold their duty of non-refoulement which means refugees will be send back to frontiers where their life or freedom will be threatened. Legomsky argues that such unjust or unfair procedure can in itself violate article 33 of Refugee Convention.[69] Furthermore, it is not the formalities of being state party to Refugee Convention but the protection for the applicants that counts even without any status determination then the requirement laid out in the article 33 will be fulfilled[70]. This is in line with what we have already established in the scop and content of non-refoulement that its only concern is where a refugee cannot be returned, and as long as any states provides protection the requirement under article 33 is fulfilled and there is no breach of the principle.

The concern within article 33 in regard to expulsion of an individual to a third country has two elements. The first element is that the sending states has to sure that the intermediate third state will not expel the applicants to his or her country of origin. Secondly, article 33 also requires that safe third country has a fair asylum determination procedure since unfair will violate the principle and in the lack of such determination the third country must provide effective protection.

Now the question becomes what it means to have fair status determination. Besides the obvious fact that the third state which is receiving an applicant from the sending state in one way or the other must explicitly agree to take refugees, which in our case is the EU-Turkey deal of March 2016. States, according to UNHCR should protect the privacy of individuals, assure that the applicants' testimony under application process will not be shared with his or her country of origin, applicant ability to confess freely under the whole

[69] Ibid, p. 655.
[70] Ibid, pp. 656-658.

procedure, and protection for vulnerable refugees[71]. This goes without saying that each applicant's case should be dealt with individually and not put under the same nationality, race, or gender as this will render the protection needs of applicants useless[72].

Thus, as UNHCR insists the Refugee Convention and the principle of non-refoulement implicitly requires a fair refugee status determination or effective protection without a determination. So far, we have covered that when a state wants to send applicants to a third country, first it must make sure that the receiving States respect and principle non-refoulement, directly or indirectly, secondly whether that state provides effective protection or a fair status determination. If either one of the two elements are not considered when sending the applicants, the sending states is in clear violation of article 33 of Refugee Convention.

2.3.2 Right to asylum and protection against refoulement under EHCR.

We will now dive deeper into analysis of protection provided by ECHR and whether it also includes right so asylum, right to be granted asylum or obligation on states to examine the substance of a claim We will heavily relay on consistent jurisprudence of ECtHR and will deduces right and obligation from its judgments.

European Convention of Human Rights has no provision providing right to asylum in the same manner with Refugee Convention. This was established in Jabari vs Turkey case of 2000 which states that states are the powerholder, and they can decide whether or not to admit aliens, right to provide residence and also return or expulsion of aliens[73]. Putting this aside we will not examine to which extent does ECHR provides protection to individuals

[71] UN High Commissioner for Refugees (UNHCR), *UNHCR Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures),* 31 May 2001, para. 50.

[72] S. H., Legomsky, 2003, pp.52-79. See also: G. Goodwin-Gill and J. McAdam, 2007, pp. 393-395.
[73] European Court of Human Rights, *Jabari v. Turkey, No. 40035/98*, 11 July 2000, para. 38.

arriving to the territories of the member states and what rights and obligation we can derive that concurs right to refugee and obligation on the states.

As I have described earlier in my paper, the main focus will be on ECHR and no other international or regional conventions such as ICCPR or CAT. Our main goal is to find what are the States obligation under article 3 of ECHR and does the convention obliges Sates to take a status determination. Secondly, we will also look into the obligation on the sending States when contemplating the return of applicants to a third or intermediate States. Lastly, also what requirements should the sending country consider before sending an applicant to third country.

2.3.2.1 States obligation under article 3 of ECHR

As we have ascertained in previous chapter that ECHR does have an implicit prohibition of non-refoulment. This also far exceeded the conventional prohibition of non-refoulement in the Refugee convention since its protection includes refugees and also people falling outside of scop of the Refugee convention, namely people who feared ill-treatment contrary to article 3. Since the protection provided here is also absolute and non-derogatory states must at all times protects its subjects from exposure of ill-treatment contrary to article 3[74].

European Court of Human Rights has placed procedural requirements upon sending states when examining the existence of risk of ill-treatment contrary to article 3 of ECHR, the court has stated that the examination "must necessarily *be a rigorous* one in view of the absolute character of this provision and the fact that it enshrines one of the fundamental values of the democratic societies making up the Council of Europe"[75]. Thus, the court established such procedural requirement that states must perform a "rigorous examination

[74] European Court of Human Rights, *Cruz Varas and Others v. Sweden, No. 15576/89*, 20 March 1991, para. 76.
[75] European Court of Human Rights*, Vilvarajah and others v. the United Kingdom, No. 13163/87*, 30 October 1991, para. 108.

in cases of expulsion to and when deciding to not consider such claim, to secure the absolute nature of article 3[76].

In this regard, in order to comply with the obligation of article 3 in cases of expulsion to the country-of-origin states need to take article 13 ECHR also into consideration otherwise there cannot be any assurance of "rigorous examination" of protection claim. Article 13 reads as:

"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."

This article provides "effective remedy" to contest decision by states authorities which violates rights within the Convention. In the case of Akdivar and others vs Turkey the terminology of "effective remedy" was said to be a remedy which is "available and sufficient to afford redress in respect of the breaches alleged" [77] and a remedy that allows the competent authority "both to deal with the substance of the relevant Convention complaint and to grant appropriate relief"[78]. In this paper the "effective remedy" obligation translates to a recourse for applicants to challenge a negative decision for removal. We will now highlight few cases to define the boundaries of article 3 in conjunction with article 13.

In case of Jabari vs Turkey, the procedural requirement against act contrary to article 3 was formulated. A brief summary of the case: Jabari an Iranian national who failed to request asylum within five days after her arrival in Turkey. Her asylum request was rejected without any substantive examination of her claim by the Turkish authorities. She claimed that she will be treated contrary to article 3 of EHCR if Turkey were to expel her back to

[76] N. Coleman, 2009, p. 272.
[77] European Court of Human Rights*, Akdivar and Others v. Turkey, No. 99/1995/605/693*, 16 September 1996, para. 66.
[78] European Court of Human Rights, *Soering v. United Kingdom, No. 14038/88*, 7 July 1989. para 91, para. 120.

Iran. The court concluded that there was a breach of article 13, specifically that Turkey had denied an "effective remedy" to the applicant, the court went on and said:

"Given the irreversible nature of the harm that might occur if the risk of torture or ill-treatment alleged materialized and the importance which [the Court, NC] attaches to Article 3, the notion of an effective remedy under Article 13 requires independent and rigorous scrutiny of a claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 […][79]".

In this judgment the court again emphasized mainly two things: first, the absolute prohibition stemming from article 3 by referring to the nature of harm as "irreversible". Secondly, that the examination in such cases must be "rigorous" and "independently". Rigorous refers to consideration of the merit of the case in other words the risk of being treated contrary to article 3[80], it indicates that purely procedural adoptable such as following 5 days-request for asylum should not be a hindrance to perform an examination of the claim.

In another case M.S.S vs Belgium and Greece that deals with both direct refoulement and indirect refoulment the court also highlighted the importance of "effective remedy" under article 13 in conjunction with article 3. A brief summer of the case: the case concerned was an Afghan national who had arrived at Greece first before applying for asylum in Belgium. Due to both states being member to the Dublin regulation the applicant was send from Belgium to Greece. Court found Belgium in violation of article 3 by sending the applicant to Greece, where the applicant was detained with bad living condition[81]. Additionally, court also found Belgium in violation of article 3 in conjunction with article 13 for lack of "effective remedy" presented for the applicant to challenge his deportation to Greece, by Belgium[82]. Since "effective remedy" requires "rigorous" scrutiny of a complaint, the court

[79] *Jabari v. Turkey, Judgement, Appl. No. 40035/98*, 11 July 2000, para. 50.
[80] N. Coleman, 2009, p. 273.
[81] European Court of Human Rights, *M.S.S. v. Belgium and Greece, No 30696/09*, 21 January 2011.
[82] Ibid. paras. 385-397.

found such procedure requirement was not met in this case. This was because Greece asylum system had deficiencies which indicated that there was risk of onwards removal of the applicant to his country of origin without any serious examination of merits of his claim or access to "effective remedy"[83].

After short description of these cases, we can conclude that article 3 of ECHR insists of examination on substance or merit of the case before expulsion of the applicant to their country of origin producing harm contrary to article 3. If country fails to comply with procedural requirements of article 3 which demands "effective remedy" which in return translates to "rigorous" as well as "independent" scrutiny" they will be in violation of it in conjunction with article 13. Furthermore, as we saw in Jabari vs Turkey case, the court has shown intolerance towards procedural obstacles in the asylum system.

However, this does not mean that states member of ECHR has obligation to grant asylum or examine the substance of the protection claim by everyone[84]. To frame it in another way, the only reason Turkey, Belgium, and Greece were found in violation of article 3 and 13 was that they were planning to expel the applicant to either their country of origin or to an intermediate country. Had they not done that there would not have been any violation of article 3 e.g., refoulement. States still have the autonomy, to grant, admit entrance and not undertake status determination, which means the protection provided by article 3 is only triggered in case of expulsion[85]. In the next section we will examine requirements in case of expulsion to a third country.

2.3.2.3 Expelling to a third country

Consideration has to be given to this subsection in order to find whether States are obliged to undertake status determination according to article 3 of ECHR when its contemplating return, not to the country of origin as discussed in previous chapter but to

[83] Ibid. paras. 385-397.
[84] N. Coleman, 2009, p. 274.
[85] N. Coleman, 2009, p. 273.

a third country. A point to be noted is if the claimant is fearing ill-treatment contrary to the article 3, such as torture, in human or degrading treatment in the intermediate or third country, the sending country would be in violation of the article 3 as if the claimant was sent to his or her country of origin.

What we are arguing here is whether states can avoid the responsibility of examining a protection request based on its substance by retuning the claimant to a "safe third country". The duty which states wants to absolve itself from is the duty as we established in previous chapter of performing a "rigorous" and "independent" examination. Furthermore, we will also look into whether or not status determination or examination of request on its substance is a requirement on third country in order to be considered "safe".

2.3.2.3.1 Examination of protection request before expulsion to a third country

Here I will highlight two cases from ECtHR that discuss the topic of state obligation before expelling claimants to a third country.

The first case of ECtHR is T.I vs United Kingdom[86] where the claimant sought protection of Germany from non-state actors and since Germany did not recognize at that time persecution by non-state actors and thus rejected his claim. Later the applicants sought protection of United Kingdom and his application was rejected without any consideration on its merits by British authorities claiming that Germany was the responsible state to consider his claim according to the Dublin Regulation. The issue at hand before the Court was whether or not UK expulsion of claimant was compatible with the positive obligation under article 3 of ECHR.

The Court first established that States cannot avoid responsibility of implicit non-refoulement under article 3 by sending applicants to a third country. Secondly, the Court also mentioned that States (United Kingdom) cannot "automatically" relay on arrangement

[86] *T.I. v. United Kingdom*, Application No. 43844/98, 7 March 2000.

between States such as Dublin Convention regarding asylum claims[87]. This problem is central to understanding Dublin Convention or any other inter-states deals (EU-Turkey deal) that creates harmonized or equal protection standards between States. And as Court showed in this case that such general application cannot be relied on automatically[88] and an examination of claim has to take place prior to expulsion.

This case was decided four months prior to Jabari vs Turkey where that Court elaborated on "rigorous" and "independent" scrutiny, as we discussed in above subchapter. However, the court went on and mentioned that in any case the sending State has to oblige by obligation stemming from article 3 which requires "rigorous" scrutiny[89].

The court went on and reviewed the applicant's situation in his country of origin (Sri-Laka) and noted that: "that it has not heard substantial arguments from either the United Kingdom or German governments as to the merits of the asylum claim. Nevertheless, it considers that the materials presented by the applicant at this stage *give rise to concerns* as to the risks faced by the applicant, should he be returned to Sri Lanka […][90]". This shows that the court still views the substantive examination of a claim of importance[91]

Thereafter the Court went further and reviewed the applicant's situation in Germany and what sort of protection was provided for him there. The court view on Germany asylum procedure and safeguards provided by the German authorities against both direct and indirect refoulement was satisfactory enough that it did not find either of the two States in breach of article 3 of ECHR.

What is interesting we can conclude from this case is the criterion of "give rise to concerns" as a requirement on sending States for the examination of applicant situation in his or her country of origin where the applicant faces risk of torture and other forms of punishments

[87] *T.I. v. United Kingdom*, Application No. 43844/98, 7 March 2000. p. 14.
[88] Ibid, p. 14.
T.I. v. United Kingdom, 7 March 2000, p. 13-14. *See also e.g.*: *Jabari v Turkey, No. 40035/98*, 11 July 2000.
[90] *T.I. v. United Kingdom*, March 2000, p. 15.
[91] N. Coleman, 2009, p.277.

before contemplating return of the applicant to an intermediate country. This criterion has lower standard compared to "real risk" the applicants face when returned to her or his country of origin[92]. This means States have more freedom or in other words partially avoid the duty of "rigorous" and "independent" scrutiny when contemplating applicants return to an intermediate/third country compared to country of origin[93]. The duty of "rigorous" and "independent" scrutiny of applicant situation in county of origin is replaced by marginal examination on his or her situation in his country of origin[94].

In another historic case [95] which is hailed Amnesty International other NGOs alike that deals with subject matter is Hirsi Jamaa and Others v. Italy[96]. The Italian authorities has intercepted migrate from Somalia and Eritrea and had returned them back to Libya which at that time was under Ghaddafi's regimes. This case further elaborates that procedural safeguard stemming from article 3 when contemplating return to a third country.

The Court showed emphasis on the right of individuals to put forward their complaints against arbitrarily expulsion by the State authority the consequences which potentially irreversible[97]. After reaffirming that article 4 protocol 4 also includes extra territorial application and states could not avoid this obligation by claiming that collective removal of the migrants took place outside of State's territory e.g., on high seas[98]. Furthermore, it also addressed that the main reason behind non-refoulment is to not expel people of concerned without a proper examination of their individual situation[99]. This cannot be as Kritzman-

[92] Ibid. p. 277.
[93] Ibid.
[94] Ibid.
[95] Amnesty International, ´Italy: 'Historic' European Court judgement upholds migrants' rights, 23 February 2012, https://www.amnesty.org/en/latest/news/2012/02/italy-historic-european-court-judgment-upholds-migrants-rights/, (accessed 1 May 2021).

[96] Hirsi Jamaa and Others v.Italy, No. 27765/09, (23 February 2012)
[97] Hirsi Jamaa and Others v..Italy para. 204
[98] European Database of Asylum Law, ECtHR – Hirsi Jamaa and Others v. Italy [GC], Appl. No. 27765/09, 23 February 2012, https://www.asylumlawdatabase.eu/en/content/ecthr-hirsi-jamaa-and-others-v-italy-gc-application-no-2776509, (accessed 1 May 2012).
[99] Hirsi Jamaa and Others v.Italy, para. 177.

Amir and Spijkerboer claim to be interpreted as the same as being assessed on the substance of a claim but a real opportunity to submit a claim which Italian government failed to company with[100].

Thus, the Court found Italian government in breach of article 4 protocol 4 of ECHR by collectively expelling aliens to Libya without any proper examination of their individual situation and identification. Furthermore, the court also found Italy of breach of article 3 in conjunction with article 13 since they were deprived of any remedy to complain about their removal and by not being having their claim examined "rigorously" by the competent authority in Italy. As for the breach of article 3 it was enough for the court to look into the political and de facto situation in Libya to conclude it was not a "safe third country[101].

2.3.2.3.2 Substantive examination of a claim as a safety condition

This chapter bring us to the question whether ECHR requires the third country to undertake status determination as a saft condition before expulsion. T.I vs United Kingdom is still viable case in this matter as well and we will examine it thoroughly here once again.

After the Court established that the situation in Sri-Lanka "give rise to concern" it turned its focused to the legal aspect of German law[102]. The goal of ECtHR was to look for "effective procedural safeguards of any kind protecting the applicant from being removed from Germany to Sri Lanka"[103]. What made it obvious that Germany was a safe Third country for the applicants and that UK had not been found in violation of article 3 was that Germany had provided sufficient guarantees that the applicant would not "immediate or summerly" deported to Sri-Lanka[104]. Additionally, Germany also guaranteed that the

[100] Kritzman-Amir, T. and T. Spijkerboer, 'On the Morality and Legality of Borders: Border Policies and Asylum Seekers', *Harvard Human Rights Journal*, vol 26, 2013, p. 13.

[101] Hirsi Jamaa and Others v.Italy, paras. 149-152.
[102] [102] *T.I. v. United Kingdom*, March 2000, p. 16.
[103] Ibid. p. 15.
[104] Ibid. p 15.

applicant would be given chance to file a complaint which means a status determination will be in process, and that the applicants will have legal remedy to challenge any decision by German authorities[105]. These guarantees from Germany to the ECtHR was sufficient so that Court ruled that there was no "real risk" of onwards removal of the applicants from Germany to his country of origin[106].

From this ruling it becomes clear that the Court expects some sort of as Coleman puts it "procedural interruption" in the third country[107] before expulsion to country of origin. This means derived from this case a form of guarantee that the applicant can have a real possibility to lodge complain, challenge his or her expulsion, or a status determination.

In M.S.S vs Belgium the Court outlined for the first time the requirements of effectiveness of article 13[108]. In short Court found violation of article 13 by Greece as there was lack of effective remedy in Greece for the applicant to successfully challenge his eventual deportation from Greece to country of origin[109]. This was due to deficiencies in the asylum procedure in Greece which made it uncertain for the court whether the applicant would be safe from arbitrary expulsion contrary to the prohibition on non-refoulement. First the court stated that "the remedy required by Article 13 must be available in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State"[110]. The Court further reiterates that lack of access to information, lack of communication between the competent authorities and the applicant, and finally lack of information regarding which organization provides

[105] Ibid. p 15.
[106] Ibid. p 17.
[107] N. Coleman, 2009, p. 278.
[108] European Court of Human Rights, *M.S.S. v. Belgium and Greece, No 30696/09*, 21 January 2011.
[109] European Database of Asylum Law, ECtHR – *M.S.S. v. Belgium and Greece* [GC], Appl. No. 30696/09, 21 January 2011, https://www.asylumlawdatabase.eu/en/content/ecthr-mss-v-belgium-and-greece-gc-application-no-3069609, (accessed 1 May 2021).
[110] European Court of Human Rights, *M.S.S. v. Belgium and Greece, No 30696/09*, 21 January 2011, para. 290.

legal aid and legal guidance[111]. All these mentioned incidents according to the Court considered to be obstacles rendering the benefit of "effective remedy" ineffective[112].

As we seen in this case the court went on for a bit for inquiring the asylum procedure of Greece before concluding it did not meet the requirements needed for Greece to be considered safe for the applicant due to lack of "effective remedy". What we can conclude from these two cases is that the first state when completing removal to an intermediate States has to make sure that that State will provide some sort of guarantee that the applicant will be give "effective remedy" which means ability to lodge complain, access the asylum procedure, providing legal aid, good communication between the authorities and the applicant. If these guarantees are in place, then it would be safe to assume that the sending State had obliged by its international obligation under ECHR and that the receiving country is safe for the applicant.

2.3 Conclusion

We have so far covered international law regarding the return of applicants both to their country of original and to an intermediate or third country in sphere of Refugee Law and European Convention of Human Rights. Before we move onwards with our analysis of EU-law regarding the principle of non-refoulement it is needed to summarize the protection provided and the obligation on states when return is contemplated.

Refugee Law has laid the ground rules for protection seekers fleeing specific form of persecution by their country of origin either directly or indirectly. However, the rights enshrined in the Convention is prone to exception when State interests are involved and so does the principle of non-refoulement under article 33 of the Convention. Thus, protection

[111] Ibid, para. 304, 318-319.
[112] Ibid, para. 319.

seekers can be return to their country of origin if a state deemed that the applicants could come under the exception of the Convention, and we can conclude that Refugee Law protection against refoulement is not an absolute right, and it can be revoked under certain circumstances.

On the other hand, as we explained, ECHR provide much more extensive right in this matter. The first part of difference and maybe the most important is that the implicit prohibition of refoulment under article 3 of ECHR is an absolute right. This means applicants past action would not trigger an exception and state must always give full effect to this prohibition. Furthermore, the protection provided under the article 3 applies to *everyone* under the State jurisdiction, including refugees. This means people that are fleeing not necessity from persecution described under Refugee law but also face real risk of maltreatment mentioned in article 3 cannot be refouled in any manner whatsoever.

The main differences regarding protection between ECHR and Refugee Law is the form of protection their personal scop and the absolute nature of the right. The form of protection is a reference to categories of harm described in each of the Conventions. As for the refugee law the protection is provided from various kind of persecution and in the ECHR of article 3 it's from torture and inhuman, degrading. Thus, we can conclude that although each of the Convention provides both implicit and explicit prohibition of non-refoulement it is still not uniform in those mentioned points.

Ignoring the departure point above there is still plenty of common ground derived from each of the Conventions. Firstly, both Convention prohibited the return of applicant directly or indirectly, through a safe third country to territories where he or she faces a risk of either persecution and/or torture. Although, the return of protection seekers to the third country is prohibited generally there is under both regimes' exception to this rule. According to the Juris prudence of ECtHR the return of individuals to an intermediate can still happen as long as the intermediate states provides protection if necessary. The return of individual can also happen under both regimes without any substantive examination of their case.

Neither in Refugee Convention of ECHR is there an obligation on the States to grant or admit alien into their territories. The prohibition is only triggered when States contemplate the returns of people of concerned.

Additionally, these to system of protection complements each other and the main goal is to provide protection to those who are in most need of protection. As Refugee law does not mention any procedural safeguard in the third country or provides any additional provision to this regard, ECHR expands on this and demands such protection to be provided. Under both regimes States must at all times provide protection against non-refoulement and treat the applicant *as if* he or she is refugee because refugeehood is declaratory rather than constitutive. The sending state under both regimes remain responsible for the applicants and has to make sure that the intermediate states do not refoul the protection seekers. As there is no obligation under either of Conventions states do not need to assess the substantive basis of the claim. There is a clear distinction between substantive examination of asylum claim and assessment whether the intermediate state will provide some sort of safeguard against refoulement or provides necessary protection.

In the following I will summarize these points derived from both regimes to have broad understanding of the common grounds for protection.

- Asylum seekers must be given a real opportunity to apply for asylum according to Harasi Jama case.

- Refugeehood is declaratory, and migrants should be treated *as if* he or she is a refugee unless proven otherwise, this include that everyone should be given protection against non-refoulement until evidence disproved their statues.

- Under both regimes' states can deny assessment or examination of protection claim. The protection provided by invoking nonrefoulment is only a duty on states to investigate rigorously and independently whether the country of origin is safe for the return and in the

case of a return to a third country this duty is investigate whether or not the intermediate country will provide protection against refoulement.

- There is a clear distinction between obligation on States which wishes to return an asylum seeker to country of origin and an onwards removal to an intermediate/third country.

-According to *T.I v. United Kingdom, M.S.S v. Belgium and Greece and Hirsi Jamaa v. Italy* when the sending states contemplate the return of asylum seekers to an intermediate country it has duty to investigate mainly two things. Firstly, whether the recent intermediate state provides protection against refoulement, and secondly whether there is sufficient procedural safeguard to ensure protection, which means right according to the article 13 of ECHR an "effective remedy" for protection seekers in the Third countries.

- As neither Refugee Convention or ECHR obliges states to undertake Status determination of protection claim, states can return protection seekers to a third country, and thus in the same manner that third country can return asylum seekers to a "fourth country" without any examination if each of the sending country respect the prohibition of direct and indirect refoulment. This is also known as "refugees in orbit" or chain-refoulement by many scholars.

- Status determination by a third country is not a requirement under either of the protection regimes and it is under full discretion of that country.

- If a third states is considered not safe for person of concerned the country where the protection claim is lodge must assess the claim rigorously and independently on its substance against refoulement.

- Sending a protection seeker to a third States not party to the Refugee Convention can be considered in overall assessment whether that country meets the requirements of being able to provide protection against non-refoulment.

-Safe third country or inter-state agreement such as EU-Turkey deal and/or Dublin Regulation cannot remove the burden from sending states to undertake duty to investigate whether those receiving states will respect non-refoulement. Safety cannot be assumed automatically.

All in all, both regimes in their own rights provide protection. However, protection provided under these regimes is only against refoulement and does not translate to a duty of examination of claims and to grant asylum, but only to not send applicant to territories where he/she faces risk of torture and persecution. In other words, Duty to not undertake statues determination is in conformity with duty of non-refoulement under both regimes.

2.3 EU-LAW

In this section we will dive deeper into the core of EU-law to find obligations and rules concerning the rights of Refugees codified in various treaties and directives in European Union (EU). As we have mentioned in the introduction the EU-Turkey readmission agreement is between a European states and Turkey thus, European states are bond by its community law which to great length has incorporated International Human Rights, including Refugee Convention. In this section our main goal is to locate those obligation which correlated and confirms the protection provided by Refugee Convention and ECHR specifically rights of refugees under non-refoulement in article 33 and article 3 of Refugee Convention and ECHR, respectively.

First and foremost, the upcoming subsections will lay the groundwork for the general treaties which the EU-Law of community law is based. Secondly, we will investigate the relation to and with general international law, more specifically ECHR and Refuge Convention. Thereafter, the focus will be given to the specific article within the various directives which deal with the rights of the refugee and obligation on the states. At the end we will draw a conclusion as we have done in previous chapter, whether the standards of

protection provided by EU-law is in conformity with international law, regarding non-refoulement and more specifically article 33 of Refugee Convention and article 3 of ECHR.

2.3.1 EU Primary Legislation

The primary Legislation of EU is consistent of founding treaties, treaties between Member states, and treaties between EU and third parties[113]. The founding treaties which is referred to the constitutional basis of EU-law and have similarities to constitutional law in a state are the 1992 Maastricht Treaty, known as the Treaty on the European Union (TEU), and the 1957 Treaty of Rome, known as the Treaty on the functioning of the European Union[114]. Both founding Treaties were later amended by the treaty of Lisbon. These Treaties lay down fundamental rules regarding, the roles of various organizations in the EU, objectives, and the functioning of the European Union.

The EU secondary legislation is based on the founding treaties consist of regulations, directives, decisions, opinions, and recommendations[115]. Each of the secondary EU legislation has various legal implication and some of them binds the member states and the citizens immediate and others are left to the discretion of the member states on how to implement them. For instance, regulations are binding in all member states and citizen without any need for legislations in the member states. Directives, on the other hands needs action for implementation from national states to have achieve goals mentioned in that objective[116]. Decisions are only binding to whom it directly refers to in that on specific

[113] EUR-Lex, Access to European Law, *Sources of European Law, (last updated 13 March 2020),* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Al14534, (accessed 1 May 2021).

[114] Ibid.

[115]K-D. Borchardt, *The ABC of European Union Law*, Luxembourg, Publications Office, 2010, p. 89.

[116]Treaty on the Functioning of the European Union [2012] OJ L. 326/47-326/390.

decision, and when it comes to recommendations and opinions, they are not binding but it is best to be followed nonetheless[117].

2.3.2 The Relation between EU-Law and International Law

This topic although very broad and complex must be mentioned in this paper very briefly to understand whether international law has effect withing EU or not. The reason being, that after concluding minimum requirement under ECHR and Refugee law in previous chapter with regards to protection provided under those regimes, we ought to know whether these protection categories are also provided by EU legislation.

Without further ado, the Treaty of Roma known also as the Treaty on the Functioning of the European Union (TFEU) in the article 78(1) has made it abundantly clear the commitment of European Union to Refuge Convention and its reads as following:

"*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.[118]*".

Furthermore, it also mentions another protection category "subsidiary protection" which is not mentioned in the Refugee Convention. With this, we can conclude that EU legislation regarding the protection for Refugees are in line with the original Conventions and provides protection in line with it if not more.

[117] K-D. Borchardt, *The ABC of European Union Law*, Luxembourg, Publications Office, 2010, p. 103-105.
[118] Treaty on the Functioning of the European Union [2012] OJ C326/47.

Moreover, the Treaty in the same article section (2) proposes a common European asylum system across Europe which is the beginning of what we know today as CEAS[119]. Common European Asylum System or CEAS will be discussed within secondary EU legislation in the upcoming subchapter.

In the same spirit the Treaty of Lisbon within Article 6 makes the Charter of Fundamental Rights of the EU (EU Charter) binding on the EU institutions and Member states alike, *only* when the institutions and states applying Union-Law[120]. Moreover, The Treaty of Lisbon in article 6 (2) makes it clear that EU *shall* accede to ECHR[121].

Thus, the EU charter in article 4 prohibits torture in the same line as article 3 of ECHR that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment[122]", and in Article 19 of the Charter we also see protection against summary expulsion, torture when individual is expelled, in order words prohibition of the principle of non-refoulement[123]. At this point it is that is inspired by the provision in ECHR.

Furthermore, in Article 18 of the charter the right to asylum is codified and it read as following:

"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'"[124].

The provision confirms that there is a "right to asylum" at the start of the article and it also sets limits or obligation on states to "guarantee" this right as proclaimed in the article.

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[119] EUR-Lex, Access to European Law, *Sources of European Law, (last updated 13 March 2020),* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Al14534, (accessed 1 May 2021).
[120] Charter of Fundamental Rights of the European Union [2012] OJ C326/391, art. 50 (1).
[121] K-D. Borchardt, *The ABC of European Union Law*, p. 30.
[122] Charter of Fundamental Rights of the European Union [2012] OJ C326/391, art. 4.

[123] Charter of Fundamental Rights of the European Union [2012[OJ C326/391, art. 19.
[124] Ibid. art 18.

Thus, to have fully understanding of this provision we need to first confirm the personal and substantial scop of "the right to asylum" as to what the content of such rights means. Additionally, we also need to look deeper into obligation stemming from the word "guarantee" within the provision.

As we have previously claimed that such right to have one claim examined on its merits does not exist in the international law or refugee law article 18 of the EU charter would be a big step towards realization of this right for the benefit of the Refugees.

Deriving from the ordinary meaning of the word "right to asylum" and in the context of the provision as Battjes argues means "a right to an appropriate status" for people in need of international protection, which also can be applied to ordinary people and not only refugees[125].

At the same time this right is limited only for people to have a right to claim asylum and not an obligation on states to grant asylum[126]. As if there was such right to grant asylum it would run contrary to the states' rights to send back individuals to a "safe" third country as we will see in the directives later.

This line of reasoning if further supported by article 51(2) of the charter which assure to the member states that:

"This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.' Art. 52(3) provides that the Charter respects ECHR, its Protocols, and the case law of the European Court of Human Rights[127]".

[125] H. Battjes*, European Asylum Law: and its Relation to International Law*, 2006. p.114.

[126] Ibid. p.113.
[127] Charter of Fundamental Rights of the European Union, art. 51 (2) and 52 (3).

Thus, elimination any notion of having on asylum claim examined on its merits and the goal of the Article 18 is to merely make international obligation more "visible" and the charter as general functions as "reaffirmation" of already existing rights derived from international obligation rather than creating new[128].

Besides, the obvious fact that this provision does not guarantee a right to have one's claim examined on its merit and obligation on states it nonetheless obliges those states to "guarantee" that refugees when expelled to an intermediate country have "appropriate" solution[129]. To have an "appropriate" solution in case of expulsion to an intermediate country from a member state will now be discussed in following subchapter as we will look more in depth into the secondary EU legislation.

2.3.3 EU Secondary Legislation

As we previously discussed the influence of international law on EU-law and more specifically of Article 78 (2) where it authorizes the EU Parliament and Council to establish a Common European Asylum System (CEAS) for granting and withdrawing international protection the Directive 2013/32/EU was created. This is a recast of previous directive due to constants change in the asylum field in Europe and also massive flow of refugee in after 2010 and onwards. The previous directive was replaced by newer one as to ascertain the principle of non-refoulment and be in accordance with the Geneva Convention of Refuge. The CEAS is built upon various directives and regulation in order to comply with international standards. In this paper we will as mentioned mainly focus on the two most relevant directives such as Qualification Directive of 2011 (recast) and Asylum Procedure Directive of 2013 (APD). Furthermore, it must be underlined as it is enshrined in Article 63 of Treaty establishing the European Community that CEAS legislation sets only "minimum standards". This entails as we saw earlier that Member states must observe the

[128] Goodwin-Gill, G. and J. McAdam, *The International Refugee Law*., 2007. p. 367.

[129] H. Battjes, 2006. p.114.

legislation but at the same time it allows member states to adopt and maintain more favorable conditions for the protection seekers.

We will now turn the focus on Asylum procedure Directive and Qualification Directive since they are made most of CEAS which should at least in theory should contain the bare minimum of international obligation derived from Refugee law and ECHR.

2.3.3.1 DIRECTIVE 2011/95/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 13 December 2011 (recast)

We will now look at the Qualification directive to find out whether it mimics the international obligations stemming from ECHR and Refugee law, and it does not fall short of this. The Qualification Directive aim to provide protection for asylum seekers that fall under its scop e.g., qualify as refugee[130]. Additionally, it also incorporates further protection criteria absent from Refugee Convention, namely, subsidiary protection, for individuals who fall short from the ambit of Geneva Convention but nonetheless faces "serious harm" if return to their country of origin[131].

We find most of the aims and goals of the Directive in its preamble which lays out its objective to be followed by the member states. One of its main objectives is to lay out the common criteria for qualification of individuals in need of international protections and simultaneity puts limits on benefits which the member states should not go lower from[132].

So far, the Qualification Directive seem to incorporate the best of both Conventions. It constantly refers to the Refugee Convention regarding the refugee definition and derive much of its definition and the protection is similar if not more. Moreover. It also provides protection to individuals against death penalty, torture or inhuman or degrading treatment

[130] Directive 2011/95/EU of the European Parliament and of the Council, [2011] OJ L337/9 (recast), art. 1.
[131] Directive 2011/95/EU of the European Parliament and of the Council, [2011] (recast), art. 15.
[132] Ibid., Preamble recital 12.

and finally, "indiscriminate violence according to Article 15 of QD which is more or less in line with article 3 of EHCR of prohibition of Torture.

What we have observed show nothing less than the protection, which is provided by the international regimes, however the critique against Qualification Directly is mostly streamed towards one of many of its core provision, namely Article 21 which stipulates the principle of non-refoulement. Article 21 reads as:

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 recognized or not, when:

(a)there are reasonable grounds for considering him or her as a danger 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.

3. Member States may revoke, end or refuse to renew or to grant the residence permit of (or to) a refugee to whom paragraph 2 applies[133].

Although in the provision urges member states to give full enforcement to the prohibition of non-refoulement in Article 21 (2) but it at the same time provides an exception from the principle, which leave the protection seekers without any protection if the conditions of article 21 (2) is met. Consequently, the Qualification Directive enforces the principle of non-refoulment on the member states it nonetheless falls shorts of mentioning the absolute nature of it. In other words, it provides protection to people both under the subsidiary protection and international protection as defined in the Directive, but as we saw in the Article 3 of ECHR this prohibition is absolute which protect also instances where there is substantial ground for

[133] Ibid., art. 21.

believing that protection seekers would face maltreatment contrary to the provision either in their country of origin or in a third country.

Failing to emphasis this absolute aspect of the principle of non-refoulment can have huge consequences and in the words of the ECtHR it can be irreparable. In this instance the Qualification Directive under scrutinize here as the representative of the European Common Asylum System or CEAS fall shorts of its ambitious plan to incorporate international obligations stemming from Refugee Convention and ECHR and in this particular instance does not meet international standard of protection.

It falls outside of the limit of this paper to begin a discourse on the primacy of ECHR and the EU-Law as which prevails in case a member states return individuals to their country of origin where he/or she face ill-treatment contrary to the Article 3 of ECHR. However, a point to be noted in such scenarios is that the Qualification Directive and the Asylum procedure Directive sets only minimum criteria and each member states are left with description of the objective of the Directives[134]. It would seem this indicates that member states are not hindered to implements favorable right or protection in this case for the people of concerned.

Now we will turn our focus on the Asylum procedure Directive (APD) for the same reasons and unravel the scop and context of the Directive, whether is fully or to the most degree incorporates the international obligation with regards to granting and withdrawing international protection. Finally what conclusion can be drawn from these two directives in comparison to the international law in previous chapters. ‘

2.3.3.2 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).

As the name suggest the Directive in question is used to determine steps for either granting or withdrawing refugee status and subsidiary protection within the

[134] Ibid., Preamble rec. 12.

Qualification Directive, furthermore, as we will discuss here it also contains rules regarding the safe third country, safe country of origin and first country of asylum when determining which country is responsible for examination of asylum claim[135]. As we will dive deeper into the procedural rules embedded in the mentioned Directive we will come across tons of criticism against the Directive and more precisely against the concept of "safe" third country which has been said to be used in order to keep asylum seekers away from accessing protection in EU soil[136].

We will firstly focus on the structure of the Directive and mention few of the importance rights conferred on Refugees and obligation of member states receiving people of concerned. Then, we will more on to Safe third country exception contained in Article 33 of the Directive and more precisely the subparagraph of article 33 (2) C stipulation the "safe" third counties. Furthermore, Article 33 has to be read in conjunction of article 38 of APD that sets requirements as to do what basis can an asylum seeker be send back to a third country. Before drawing any conclusion, we will investigate reports gathered around by NGOs and scholars criticizing APD and why the concept of safe third country can be harmful. On the last section we will turn our focus on conclusion of EU primary and secondary legislation and whether they imitate international standard obligation in regard to the principle of non-refoulement.

First and foremost, the APD gives full effect to the principle of nonrefoulment according to the refugee convention[137]. It also in its preamble contains the right of individuals to an:

'effective access to the procedure, the opportunity to cooperate and properly communicate with the competent authorities…and sufficient procedural guarantees to pursue his or her case, throughout all stages of the procedure'[138].

This has great importance to the realization of asylum seekers right. This means, that all the people who request for asylum are given the right to have his or her application for protection

[135] Directive 2013/33/EU of the European Parliament and of the Council, [2013] OJ L180/60 (recast).
[136] G. Goodwin-Gill and J. McAdam, 2007, p. 390.
[137] Directive 2013/33/EU of the European Parliament and of the Council, [2013], preamble rec. 3.
[138] Ibid., preamble rec. 25.

examined. As we have previously established such right do not exist in the contemporary international law, so the APD should be given due credit on expanding the right of asylum seekers.

The structure of the Directive is as following:

a) Articles 1-5 contains general provision which includes, the purpose, definitions, scop, responsible authorities for processing to carry out task in accordance with the Directive and more favorable provision which give the member states the discretion.
b) From article 6-30 we see basic principle and guarantees. Among the bulk of guarantees mentioned in the second chapter of the Directive special attention must be given to the Article 6 requires member states to assists asylum seekers on how and where to submit the application for international protection, as this can be seen as prolongation of the preamble 25 of the Directive. Additionally, it also demands from each member states according to Article 8 to sort out and help asylum seekers in detentions and make them aware of their rights. Article 10 sets requirements for the examination of the applicants, and in the same manner right to communication with UNHCR[139] right to personal interview[140] and right to a lawyer[141] is also stipulated in the Directive among others.
c) Article 44-45 contain procedural rules for the withdrawal of international protection
d) The Final provision contained in article 46-55 provide right to an effective remedy and other general provision before annex mention the designation of safe country of origins for the purpose of Article 37 (1).

As we can see the Directive not only confirms the already existence rights and make them more "visible" and expands on those rights. As we saw in the preamble that the Directive requires member states to provides "effective procedure" when it's requested by the asylum

[139] Ibid., preamble rec. 12.
[140] Ibid., preamble rec. 14.
[141] Ibid., preamble rec. 19.

seekers in the member states which non other international or reginal law, including the refugee conventions contains.

Having said that, the criticism which the Directive has faced it has been mainly on the topic of "Safe" third country exception of Article 33. This Article allows member states to not examine an application for international protection on its merits and declare it inadmissible on the ground that there exists another "safe" third country (not country of origin or destination country) from which the applicant could have sought protection from and transited through before arriving to the territory or the destination country. This brings us to the topic of the "safe" third country.

2.3.3.2.1 Safe third country (Inadmissible applications)

According to the Article 33 of the Directive "Member States may consider an application for international protection as inadmissible *only if*

a) another Member State has granted international protection, 25;

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 dependent 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 dependent's situation which justify a separate application[142].

[142] Directive 2013/33/EU, [2013], art. 33.

Article 33 (2) is utilized as procedural mechanism to reject protection seekers while returning them to "safe" third countries which the protection seekers have or had "connection" to. This provision is thus, used to keep asylum seekers to fair and sufficient procedural rights in Europe. Article 33(2) states that the member states may considers request for international protection inadmissible if another country said to be responsible for admitting the asylum seekers to its procedural mechanism. Thus, it means member states are absolved from their duty according to the Directive to fulfill the examination of international protection request e.g., whether the alien has well-founded fear of persecution according to the Refugee Convention and/or runs a real risk of maltreatment according to article 3 of ECHR in his/her country of origin. As Battjes argues such omission is not contrary to the international law as long as the member states treat aliens as if he/she were entitled to protection[143]. This is further supported in the preamble of the Directive itself that "where it can reasonably be assumed that another country would do the examination or provide sufficient protection"[144].

The first signs of the concept of "safe" third country and first country of asylum can be referenced to the UNHCR Executive Committee Conclusion 15 and 58 issued respectively in 1979 and 1989[145]. More importantly it is in Executive Committee Conclusion 58 (EXCOM) we see the first glimpses of requirement on states and the formulation of "safe" country when the destination states contemplating return. Among others the main topic of concern was the respect for non-refoulement. It was concluded that a third country is only considered safe if the protection by that third country entails "protection against refoulement" and the protection seekers "are permitted to remain there and to be treated in accordance with recognized basic human standards until durable solution is found for them" in addition to lack of persecution in the "third country"[146].

[143] H. Battjes, 2006, pp. 397-398.
[144] Directive 2013/33/EU, [2013], Preamble rec. 43.
[145] Executive Committee Conclusion, *Problem of Refugees and Asylum-Seekers Who Move in an Irregular Manner from a Country in Which They Had Already Found Protection,* No. 58 (XL), 1989.
[146] Executive Committee Conclusion,1989, para. f and g.

The practice of third "safe" third country although is a European invention it has its foundation in international law as well[147]. The Article 31 of Geneva Convention allows these practices by providing that:

'Contacting Parties shall not impose penalties, on account of their illegal entry or presence, on refugees who, *coming directly* from a territory whether 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.'

Thus, "coming directly" has been interpreted in the way that if the protection seekers are not "coming directly" from their country of origin and passing through another country which provides effective protection, then the transit or third country is primarily responsible for assessment of their protection claim[148].

For this paper we will now look more accurately at the Article 33 (2) (c) which mentions safe third country which is neither a member states of the EU or first country of asylum in combination with Article 38 which contains both procedural rules and safety criteria for safe third countries.

2.3.3.2.2 Article 38: The concept of safe third country (procedural and safety Requirements)

The wording of the provision lay out five cumulative criteria which should be present in that country which is considered to be safe by a member state and those criteria are the following:

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

[147] Costello C., 2005, p. 40.
[148] Ibid. p. 40.

(a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;

(b) there is no risk of serious harm as defined in Directive 2011/95/EU; (c) the principle of non-refoulement in accordance with the Geneva Convention is respected;

(d) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman, or degrading treatment as laid down in international law, is respected; and

(e) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention[149].

As we can see there are no requirement on the third state to be party to either Geneva Convention or the ECHR. As both Battjes and Coleman argues that the third country does not qualify as "safe" just because of mere ratification of international conventions but the de facto and material safety is what is being referred to in the Directive[150].

Furthermore, what comes to the light reading the provision is that it states that refugees can have a "possibility" to request refugee status" not an opportunity to request it. This indicates that the third country is exempt from obligation under the Directive to run examination of applicant's refugee status[151]. It can also be argued here that as we also saw in the international law that as long as the third country take consideration to the requirement of the principle of non-refoulment it can so in turn, return the applicant to a fourth country and the fourth country could in theory also do the same which as by many it was named as "chain refoulement" or "refugee in orbit". We can also conclude that there is nothing in this provision which prohibits the third states to expel the person of concerned to a fourth state as long as its respect the principle of non-refoulement in article 38 (c) and (d)[152].

[149] Directive 2013/33/EU, [2013], art. 38.
[150] H. Battjes, 2006, p. 424 and N. Coleman, 2009, p. 289.
[151] H. Battjes, 2006, p. 422.
[152] Ibid. p. 421.

2.3.3.2.3 Article 38 (2) Procedural requirements

Applying the exception of safe third country would not happen unless these following procedural requirements are meet and the sending states is "satisfied" with the safety of the third country.

These requirements in are:

2. The application of the safe third country concept shall be subject to rules laid down in national law, including:

(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[153]*;*

The first requirement and maybe the most relevant is that there should be a "connection" between the asylum seekers and that third country in question. The Directive does not provide any further explanation as to what constitute a "connection" between these two subjects. It leaves this at the hands of the member states to decides and can create a loophole which some states can and will exploit[154]. It only mentions further that the "connection" is "reasonable" for return. What constitute a reasonable connection is ambiguous and neither case-law or any other sources have shed lights on this criterion. Although, this criterion is not a safety criteria and member states cannot send an applicant of international protection based solely on the connection to another third country which is not safe but nonetheless it opens the opportunity to reject asylum seekers if the country which they transit through is considered safe[155].

What is concerning with these specific criteria is that refugees go through many countries before arriving at the door of destination country and not every country which they have transited through or stayed for couple of days or week was intentionally at their discretion. The decision of these matters could be and mostly likely is at the hand of smugglers and other benefactors on their journey. In the same manner UNHCR also voiced their concern about

[153] Directive 2013/33/EU, [2013], art. 38 (2) (a).
[154] N. Coleman, 2009, p. 289.
[155] Ibid. p. 289.

this and states that 'Mere presence in a territory is often the result of fortuitous circumstances and does not necessarily imply the existence of any meaningful link or connection'[156].

(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[157];

The words which are standing out in this subparagraph is that member states authorities can "satisfy" themselves when considering the safety of the third country. As Coleman puts it "To *satisfy* is a subjective criterion, and lighter than, for example, a requirement to "establish" or "demonstrate" the safety of a country"[158]. So, it makes it so that member state arrives at conclusion much easier on the matter of safety of the third country compared to if they either had to "established" or "demonstrate" which would make it harder.

Additionally, this conclusion of the safety of the third states does not oblige the member state's national designation to have individualized examination of protection claim as stated further down the subparagraph (b). This means, that a member state can send applicants when it has been satisfied with the safety of the country without any examination of the individual circumstance of the applicant.

(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

[156] UN High Commissioner for Refugees (UNHCR), UNHCR's observations on the European Commission's proposal for a Council Directive on minimum standards on procedures for granting and withdrawing refugee status (COM(2000) 578, Final, July 2001, para. 37.

[157] Directive 2013/33/EU, [2013], art. 38 (2) (b).
[158] N. Coleman, 2009, pp. 289-290.

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)[159].

This subparagraph allows to challenge against the presumption of safety of the third country for his/ or her case taken by the member state authorities, both regarding the criterion of "connection" and the safety of the third case of subparagraph (b). thus, the Directive provides for the possibility to challenges the administrative decision. It means that although the states have adopted some "methodology" to consider a third states "safe" the applicants should be given to challenge this decision based on his/or her peculiar circumstance. This is the latest addition to the Directive to comply with international obligations and can be argued even to the effect of "effective remedy" embedded in Article 13 of ECHR[160].

All in all, the APD allows member states to declare a country generally safe for an individual and absolve from obligation to admit them into their legal procedure for international protection. As long as the substantive requirements in article 38 (1) are fulfilled the Directive can declare a country safe for the return of protection seekers without any examination of their merit of admittance to legal procedures[161].

The subparagraph is meant to be allow the states to take a generic approach to the safety rather than an individualistic and allows such practices to take place, however the subparagraph (c) allows for rebuttal and only then a more personal individualized examination can take place. This show that the provision in question is wavering between individual and generic approach, combined with much ambiguity leaving it to the discretion or the mercy of member states[162].

The criterion of to be "satisfied" although a very vague term it may be, we can see a glimpse of attempt of clarification in the preamble 40, 42 and 48 of the Asylum Procedure Directive. Specifically, preamble 48 concerning the safe third country, it lays down some guidelines

[159] Directive 2013/33/EU, [2013], art. 38 (2) (c).
[160] H. Battjes, 2006, p. 423.
[161] N. Coleman, 2009, p. 290.
[162] H. Battjes, 2006, p. 425.

which member states follow when declaring a state as safe[163]. Firstly, the concept of the safe third country should be based on "up-to-date" information. For example, in our case the coupe in Turkey and the recent political and social changes in Turkey should be taken into consideration. This up-to-date information further, has to be confirmed or based upon credible sources of relying valid information such as EASO, UNHCR, the Council of Europe and other relevant international organization[164]. I would also dare to add other local and international NGOs located in Turkey constantly reporting on this matter and among others Amnesty International can be mentions here.

The preamble further states that if a country human rights situation does not live up to the standards which are required by Directive e.g., that there has been many concerning reports or incidents of human rights violation or and incidents of refoulement that country no longer "satisfies" the member states to be safe for the return of the protection seekers[165].

This shows as we stated in the beginning the APD is bult upon minimum standards of protection. The minimum standard examined above have gathered many criticisms both in regard to the previous directive and the current applicable directive which has brought changes compared to the old one but still not enough. We will now see what main concerns and critique against the current and applicable directive of 2013 are.

2.3.3.2.4 Individualized or General safety requirements?

As we mentioned in previous subchapter the APD waver between generic and individual approach to the safety of the third state when contemplating return of protection seekers. Our aim is to shed lights on the issues rising from both generic approach and individualized approach to safety. Then we will conclude whether the Directive is in line with the international obligation or does it pave away for states to summery reject asylum seekers from its procedural safeguards.

[163] Directive 2013/33/EU, [2013], preamble rec. 48.
[164] Ibid., Preamble rec. 48.
[165] Ibid., Preamble rec. 48.

The application of safe third country exception arises concerns regarding the principle of non-refoulement[166]. As we elaborated in previous chapter the prohibition of non-refoulement prohibits the return of individuals not only to their country of origin where the individual fear risk of persecution but also to a territory from where he or she may be subsequently return or expelled to his or her country of origin, in other words indirect-refoulement. The question thus become whether the exception of third safe country in APD provides sufficient protection both against direct refoulement and indirect refoulement.

The principle of non-refoulement in international law does not obliges member states to undertake status determination of individuals unless the return is to where he or she faces real risk of maltreatment or persecution[167]. In doing so it allows member states to expel protection seekers to other states where he or she could seek protection from without any breach of their international obligation[168].

The actual reason as why the concept of safe third country has been and is under criticism, is due to it gives member states of EU the mechanism or pathway by which the return can happen. The main mechanism in question is the generic approach to safety of a third state which the APD allows the member states to designate list of safe third country where the return of individuals can be contemplated without any substantial examination of protection claim[169]. In other words, member states declaring other states safe would allow them to return asylum seekers on the basis that the protection could have been sought from that country.

In conclusion No 15 EXCOM, UNHCR states that "asylum should not be denied solely on the ground that it could be sought from another state"[170]. Thus, other condition has to be meet before expelling a protection seeker to third safe country and one of the most fundamental

[166] Costello C., 2005, p. 47.
[167] See chapter 2.1 for further information.
[168] N. Coleman, 2009, p. 325.
[169] Directive 2013/33/EU, [2013], art. 38 (2) (b) and art. 33.
[170] Executive Committee Conclusion, *Refugees without an Asylum Country,* No. 15 (XXX), 1979. para. iv.

protection which must be adhered to at all costs is the protection against refoulement in the third states among others[171].

Then the main question that needs answer is whether the generic approach mentioned in the APD is compatible with international law? If so, what are the positive and negative side of this approach. To answer this question, we will highlight some cases from jurisprudence of ECtHR where the topic of safety in regard to a third states was discussed or elaborated on.

Although, we have mentioned T.I vs UK case in previous chapter regarding the obligation of principle of non-refoulement of the states under ECHR, it is still a valid case which has particular importance to the generic approach in question. What is under scrutiny here is not the scop and content of the principle of non-refoulement, but in what manner or order the court examined the case. The European Court of Human Rights considered the "alleged risk of ill-treatment in Sri-Lanka", even though the court being aware that Germany was not only signatory to the Dublin regulation but also to the ECHR[172]. After it concluded that the situation in the home-states "gave rise to concerns as to the risk of ill-treatment" if the applicant is returned the court, then addressed the question of "effective protection" against refoulement in the third state e.g., Germany[173].

The court's order of examination of the case has many authors and scholars have believed that it suggests an examination on the merits of the applicant's case where the situation in country of origin "give rise to concerns"[174]. If this case suggests a full examination of alleged risk of ill-treatment in country of origin before sending the applicants to a third state, then it would mean that the APD is not in conformity with ECHR and with the prohibition of non-refoulement. Because APD on the contrary exempt states to undertake such examination according to article 33 and this would mean that the exception of safe third country is in clear violation of principle of non-refoulement.

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[171] Costello C., 2005, p. 48. See also H. Battjes, 2006, p. 418.
[172] H. Battjes , 2006, p. 411.
[173] Ibid. p. 411.
[174] G. Noll, 'Formalism v. Empiricism: Some Reflections on the Dublin Convention on the Occasion of Recent European Case Law', *Nordic Journal of International Law,* vol. 70 no.1, 2001, p. 161.

Among other authors Noll has clearly support and interpreted T.I vs United Kingdom which according to his view the court has rejected "formal" approach and accepted the "empirical" approach[175]. From his point of view the empirical approach which he claims to have been the approach of the ECtHR when deciding the question of non-refoulement within ECHR consist of three steps are as following:

1. The first is an assessment of the direct risk for the claimant in the country of origin. With the term *"direct risk",* we mean the risk that the claimant is persecuted or otherwise exposed to a human rights violation in the country of origin. This implies nothing less than a full-fledged material assessment on the part of the decision-maker. In case the claimant is found to fall under the scope of international norms prohibiting refoulement, the decision-maker will proceed to the second step.

2. This step entails an assessment of the indirect risk for the claimant in the responsible Member State. The term "indirect risk" denotes the risk that the responsible Member State sends back the claimant to her country of origin. The second step forces the decision-maker to analyze the law and practice of the responsible Member State with regard to the parameters of the claimant's case. Where such an indirect risk exists, the decisionmaker will proceed to the third and last step.

3. In that step, the international meaning of relevant prohibitions of refoulement has to be established, and the indirect risk can be measured against its benchmarks. To establish the international meaning of a norm, the decision-maker has to construe it in accordance with Articles 31 to 33 of the Vienna Treaty Convention. If removal by the responsible Member State cannot be said to violate the international meaning of relevant prohibitions of refoulement, removal to that Member State under the Dublin Convention is legal. If the opposite is true, removal would entail a violation of international law by the removing

[175] G. Noll, 'Formalism v. Empiricism: Some Reflections on the Dublin Convention on the Occasion of Recent European Case Law', 2001, p. 181.

Member State. In that case, the latter state is not only allowed, but also obliged to make use of Article 3(4) DC and refrain from removal[176].

Thus, from Noll's perspective the T.I vs UK suggest an obligation on states to undertake an examination on the merits of the claim and is in the opposite position to the formal approach. Formal approach which suggests that two member states apply and interpret the convention in the same manner without any divergence, which implies that removal to a third states would not breach the principle of non-refoulement when the removing states does not examine the merits of the claim[177].

The arguments presented by Noll does not hold true according to Battjes. Battjes argues that although court takes an "empirical" approach or in other words the court do perform an examination of alleged risk in the country of origin and then examination of effective protection in Germany (third state) at the same time it is still not in "odds" with the generic approach[178]. The court suggest that member states cannot automatically rely on the arrangement in the Dublin Convention, but at certain extend they still can rely on the contracting states obligation under those arrangements[179].

This is further confirmed in the *Amuur vs France* case where France authorities were planning to send a Syrian protection seeker to Somalia, a country party to the Refugee Convention[180] and had ratified the ECHR which played a part in considering Somalia as safe third country for the applicant[181].

What we can derive from T.I vs UK and Amuur vs France case is that states can rely to certain degree on another member states which they have certain arrangement with or are contracting states under the same convention, without the need to examine each case for protection individually, which mean that generic approach to safety of the third country is

[176] Ibid, p. 181.
[177] G. Noll, 2001, p. 161.
[178] H. Battjes , 2006, p. 411.
[179] Ibid. p. 411.
[180] European Court of Human Rights, *Amuur v. France, No. 19776/92*, 25 June 1996, par. 48.
[181] European Court of Human Rights, *Gezici v. Switzerland, No. 17518/90*, 7 Match 1991.

compatible under international law[182]. Furthermore, the generic approach implies that the receiving third state would oblige by its international obligation or the agreement with the sending states for example under the readmission agreement to provide effective protection against refoulment, either by providing visa permit for arrival or examination of their case[183].

It has to be mentioned that the generic approach is not necessarily all good and there will be incidents where states will abuse this system by "shuttling" asylum seekers to a third states solely because it could have been sought from that third state[184]. Additionally, the use of safe third country exception coupled with accelerated procedures which has been already criticized by the UNHCR[185] tends to reduce or exclude the rights of appeal[186].

The general approach to safety of another third states for asylum seekers has also been under scrutiny by the House of Lords, stating that "General rules cannot cater for every situation. Even in relation to individual countries, a particular refugee-producing country may be safe for some groups, but not for others; or some parts of the country may be safe, but not others"[187].

It is true that many protection seekers have various reason for their flee from country of origin which can also coincide with the same reason in another "safe" third country from which they could also have said to flee due to the cultural, religious, or political differences before arriving to the destination country.

Costello argues that the application of "safe" third country so far been, unjust, unfair, and inefficient which has in many instances resulted in indirect refoulment of protection

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[182] H. Battjes, 2006, p. 413.
[183] Ibid., p. 413.
[184] G. Goodwin-Gill and J. McAdam, 2007, p. 391.
[185] Executive Committee Conclusion, *The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum*, No. 30 (XXXIV), 1983.
[186] UN High Commissioner for Refugees (UNHCR), *UNHCR Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures),* 31 May 2001, para. 12.

[187] House of Lords European Union Committee, *Handling EU Asylum claims: New Approaches Examined*, London, Authority of the House of Lords, 2004, p. 25., para 66.

seekers[188]. A study done by ECRE back in 1995 shows that there has been 16 cases of chain refoulement in 1994 by states applying the exception of third safe country[189]. This goes to show that the safe third country practices are highly susceptible for abuse from sending states and the practice fails to emphasis the importance of the principle of non-refoulement and a guaranteed access to either status determination procedures[190].

It is no wonder that UNHCR many times has reiterated the importance of individualized approach when contemplating sending a protection seeker to a third country, by condemning the use of safe country "list" or designations, which again proves that a country can be safe for certain groups but not for others[191].

One of many other factors which may as well fall out of the scope of this paper that needs to be noted is UNHCR voice concerns only that "fraction" of those which are returned from western European countries under the exception of safe third country apply for asylum, which indicates that they will re-enter western countries irregularly[192].

The arguments above suggest that an absolute trust that another country is safe without examination of individual claims is flawed and there need to be a mechanism in place challenge these assumptions if an asylum seeker presents counter evidence. The "effective protection" from indirect refoulement obliges sending states under international law to established that the receiving third states is de facto safe for the applicants in question.

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[188] Costello C., 2005, p. 47.
[189] Ibid., p. 47.
[190] G. Noll, *Negotiating Asylum; The EU Acquis, Extraterritorial Protection and the Common market of Deflection*, London, Kluwer, 2000, p. 209.

[191]UN High Commissioner for Refugees (UNHCR), *UNHCR summary observations on the Commission's proposal for a Council Directive on minimum standards on procedures for granting and withdrawing refugee status (COM(2000) 578*, Final, September 2000, p. 5.

[192] UN High Commissioner for Refugees (UNHCR), UNHCR, '*Global Consultations on International Protection, Background paper no. 2: The application of the "safe third country" notion and its impact on the management of flows and on the protection of refugees'*, May 2001. P.1.b.

However, can we say for sure established either by interpreting international law or the jurisprudence of it, that the "effective protection" obliges states to undertake individual examination of each case before expelling an individual to a third states? So, far we cannot establish such mandatory obligation derived from international law.

On the other hand, an absolute trust that the third states are safe without prior examination contrasts with the case-law or jurisprudence of ECtHR for example the case of T-I vs United Kingdom. And at the same time there is no duty to examine the substance of a claim under international law either.

It is not to claim that international law does not allows individuals examination of cases before the return to a third states but the international law and UNHCR states a middle ground to this question at hand. The middle ground is that it which is according to Battjes which defensible under international law is that country can declare a case inadmissible on the ground that there is another third safe country which has the responsibility of the claimant case, but this trust that there exist another safe third country cannot be absolute, and the applicants should be given the opportunity to rebuttal the safety presumption by the destination state[193].

This line of reasoning seems to align with UNHCR Executive Committee that "under certain circumstances and with appropriate guarantees in the individual case, the transfer of responsibility for assessing an asylum claim to another country may be an appropriate measure[194]". In the same manner UNHCR allows the use of "lists" of safe third country as long as it also give applicants an opportunity to rebuttal the presumption of safety based on the applicants particular or individual circumstance[195].

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[193] H. Battjes, 2006, p.432

[194] Executive Committee of the High Commissioner's Programme, *Note on international protection*, A/AC.96/975, 2 July 2003, para. 12.

[195] UN High Commissioner for Refugees (UNHCR), *UNHCR's observations on the European Commission's proposal for a Council Directive on minimum standards on procedures for granting and withdrawing refugee status (COM(2000) 578*, Final, July 2001.) para 33.

This means that the first step when all the requirements in the APD are meet in regard to the "connection" between the applicants and the third country a member states can decline to examine the case on its merits and thus call it inadmissible due to the existence of another safe country. However, the claimant should be then given a real opportunity to provide counterevidence against the presumption of safety of the third states in his/or her case. if then the claimant succeeds inn providing that the third safety is indeed not safe for her, then the destination country is obliging to examine the soundness of her claim in order to established whether the applicant has real risk of persecution or not.

Thus, it comes as no surprise that Article 38 (2) (c) of Asylum Procedure Directive incorporates this procedural safeguard on two grounds. The first ground is already mentioned above and the other ground which a claimant can challenge the authorities declaring the case in admissible is on the matter of "connection" of applicants to that saft third country[196]

2.4 Conclusion

As been After discussing the EU law and EU secondary legislation we can say for sure say that international law has been an anchor point of inspiration for whole EU Legislation although they are sperate entities and operate independently of each other.

EU legislation only incorporates international obligation clearly derived from in our case the Refuge Convention and European Convention of Human Rights it also makes it "visible" and as we will see it has to some degree expanded on those obligation. It goes without any discussion that EU legislation has given full effect to the principle of non-refoulement in accordance with Refuge Convention, ECHR and allows for member states to follow instruction from ECtHR as well.

What has been mostly under scrutiny in this chapter was the two Directive under EU secondary legislation and under European Common Asylum Procedure or CEAS. The

[196] Directive 2013/33/EU, art.38 (2) (c).

Asylum Procedure Directive (APD) and the Qualification Directive (QD) have codified many of international obligation and what is more interesting it is under these Directive we see those rights of protection seekers to be admitted to the procedural for examination for qualification to refugee status. The right to have one's claim examined is non-existence in the international sphere despite many efforts of scholars and international community, but the under EU-Law and more specifically under the APD we see that member states are obliged to assess a case on its merits.

However, it has to be mentioned that the Directive sets minimum standards for protection which is actually in line with international obligation stemming from ECHR and Refuge Convention. The minimum standard of protection means that it cannot be challenged from member state unless there is exception within the Directive itself and the member states cannot bestow less favorable rights on protection seekers, they on the other hand are fully allowed to give more favorable rights and benefits during the procedure to the asylum seekers but are barred from any less than what is described in the Directives.

Although, the Directives provides for opportunity for asylum seekers to have their claim examined on its merits it still provides for exception from it under "safe" third country of first asylum, Europeans safe third countries and safe country of origin exceptions, that allows member states to declare a case inadmissible due to the fact it could have been sought or the protection is already given by another country. Under the safe country exception member states are allowed to declare a case inadmissible and return the applicants for international protection to another country without an examination on the merits of the case.

For this paper the safe third country exception has great importance and we analyzed this under the APD and concluded that although, it is neither contrary for international law due to its generic application of "safety" but on contrary many believed it has been derived from the Refugee Convention Article 31 phrase "coming directly". In other words, the exception of the safe country under the APD is not contrary to any international convention, since no international convention obliges a "right" of refugees to have their application for international protection examined on its substance.

The mechanism which allows such exception is, first and foremost the exist a "connection" between the applicant and another country. Furthermore, it also requires that third country will abide by the principle of non-refoulement, which means both direct and indirect refoulement. Beside the requirements of non-refoulement in the third states, the third states also has to not expose the applicant to ill-treatment according to the ECHR Article 3 and there is no fear of persecution according to the Refugee Convention.

In any regards, the application of safe third country has been criticized by many scholars and international community alike due to the fact that in most cases where the country has applied this exception, it has led to undermining the principle of non-refoulement. What has been mostly concerning about the exception of "safe" third countries despite, the requirement of non-refoulement, prohibition of torture, and no risk of persecution, is the fact that it applies "generically" and ignores or rather does not account for the particular situation of each applicant.

The exception of safe third country in APD is what the EU-Turkey deal is based on, Turkey of course being the "safe" country in this context and Greece the sending or destination states. We will look into the "Deal" more in depth to discuss both the circumstances it become to know as the deal and the situation of the deal after its implementation.

CHAPTER 2

3. The EU-Turkey Deal of 2016

Year 2015 marked one of the crucial years for the Refugees around the globe and it was in aftermath called what we know today as "refugee crisis" by UNHCR[197]. The

[197] The UN Refugee Agency, 2015: the year of Europe´s refugee crisis, 8 December 2015,https://www.unhcr.org/news/stories/2015/12/56ec1ebde/2015-year-europes-refugee-crisis.html (accessed 1 may 2021).

data gathered by UNHCR showed that by the end of the year more than 911.000 refugees and migrants arrived at the shore of European countries either from Mediterranean Sea or through Aegean Sea from Turkey[198]. Among these numbers, from the beginning of 2015 around 880.00 people entered Greece from Turkey[199] which is a huge jump from the last two years number of arrivals.

Such massive flow of mixed with refugees and migrants called for a rapid response from European countries in order to curb the flow of new arrivals but at the same time not to compromise its core value. The humanitarian crisis of refugees quickly moved from the legal sphere of identifying people in need to the political sphere of "illegal migration" and people seeking better life in Europe. Antonio Guterres previous UNHCR high commissioner for refugees taking the politicization of this matter into consideration stated that:

"As anti-foreigner sentiments escalate in some quarters, it is important to recognize the positive contributions that refugees and migrants make to the societies in which they live and also honor core European values: protecting lives, upholding human rights and promoting tolerance and diversity,"[200]

Europe had to, now couple with the massive flow of new arrivals the likes of which they had not seen before which meant and also emphasized by High commissioner that "Exceptional circumstances require an exceptional response. Business as usual will not solve the problem[201]".

And it came as no surprise that Turkey was a key player in this matter and soon after on 15 October 2015, both the republic of Turkey and European Union agreed on Joint Action Plan

[198] Ibid.
[199] European Commission, *EU-Turkey Joint Action Plan: Implementation Report*, 2016, p.1.

[200] The UN Refugee *Agency, A million refugees and migrants flee to Europe in 2015,* 22 December 2015, https://www.unhcr.org/mt/3242-million-refugees-migrants-flee-europe-2015.html (accessed 1 may 2021).

[201] The UN Refugee Agency, *UNHCR chief issue key guidelines for dealing with Europe´s refugee crisis,* 4 September 2021, https://www.unhcr.org/news/latest/2015/9/55e9793b6/unhcr-chief-issues-key-guidelines-dealing-europes-refugee-crisis.html (accessed 21 May 2021).

with the objective to address the crisis and to manage the refugee crisis created by the situation in Syria[202].

The three-core objective this joint action plan was based on were:

1) Addressing the root causes leading to the massive influx of Syrians.
2) Supporting Syrians under temporary protection and their host communities in Turkey (part1) and
3) by strengthening the cooperation to prevent irregular migration flows to EU (part 2)[203].

Despite the joint action plan between these two parties after a year of implementation the result was lackluster and European Commission implementation report was already suggesting a more improved and better bilateral agreement with Turkey[204]. This is where we enter the era of EU-Turkey deal.

For this paper however, we will only focus on the EU-Turkey deal and more accurately the exception included or declaring Turkey as safe third country according to the deal and in accordance with the Article 38 of Asylum procedure Directive.

3.1 Scope and Content of EU-Turkey Readmission Agreement

The EU-Turkey deal agreed upon on 18 of March 2016 and effective from 20 of march[205] contains for the most part core of agreement with the Turkey but it only depicts half of the picture or more accurately one third of the whole picture. The Deal should be read

[202] European Commission, *EU-Turkey Joint Action plan*, Brussel, 15 October 2015, http://europa.eu/rapid/press-release_MEMO-15-5860_en.htm (accessed 1 May 2021).

[203]Ibid, p. 1.
[204] European Commission, *EU-Turkey Joint Action Plan: Implementation Report*, 2016, p. 1.
[205] European Council, *EU-Turkey Statement, 18 March 2016*, 18 March 2016 https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/ (accessed 1 may 2021).

in conjunction with the EU summit conclusion of 17-18 of March 2016 that "confirms its comprehensive strategy to tackle the migration crisis[206] and the commission communication on the agreement[207].

The full disclosure of the deal will be in the Annex of this paper, but the deal has all in all 9-action plan. We will mostly dedicate this paper to the action plan 1 of the deal and the other 8 action plans can be summarized as following. Among others the deals provide legal pathway for resettlement of Syrian refugee under 1-1 schemes. Since under the deal for each and Syrian sent to Turkey from Greek Islands another will be resettled to EU. Furthermore, Visa liberation for Turkish citizens was promised and beside all that a pathway for Turkey to be in discussion to join European Union[208].

Now we will focus on the action plan which has gathered most controversy since the release of statement in 2016.

1) All new irregular migrants crossing from Turkey into Greek islands as from 20 March 2016 will be returned to Turkey.
   This will take place in full accordance with EU and international law, thus excluding any kind of collective expulsion. All migrants will be protected in accordance with the relevant international standards and in respect of the principle of non-refoulement.
   It will be a temporary and extraordinary measure which is necessary to end the human suffering and restore public order.

[206] European Council, *European Council Conclusions*, Brussels 17-18 March 2016, https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/european-council-conclusions/ (accessed 1 May 2021).

[207] European Commission, *Communication from the Commission to the European Parliament, the European Council and the Council, Next Operational Steps in EU-Turkey Cooperation in the Field of Migration*, COM(2016) 166 Final, Brussels, 16 March 2016, https://ec.europa.eu/transparency/documents register/detail?ref=COM(2016)166&lang=sv (accessed 2 May 2021).
[208] European Council, *EU-Turkey Statement*, 2016.

> 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.

There are mainly two school of thought regarding the legality of the deal. The first school of thought represented by Den Heijer and Spijkerboer claims if the deal is a treaty, then it will be non-binding i.e., unlawful since Article 218 of TFEU which lays out procedure for negotiating between the Union (EU) and a third country (Turkey) has not been adhered to by the European Union[209]. The article specifically demands that agreements regarding common foreign policy shall obtain the consent of the European Parliament[210].

This issue was also brought up to the European Court of Justice (ECJ) by three asylum seekers (two Pakistani and one Afghan) voicing their concerns that according to the EU-Turkey deal they are endangered of being sent back to Turkey if their cases are rejected and then to their country of origin in other words, they feared the consequences of "chain-refoulement"[211]. First The Asylum seekers argues that since the EU-Turkey statement

[209] M. Den Heijer and T. Spijkerboer, EU Law Analysis, *Is the EU-Turkey refugee and migration deal a treaty?*, 7 April 2006, http://eulawanalysis.blogspot.com/2016/04/is-eu-turkey-refugee-and-migration-deal.html (accessed 2 May 2021).
[210] Treaty on the Functioning of the European Union [2012] OJ C326/47, art. 218, para. 6 (a).
[211] Court of Justice of the European Union, C-208/17P, C-209/17P and C-210/17P [2018] ECR (not published), *NF, NG and NM v. European Council*, 21 April 2017.

constitute an international agreement, additionally they also claimed that the agreement breaches the regulations laid out in the TFEU[212].

The court of the other hand dismissed the case by stating it does not have the jurisdiction to examine the legality of the deal [213]. Furthermore, the courts rely on the evidence provided by the council, on the matter of negotiation between two heads of states (turkey and EU-member states) that it shows the deal was not struck on behalf of EU rather by its member states as "actor under international law"[214].

This clearly indicates that the deal is not a treaty in the traditional understanding of it which means the question of negating the procedural rules in TFEU does not raises any concerns for the EU, and it's a bilateral agreement which cannot be legally challenged as such.

Steve Peers seems to agree with the above-mentioned line of reasoning, and he claims that "since the agreement will take the form of statement, in my view it will not be as such legally binding[215]".

He also predicted in advance that it could not be challenged either at EU level of national level, as we saw from the case above[216]. It is however not to say that the deal on the individualistic basis cannot be challenged by the individuals regarding the safety of the third country for the applicants as this would run contrary to the APD Article 38 (2) (c), where it allows for protection seekers to challenge the assumption of safety in her or his case.

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[212] General Court of European Union, *The General Court declares that it lacks jurisdiction to hear and determine the actions brought by three asylum seekers against the EU-Turkey statement which seeks to resolve the migration crisis*, 28 February 2017, https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-02/cp170019en.pdf (accessed 3 May 2021).

[213] Ibid.
[214] Ibid.
[215] S. Peers, EU Law Analysis, *The draft EU/Turkey deal on migration and refugees: is it legal?,* 16 March 2016, http://eulawanalysis.blogspot.com/2016/03/the-draft-euturkey-deal-on-migration.html (accessed 3 May 2021).
[216] Ibid.

Peers was also one of the many strong critics of the agreements on the section 1 that "All new irregular migrants crossing from Turkey into Greek islands as from 20 March 2016 will be returned to Turkey"[217]. Stating "anyone with a legal qualification who signed off this first sentence should hang their head in shame[218]" because it indicates to collective expulsion contradictory to the jurisprudence of ECtHR and article 4 Protocol 4 of ECHR banning collective expulsion of aliens. Although, the second paragraph of the deal contradicts the first in a better way it is nonetheless a very controversial statement.

The Communication from the commission of the parliament and the council has provided in the European Commission Communication that there will be safeguard according to the ECHR and the Charter of Fundamental Rights that every case will be treated "individually"[219]. These procedural and legal safeguards for the applicants are embedded in APD and if not respected this would be straight contrast to the legal requirements in the said directive and the obligation stemming from ECHR and the Charter[220]

Furthermore, the deal was opposed by an "extraordinary "and "temporary" measure which has been almost 5 years since its inception and there is no end to the duration of applicability of the deal so far.

Other legal safeguard was also mentioned the Communication, among other the protection against refoulement, which means either examination of asylum claims or in the absence of such examination that a third country will provide "effective protection" as described in previous chapter[221].

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[217] European Council, EU-Turkey Statement, (18 March 2016).
[218] S. Peers, EU Law Analysis , *The final EU-Turkey refugee deal: a legal assessment*, 18 March 2016, http://eulawanalysis.blogspot.com/2016/03/the-final-euturkey-refugee-deal-legal.html (accessed 3 May 2021).

[219] European Commission, *Communication from the Commission to the European Parliament, the European Council and the Council, Next Operational Steps in EU-Turkey Cooperation in the Field of Migration*, COM(2016) 166 Final, Brussels, 16 March 2016.
[220] Ibid. p. 3.
[221] Ibid. p. 3.

Although we could spend hours upon hours analyzing all aspects of the deal and the effect it had on the migration flow from Turkey to Greece and then to Europe back and forth and this paper will not suffice until we mention Turkey. We must not forget that this deal exists only n one condition and that is that Turkey is considered to be a "safe" third country for all the protection seekers transiting through Turkey and seeking asylum in Europe. So, without further ado we will turn our focus on the situation in Turkey. If the situation in Turkey come short of the obligation both from International Refugee law and the Asylum Procedure Directive's requirements regarding the Safe Third Country Article 38 then the return of people of concerned would then be illegal, regardless the action plans stated in the deal.

CHAPTER 3

4. Turkey as safe Third country

In this section of the paper, we will look at the available sources and by applying the mechanism according to the international law and Asylum Procedure Directive of 2013 to decide if Turkey is safe for the return of asylum seekers as foreseen by the EU-Turkey readmission deal of 2016. As we established in chapter 2 of this paper the criterions are simple. For Turkey to be qualified as safe third country it has to provide access to fair and effective asylum procedure and statues determination or "effective protection" without such determination[222].

In order to do so we will base our search on safe legal requirements by the Asylum Procedure Directive's Preamble which also requires that member states on how to assess safety of a third country. The Preamble requires that in case a member states applies the concept of safe third country in the Directive it needs to base on the decision on the "up-to-

[222] European Court of Human Rights, *M.S.S. v. Belgium and Greece, No. 30696/09*, 21 January 2011, p.61 para. 300, (for further detail of these terminologies, see Chapter 2).

date" relevant information provided by the accredited sources such as UNHCR, EASO other Member States, the Council of Europe, and other relevant internationals organization[223]. We will in the same manner apply the same requirements, required by the member states for application of the safe third country concept for Turkey and then conclude whether Turkey meets these requirements or does it fall short. It has to be noted that as we also established in Chapter 2 that it is actually the "de facto" situation of the country in question determines the safety of that country for the return of asylum seekers and not the amount of International Human Right Convention that country has ratified.

It is however, of importance to also look into what legal protection is provided by Turkey in its Asylum law for Returnees under the Deal, what nationalities can in fact seek protection, the quality of the decision-making organ in Turkey and how can protection seekers access these rights. Beside the mentioned approach above, we will also look into whether Turkey in these recent years incidents with indication had that there have been incidents of refoulements either for the protection seekers deported under the Deal or at the Turkish borders and what has been the main concerns from the relevant actors on the ground.

4.1 Introduction to Turkey's Asylum Law

Turkey being signatory state to the 1951 Refugee Convention and its Protocol is among the very few countries which still maintains the geographical limitation that means it only recognizes Refugee from European Countries[224]. However, Turkey still provides protection to other Nationalities as well under its EU-inspired adopted law on Foreigners and International Protection (LFIP) binding at domestic level[225]. Turkey asylum

[223] Directive 2013/33/EU, preamble 48.
[224] Asylum Information Database (AIDA), *Country Report: Turkey*, update 2020, https://asylumineurope.org/wp-content/uploads/2021/05/AIDA-TR_2020update.pdf (accessed 5 May 2021), p. 20.

[225] Ibid p.20

law has dual structure to it since it provides different type of protections depending on the applicant's nationality. For instance, Syrians are under Temporary Protection Regulation of 2014/6883 based on the LFIP Article 91, which was later amended by Regulation of 2016/8722[226]. All the other nationalities, such as Afghans, Iraqis, Somalis, and more are under the LFIP which has been amended several times including once in 2018[227].

We in the same manner, will also look into these different systems of law separately, the Temporary Protection Regulation (TPR) for Syrians and Law on Foreigners and International Protection (LFIP) system for all other nationalities to discuss what kind of protection is provided under each regime and if it meets international standards in accordance with ECHR and Refuge Law.

4.1.1 Temporary Protection for Syrian Nationals

Syrian nationals are under the protection provided by mainly two legislatives body.

1) Temporary Protection Regulation 2014/6883 which is based on Article 91 of the LFIP[228], and
2) Regulation 2016/8722 which amended the Temporary Protection (TPR)[229].

Article 1 of the amended Temporary Protection Regulation reads as following:

'The citizens of the Syrian Arab Republic, stateless persons and refugees who have arrived at or crossed our borders coming from Syrian Arab Republic as part of a mass influx or individually for temporary protection purposes due to the events that have taken place in Syrian Arab Republic since 28 April 2011 shall be covered under temporary protection, even if they have filed an application for international protection[230]'.

[226] Regulation Amending the Temporary Protection Regulation; Turkey, [2016] 2016/8722.
[227] Law on Foreigners International Protection; Turkey [2013] 2013/6458, entered into force April 2014.
[228] Law on Foreigners International Protection; Turkey [2013] 2013/6458, amended 29 October 2016.
[229] Regulation Amending the Temporary Protection Regulation; Turkey, [2016] 2016/8722.
[230] Ibid., art. 1.

Reading the Article, it become es clear that it implies a generical application of Protection on Prima facie, group basis for all Syrians and stateless Palestinians coming to Turkey[231]. Thus, Temporary Protection encompasses all individuals fulfilling the nationality criterion, without the need for individual assessments of their particular and specific reason for the need for International Protection under LFIP. This can be understood due to the mass influx of Syrians and stateless people arriving to Turkey and an individual assessment of each of their protection needs could be an excruciation practice if not impractical considering the Turkish asylum system inexperience which we will cast light on later.

However, being eligible for protection under TPR is not as straight forwards as one would assume. Article 1 of the TPR seemingly suggest a criterion of "coming directly" from country of origin as part of eligibility criterion, since the phrases such as "arrive at our border" have crossed our borders" or a third country is understood (wrongly) that it suggested that individuals applying for Temporary Protection has to arrive directly from their country of origin in order to benefit from protection provided[232].

As result the Directorate General of Migration Management (DGMM) an authority responsible for Registration and processing of TPR and IP[233] apply this criterion to not include individuals otherwise fully eligible for protection under TPR[234]. This leaves people of concerned out of protection system created specifically for his/her nationalities due to incompetency of the officers either at the border or the Airport and they have to apply for other types of International Protection which has its own flaws.

Putting that Aside for now TPR does also provide protection against refoulement in Article 6 which read as:

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[231] Asylum Information Database (AIDA), *Country Report: Turkey*, update 2020, p. 20.
[232] Ibid., p. 138.
[233] Temporary Protection Regulation: Turkey, [2014] 2014/6883, amended by Regulation 2018/11208, art. 10.
[234] European Council of Refugee and Exiles (ECRE), Asylum Information Database (AIDA), *Country Report: Turkey*, update 2018, https://asylumineurope.org/wp-content/uploads/2019/04/report-download_aida_tr_2018update.pdf (accessed 5 May 2021), p. 53.

"No one within the scope of this Regulation shall be returned to a place where he or she may be subjected to torture, inhuman or degrading punishment or treatment or, where his/her life or freedom would be threatened on account of his/her race, religion, nationality, membership of a particular social group or political opinion.[235]*"*

What is unique with this Article that it incorporates both the principle nonrefoulement from the Refuge Convention Article 33 and the implicit prohibition of refoulement under Article 3 ECHR.

Furthermore, under Article 65 (3) of the law on Foreigners and International Protection, individuals are entitled to apply for international protection. This is also in accordance with the EU directive which allows individuals for status determination. It has to be noted that TPR is different than IT under LFIP since protection under TPR is not per say based on individual assessments and thus not a status determination such as in Europe. However, international protection for all the other national does go through such determination process and we can argue that Article 65 (3) provide a right for individuals to apply for protection more or less in line with EU Directives.

So far, the protection provided under TPR seems to meet the minimum requirement under APD since it protects individuals from return to territories where they face risk of persecution and/or ill-treatment while it has also created a framework where individuals can seek or apply for either International Protection under LFIP or Temporary Protection under TPR system.

4.1.2 International Protection under LFIP

Under the LFIP regimes we see three different types of International Protection statuses.

[235] Temporary Protection Regulation: Turkey, [2014] 2014/6883, art. 6.

1) Refugee status: People from European states who qualify for Refugee status according to the Refuge Convention of 1951[236],
2) Conditional refugee status: people from non-European states who qualify for refugee status according to the Refuge Convention of 1951, and[237]
3) Subsidiary protection status: For people falling outside the scope of Refugee Convention, but still run the risk of being tortured or killed in their country of origin if returned, and/or the country of origin is dealing with internal conflict or war[238].

The Law on Foreigners and International Protection in the same manner as the Temporary Protection Regulation provides effective protection against refoulement under its article 4[239]. Furthermore, the right to seek asylum is also provided for the applicants under the Article 65 (3) of LFIP.

With this we can fairly conclude that under both system of protection in Turkey there is legal protection mechanism which will prevent the breach of protection seekers right in light of refoulement and it also provides for the opportunity to apply for some sort or refugee status depending on the nationality of the applicant.

4.2 Protection gap

Disregarding the points mentioned above for now, the deciding factor for assessment if a third country is safe in not solely dependent on the existing laws and international obligation but whether the de facto application of those obligation for the protection seekers are available in manner which they can effectively exercise their rights.

[236] Law on Foreigners International Protection; Turkey [2013] 2013/6458, entered into force April 2014, art. 61.
[237] Ibid., art. 62.
[238] Ibid., art. 63.
[239] Ibid., art. 4.

That is why we will turn our focus on the reports gathered and concerned shared by the majority of stakeholders in Turkey to decide whether the asylum system is definitely providing protection according to the law or is there a gap in protection.

4.2.1 Access to Procedures

Access to international procedure is a vital step in asylum process and if not done correctly it can lead to the violation of the principle of non-refoulement, since denying this right means not knowing whether the application is in need for protection or not which is important if countries want to avoid breaching its international obligation. In Turkey prior to 2018 there was joint registration done by UNHCR and the Provincial Director of Migration Management (PDMM), but that changed and the process for registration has been solely taken over by the Turkish government, more precisely Director General of Migration Management (DGMM)[240].

Since the transition, reports have come out regarding the difficulty to gain access to the procedures. According to European Council for on Refugees and Exiles (ECRE) individuals have faced "severe obstacles" to apply for international protection, while some nationalities, according to sources, have experienced huge problems in addition to discrimination in the process to apply for asylum[241]. According to some reports gathered by ECRE and Refugee International Afghan men are specifically given lengthy registration dates which sometimes can be over many years by PDMM[242]. Not being able to receive registration cards ("kimlik") in Turkey basically means asylum seekers are without any remedy in eventually deportation or detention, not to mentions other benefits such as

[240] The UN Refugee Agency, *Registration and RSD with UNHCR*, https://help.unhcr.org/turkey/information-for-non-syrians/registration-rsd-with-unhcr/ (accessed 5 May 2021).

[241] European Council of Refugee and Exiles (ECRE), Asylum Information Database (AIDA), *Country Report: Turkey*, update 2018, https://asylumineurope.org/wp-content/uploads/2019/04/report-download_aida_tr_2018update.pdf (accessed 5 May 2021), p. 55.
[242] Ibid., p 55 (see also Refugee International, 'You cannot exist in this place': Lack of registration denies Afghan refugees protection in Turkey, 13 December 2018).

education, healthcare is not accessible without such registration[243]. Being able to register to states one's wish to apply for protection can have major implication for individuals' rights, and shield from being refouled since without such registration a person's reason in the country cannot be concretizes which can leave those individuals prone to deportation from that country.

Asylum seekers from Syria do not get any special treatment from PDMM either for accessing the procedures for protection. Since 2011 Turkey had introduced open-door policy for Syrians entering Turkey, either from air or at the border, by mid-2015 Turkey ever so slightly changed its open-door policy based on humanitarian access to Turkish territory for Syrians[244]. However, since 2018 Turkey has stopped open-door policy or Visa-free system for Syrian national to Turkey[245].

Access to the Asylum procedure for Syrians since the transition of responsibility from UNHCR to Turkish authority had negative impact for Syrians as well as the other nationalities[246]. The number of unregistered Syrians according to the Humanitarian Implementation plan (HIP) was around 400.000 in 2017 and could well be getting higher every year as the numbers indicate[247].

[243] Ibid.
[244] ECRE, AIDA, *Country Report: Turkey*, 2018 update, March 2019. P. 126.
[245] Ibid., 112-113.
[246] Asylum Information Database (AIDA), *Country Report: Turkey*, update 2020, p.146.
[247]European Commission's Directorate-General for European Civil Protection and Humanitarian Aid Operations, *Humanitarian Implementation Plan (HIP) Turkey*, last update, 13 November 2017, https://reliefweb.int/sites/reliefweb.int/files/resources/hip_turkey_2017_ver_2.pdf (accessed 5 May 2021), P.3.

4.3 Alleged Pushback and Concern for Refoulement

According to Article 6 of TPR[248] and Article 4 of LFIP[249] Syrian and other nationalities are protected against refoulement, and the protection seekers can stay in Turkey for the duration which takes to assess his or her case[250]. Though, the protection against refoulement is not absolute in Turkey and individuals can be returned according to the Emergency Decree 676 of 2016[251]. Thus, according to the Emergency Decree which amended Article 54(2) of LFIP that also includes both temporary protection seekers and international protection seekers a person can be deported "at any time during international protection proceeding" based on these reasons:

(a) Leadership, membership or support of a terrorist organization or benefit oriented criminal group;
(b) Threat to public order or public health;
(c) Relation to a terrorist organization defined by international institutions and organizations.[252]

As we can see the provision allows for exception from the principle of non-refoulement and allows deportation based on the aforementioned grounds. The concerns over the derogation of principle of non-refoulement does not stem from the law-making aspect of it, we can also observe identical exemption under Refugee convention as well as under other state nations based on its interest of self-preservation in face of threat to general public safety, however the concern as stated by NOAS stems from its misuse in Turkey[253].

[248] Temporary Protection Regulation: Turkey, [2014] art.6.
[249] Law on Foreigners and International Protection; Turkey [2013] art. 4.
[250] Ibid., Article 80(1)(e)
[251] Emergency Executive Decree; Turkey, [2016] No.676.
[252] Law on Foreigners and International Protection; art. 54(2), amended by art.36 Emergency Executive Decree; No. 676.The provision cites art. 54(1)(b), (d) and (k), the latter inserted by Emergency Decree 676.
[253] Norwegian Organization for Asylum Seekers (NOAS*), Seeking Asylum in Turkey – A critical review of Turkey's asylum laws and practices*, Oslo, December 2018 update. p.25.

In similar fashion ECRE voiced its concerns regarding the ground for derogation stating that it being vague which could lead to varieties of interpretation by authorities[254]. Amnesty International has criticized the new Emergency Decree which have exorbitated the risk of being refouled to territory where protection seekers have fear of ill-treatment or faces risk of persecution, and according to cases gathered by Amnesty International the risk of being refouled from Turkey is a realistic one rather than theoretical[255].

What has many stakeholders doubt the quality of such deportation orders issued by the concerned authorities is that it's not the court or a judge deciding whether an individual fall into the mentioned grounds but the administration[256].

More concerning is the mechanisms the Turkish authority functions under to refouls protection seekers from its territory. The two well-known methods use to deport or deny people are volunteer returns mechanism, inadmissibility criteria based on safe third country for different nationalities under the Turkish asylum law and the alleged while apparent pushbacks from its border with Iran and Syria.

4.3.1 Volunteer Return Mechanism

Since the Turkey has dual asylum law, the situation and report depending on what category a person falls into also changes.

ECRE reports that according to the Turkish authorities over 315.000 Syrians have left Turkey in past years[257]. To this report many Syrians have been critical and repeatedly voiced their concern that the free "volunteer returns" have been used to mislead people or

[254] AIDA, *Country Report: Turkey*, update 2020, p.3.
[255] Amnesty International (AI), *Refugees at heightened risk of refoulement under Turkey's state of emergency*, 22 September 2017, p. 4.

[256] NOAS, *Seeking Asylum in Turkey – A critical review of Turkey's asylum laws and practices*, December 2018 update, p.25.
[257], AIDA, *Country Report: Turkey*, Update 2020, p.141.

coerced to sign the volunteer forms[258]. There have been reports of beating, coercion and threats among other methods used by the Turkish authorities on Syrians refugees to sign these leaflets for volunteer return from Turkey to Syria[259]. Although, UNHCR has been active in observation of these volunteer returns and UNHCR has monitored 16.805 interviews just in 2020[260]. Despite, the UNHCR effort to monitors such returns many stakeholders have been concerned that the work of UNHCR has been mainly limited to ONCUPINAR border and not focused on the "volunteer returns" from removal centers across Turkey[261]. Soon, it came no surprise (to at least to the people involved in helping protection seekers) that there was rise of approximately 20-30% in deportation cases which was mainly caused by "voluntary returns" and that the Turkish government "suspect that they were involved in a criminal act"[262].

Volunteer returns by deception, use of force and lack of legal aid is more common in detention centers for removal where there is no supervision by UNHCR[263]. Reports by lawyers in big cities such as Izmir and Istanbul in Turkey are claiming that their clients were coerced to sign volunteer return leaflets especially when lawyers are not presents at the time of signing[264].

[258] Ibid., 141.
[259] Ibid., 141.
[260] UN Refugee Agency (UNHCR), *UNHCR, Turkey: 2020 Operational Highlights,* 2020, https://reliefweb.int/sites/reliefweb.int/files/resources/UNHCR%20Turkey%202020%20Operational%20Highlights.pdf (accessed 10 May 2021), p. 7.

[261] AIDA*, Country Report: Turkey*, Update 2020, p.141.
[262] Ibid., p.41.
[263] Ibid., p. 35.
[264] Ibid., p. 34.

4.3.2 Expulsion from Turkey

We have established in Chapter 2 that a would-be refugeeing theory can also return to a fourth "safe" country and so on if the requirements within the principle of non-refoulement is respected by both the receiving state and the sending state.

It is no wonder that we find more or less a very similar regulation in Turkish law allowing for practice of the safe third country concept. Article 74 of the LFIP stipulates the concept of safe third country with identical working with the Asylum Procedure Directive, laying out criterions for considering another country safe if they meet these requirements in the article:

a) the lives or freedoms of persons are not under threat on account of their race, religion, nationality, membership of a particular social group or, political opinion;

b) implement the principle of non-refoulement with regard to countries where persons may be subjected to torture, inhuman or degrading punishment or treatment;

c) provide the opportunity to apply for refugee status, and when the person is granted refugee status, the possibility to provide appropriate protection in compliance with the Convention; ç) ensure that there is no risk of being subject to serious harm

(3) The assessment of whether or not a country is a safe third country for the applicant shall be made on case-by-case basis for each applicant, including the assessment of connections between the person and the country according to which it would be reasonable to return the applicant to the third country concerned[265].

The Connection between the applicants and a third country seems to be fulfilled if one of the requirements in RFIP no 29656/2916 Article 77 (2) is met and these requirements are:

(a) The applicant has family members already established in the third country concerned;

[265] Law on Foreigners and International Protection, art. 74 (2).

(b) The applicant has previously lived in the third country concerned for purposes such as work, education, long-term settlement;

(c) The applicant has firm cultural links to the country concerned as demonstrated for example by his or her ability to speak the language of the country at a good level;

(ç) The applicant has previously been in the county concerned for long term stay purposes as opposed to merely for the purpose of transit[266].

What causes so much concern regarding the application of "safe third country" concept is that is happening behind closed doors and the applicants which are the direct part in the case are not notified which country are "chosen" for them as the safe third country where they will be returned to from Turkey[267]. The decision of application of this concept are mainly taken by the administrative courts and the court does not clarifying the most important matter to the applicants, i.e., the country where the return is contemplated to[268]. Although, Turkey does not operate with the "list" of designated safe third countries, in practice Turkey considers Iran and Pakistan a safe country for Afghan national if the requirements in the provisions are met[269].

Considering either of the two countries safe for Afghans is a stark contrast to the reality on the ground. Pakistan and Iran have never been safe and in no time have these two countries respected or adhered to the principle of non-refoulement, let alone providing effective protection.

For Syrians on the other hand countries such as, Iran, Sudan, Haiti and Micronesia were considered safe, although as of April 2021 there has been no report of inadmissible

[266] Regulation on the Implementation of the law on Foreigners and International Protection; Turkey [2016] No. 29656. art. 77 (2).
[267] AIDA*, Country Report: Turkey*, Update 2020, p. 67.
[268] Ibid., p.67.
[269] Ibid.

applicant sent back to the mentioned countries[270].

4.4 Cases of Refoulement

In previous subchapter we have highlighted concerns from various stakeholders in Turkey. The issues which have been underscored were the either related to the practice by the relevant authorities or the certain provision within the Turkish asylum system providing little to no access to the procedure while at the main time allows for derogation from the non-refoulement.

In this subchapter we will mainly focus on the returnees under the agreement between Turkey and Greece and if they are given an opportunity to apply for protection and if their rights under the deal is upheld.

The European University Institute for Migration Policy center in 2017 had conducted 26 interviews with 43 people of whom 10 were Syrians and 33 non-Syrians for assessment of risk post deportation to Turkey[271]. We will use this policy brief to showcase the apparent lack of protection in Turkey for all those who are constantly retune to Turkey under the deal.

As stated in the case-study the outcome of those 33 non-Syrians once they were admitted to Turkey were as following:

1) Out of 33 of readmitted to Turkey, 16 of them were unable to apply for protection.
2) As confirmed by other reports in previous subchapter, 25 out of 33 were coerced in Turkish detention centers to sign returns forms to return to their respective countries.

[270] Ibid., P. 68.
[271] J, M, Alpes., S, Tunaboylu., S, Hassan., et al., ´Post-deportation risks under the EU-Turkey Statement: What happen after readmission to Turkey?´, *Migration Policy Centre, 2017,* p. 2.

3) Out of 33 non-Syrians 11 of them still find themselves in Turkey, 15 in their country of origin and the rest seven of them back in European countries by paying smugglers[272].

Once the returnees are admitted to Turkish authorities, they are immediately sent to detention centers with the main goal to expel them later to their country of origin[273]. While being detained they are held mostly incommunicado and according to the lawyers to apply for international protection while detained depends on "pure luck"[274]. Additionally, other reports regarding inhumane condition and illegal detention for long period of times with some refugee claiming to have been "beaten" regularly by the staff members of the detention center is also extremely worrisome[275]. Not only are the readmitted refugee effectively denied any opportunity to apply for international protection as foreseen in the EU-Turkey statement, additionally they are also being beaten, held incommunicado without any legal aid in these detention centers.

For instance, out of 33 non-Syrians 16 of them had stated that they were discouraged by the detention staff to not apply for asylum or otherwise generally ignored whenever they stated their wish[276].

The fate of readmitted Syrians to Turkey were arguable the same:

a) 3 out of ten were in detention centers for 10 months.
b) 6 out of 10 were in Turkey as of then, and four others were forced to return to Syria of whom one was a pregnant woman and a child[277].

Once an individual signs the "voluntary return" from a V87 code is issued which basically means that those individuals will be unable to re-access rights and benefits upon their return

[272] Ibid., p. 4.
[273] Ibid.
[274] Ibid.
[275] Ibid.
[276] Ibid. p. 5.
[277] Ibid. p.10.

to Turkey[278]. One of the many who was coerced to sign these forms and returns to Syria faces a very difficult choice and, in a phone, -interview he said that "I have two possibilities: fight and get killed or try to go out by smugglers." "The situation in Idlib is like hell." "We are asking the Turkish government to open the borders. Otherwise, we will be killed here.[279]"

From these cases it becomes evident the Turkey does not provide for sufficient procedural safeguards for individuals readmitted to apply for international protection and have their claimed examined on its merit quite contrary to what the agreement stated and requires from Turkey.

4.5 Conclusion

The situation of protection seekers in Turkey in the last five years have been a case study for all scholars around the globe. Since the agreement between the two states parties Turkey has made efforts to meet the requirements set out in the EU-Turkey statement. Turkey under its Law on Foreigners and International Protection (LFIP) and Temporary Protection Regulation (TPR) provides opportunity for protection for Syrians and non-Syrians while remains its geographic limitation. It also states at least in the law protection against refoulement which is a clear indication of European influenced.

However, maybe the European inspired law and regulations has just remined inspired without any practical implementation. It is obvious that the deal is an incentive for Turkey and promise from European member states to invite Turkey within the walls of the Union and it is maybe exactly because of this that we have seen reports about deteriorating protection for asylum seekers in Turkey.

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[278] AIDA*, Country Report: Turkey*, Update 2020, p.142.
[279] J, M, Alpes., S, Tunaboylu., S, Hassan., et al., ´Post-deportation risks under the EU-Turkey Statement: What happen after readmission to Turkey?´, *Migration Policy Centre, 2017,,* p. 8.

Since the failed coup on Erdogan which brough upon many drastic changes for the worse starting from the Emergency decree which allows for derogation from principle of non-refoulement to closing its border to both Iran and Syrian, alleged pushback and exceptionally high cases of refoulment since then. Additionally, the LFIP also allows for exception based on "safe" third country as in EU, but it operates behind curtains and without telling the people concerned which country they will be send back to. In this regards Turkey has shown that it will go to any lengths to divert protection seekers from its territory.

The evidence further suggests that individuals readmitted under the EU-Turkey deal are immediately sent to detention centers where they will be held to either sign volunteer repatriation forms or decide upon which other country is responsible for their asylum claim.

My analysis further showcased gap between the law in theory and the practice in reality. On the paper even taking the derogation from the principle of non-refoulement into account Turkey asylum law does provide sound framework with adequate protection from persecution and ill-treatment all the while providing rights for individuals to seek and apply for asylum. The reality however is different, the cases of readmitted people from Greece to Turkey can be used a prime example for this argument. Reports from UNHCR, ECRE, EASO and many other local and international stakeholders have voiced their concerns for the gap between law and reality on the ground.

Thus, there is little evidence for Turkey to be considered safe for either returns of asylum seekers from Greece and the concept of "safe" third country and safety of already many nationalities residing in Turkey. We can herby conclude that Turkey does not meet the minimum requirement by international law and Asylum Procedure Directive to be qualified as a safe third country.

5. Compatibility of the Deal with Human Rights standards and Refugee law

CHAPTER 4

The question of compatibility of the EU-Turkey deal, is the question of whether the deal allows or denies protection seekers access to fair and efficient asylum procedure both in Greece and Turkey. The findings from previous chapter will be underscored while discussing whether or not the deal is in compliance with the requirements set out in Refugee law, ECHR and EU law. For this purpose, most of sources from the previous chapters especially chapter 2 of this paper will be re-used to allows for compatibility analysis in this section thesis.

This section will be divided in three parts before a conclusion in the next chapter summarizing the paper in general. The first section will highlight some key aspect of the deal, not necessary connected to the analysis done in chapter three but rather showcasing some specific features of the readmission agreement in general. Thereafter, we will analyze if the principle of non-refoulement as envisaged in international law is in harmony with the deal, and the deal does not guarantee anything that does not meet the minimum requirement thereafter.

In the last part, the main topic of discussion will be if both parties to the deal complies with the principle of non-refoulement and what can be learned since the implementation from 2016 until recent years.

5.1 Readmission Agreement in International Law

The deal between head of European states and Turkey in 2016 which later become to known as the EU-Turkey deal (statement) is not a new phenomenon in externalization of responsibilities, and it can be traced all the way back to, at least in

Europe, second World War essentially applied to situation of displacement due to the war[280].

Such readmission agreement as we have at our hand is not problematic in international law, since it is merely establishing mechanism based on agreement between multiple states or two states to send and readmitted individuals[281]. We can argue that as such readmission agreement and more particular the EU-Turkey deal is not the legal basis for rejection of asylum seekers transiting through Turkey, so the basis for rejection or expulsion is always within the decision taken by the rejecting states (Greece)[282]. In other words, it's the expelling states (Greece) based on its implementation of the safe third country exception within the Asylum Procedure Directive that constitute the legal basis for rejection and not the deal itself. As such the deal cannot violate international law since it operates mainly as tool for the transfer of asylum seekers to another country. For instance, Greece while applying the Directive can reject asylum seekers on the basis of that Turkey is a safe country for that person as long as the requirements in the Directive are met. The decision of inadmissibility implies a relief of duty on member states (Greece) to not conduct an examination on the merit of the case, since effective protection could be sought from another third country (Turkey). Just to mention briefly that the Directive only lays down the minimum requirement on member states, and if a member state wished to undertake statues determination, they can do so without any regards to safe third country exception.

It has to be noted that while the readmission agreement per se cannot violate international law, States cannot divert from their international obligation and responsibility therein by contracting them out to a third party or "privatize" them[283].

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[280] H, Caron, ´ Refugees, Readmission Agreements, and "Safe" Third Countries: A Recipe for Refoulement? ´, *Journal of Regional Security*, vol.12 no.1, 2017 p. 34.

[281] N. Coleman, 2009, p. 305.
[282] Ibid., p.305-306.
[283] G. Goodwin-Gill and J. McAdam, 2007, p.387.

5.2 Protection against refoulment in harmony with EU/Turkey deal?

As we already established under chapter two of this paper, the protection against refoulement limits states conduct and prohibits the return of protection seekers to territory where they face real risk of persecution or ill-treatment. Furthermore, the concept of third safe country under international law is not prohibited and as such in our case Greece can return asylum seekers to Turkey as long as the legal requirement are adhered to. This means, that Greece is partially relieved from its duty to examine the substance of the case of protection seekers as long as there exist another country which can provide effective protection, i.e., protection against refoulement. However, the principle of non-refoulement also prohibits indirect refoulement under Refuge Convention, so for instance if Greece knows that individuals who are returned under the deal are in danger of being return from Turkey (intermediate country) to their respective country of origin where the face persecution it stands to logic that Greece will be found in violation of the principle.

Legomsky´s complicity principle confirms this line of reasoning that "Under a purist version of the complicity principle, one could argue that a state may not return an asylum seeker (or anyone else) to a country that will violate any of that person's human rights that the sending state itself is obligated to protect"[284]. So, if Greece knows or ought to know that Turkey in fact does not provide effective protection against refoulement under its Asylum regime or there is evidence contrary for the safety of asylum seekers it will be in clear breach of its international obligation.

Additionally, under international law the prohibition against refoulement also provides safeguard for individual protection seekers to rebut the presumption of safety of a specific third country in her/his case[285]. more accurately, we discussed this issue under the ECHR law and EU law that although the generic approach for the safety of third country under

[284] S. H., Legomsky, 2003, p.647.
[285] H. Battjes, 2006, p.412.

international is allowed, it nonetheless obliges states to allow for individuals to rebuttal this assumption if counter evidence is provided.

Under the section of EU-law we see more detailed obligation of states for protection of asylum seekers. specially EU Directive provides for exhaustive criterion as to wat constitutes a safe third country which did not exist in international law. The Directive also requires “connection” of asylum seekers with the third country and provides asylum seekers a right to request protection in the member states, these two points is absent in international legal sphere for refugees.

My analysis so far shows that the EU-Turkey deal is in line with the principle of nonrefoulement derived from Refugee law ECHR, jurisprudence of ECtHR and EU law. The legal basis of the deal is sound, and it does not seem to be in conformity with the international obligation. The deal is based on concept of safe third country, which has its roots in international law, it does not prohibit individuals to rebut the presumption of safety in her/or his case, it respects the prohibition on direct and indirect refoulement, and it also takes into account the situation of the third country.

That being said, after analysis of de facto situation of Turkey in chapter four it becomes less clear whether Turkey can be regarded a safe third country as envisaged under Asylum procedure Directive.

This brings us to the last section of this chapter, which begs the question whether Turkey actually meets the legal requirement laid out in the APD to be considered a safe third country and if Greece has taken the recent development in Turkey into account and stooped delivering inadmissibility decision for protection seekers.

5.3 Lack of Adherence by State Parties

International obligation for the protection of refugees, promises to implement and adhere to those obligation and the reality on the ground stand in contrast to each other in Turkey and Greece. We will discuss implementation of the EU-Turkey deal separately for each of these countries.

5.3.1 Implementation of EU-Turkey deal by Turkey

The first part of departure from those obligation could not have been more barren to the naked eyes than one would think, to clarify Turkey maintained and still maintains its geographical limitation to the Refuge Convention till this day. It recognizes refugee only from European countries and non-Europeans falls categorically under different protection regimes in Turkey. After the deal was concluded by both parties UNHCR pointed out that in regard to Article 38 (1)(e) for designation of Turkey as a safe third country for the return of asylum seekers that non-Europeans should be able to request refugee status in accordance with Refuge Convention of 1951[286]. The argument from UNHCR were rebutted by the European Commission claiming that it's not a requirement under Asylum Procedure Directive to lift the geographical limitation for a country to be considered a safe third country[287].

Regardless of what side of the argument one lands on the main concern arising from this limitation is whether Turkey asylum law provide for opportunity to apply for asylum or not.

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[286] UN High Commissioner for Refugees (UNHCR*), ' 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, pp. 4–7.

[287] European Commission, *Communication from the Commission to the European Parliament and the Council on the State of Play of Implementation of the Priority Actions Under the European Agenda on Migration*, COM (2016) 85 final, Brussels, 10 February 2016, https://eur-lex.europa.eu/resource.html?uri=cellar:97f62a52-3255-11e6-b497-01aa75ed71a1.0023.02/DOC_1&format=PDF (accessed 10 May 2021), p. 18.

As we analyzed under chapter three under LFIP, Turkey provides protection on group basis for Syrians and Temporary protection for all other nationalities. Although, under both regimes for Syrians and other non-European nationalities access to asylum procedure were deemed difficult per evidence. Subsequently, whether it a requirement under APD to remove geographical reservation, it's evident that as long as Turkey maintains its geographical limitation full access to procedure in accordance with Refugee Convention for all nationalities is full of hurdles.

Moving from the legal discussion, what is important in international law, is the de facto protection and compliance to the obligation mentioned in the deal and not the mere ratification of international treaties. We cannot hold the geographical limitation against Turkey if it can provide protection from persecutions and ill-treatment in accordance with the principle of non-refoulement. This question cannot be answered with certainty after what we analysis in chapter four of this paper. Many reports from various stakeholder in Turkey were not stratified by the protection provided for Syrians and other non-European's nationalities under Turkish asylum law. Specifically, since the failed coup, and the implementation of derogation of non-refoulement, unlawful removals from detention centers, lack of judicial reviews and the introduction of concept of safe third country.

Additionally, another point that needs to be clarified is that although the deal explicitly mentioned the return of irregular migrants to Turkey which suggest collective expulsion without nay access to asylum procedure is in clear violation of Article 4, Protocol 4 of ECHR and violates the right to seek asylum in Europe. It can be argued that the following paragraph in the deal contradicts such practices and people arriving to Greece with clear wish to apply for protection will have access to the procedure, otherwise as we clarify under Hirsi Jamaa vs. Italy case such practice is in clear violation of ECHR.

With these points it becomes clear that a case could be made for Turkey "legally "could be a safe third country, since it adheres to the principle of non-refoulement, theoretically people can access the asylum procedure, there is asylum law that to some degree provides

protection against refoulement in accordance with the Refuge Convention. However, once we take the actual condition on the ground into account the picture that Turkey portrays on the paper becomes inhibitive and far from consistent.

5.3.2 the Implementation of EU-Turkey Deal by Greece

The situation of Greece poses another threat for asylum seekers trying to apply for protection. From the introduction of old Greek law in 2016 and the new (4636/2019 International Protection Act) all the new arrivals fall into two distinctive asylum procedures in Greece. The so-called regular procedure where the application for protection is mainly assessed on its merit[288] and the fast-track or accelerated border procedure with geographical limitation[289] where the decision on inadmissibility is given based on safe third country exception. Every person who arrived in Greek Islands since 2016 till now were under the border procedure expect from people who are deemed vulnerable by law[290].

Greece by being a member state of European Union does comply with the Asylum Procedure Directive and it has incorporated it word by word within its asylum law[291]. Thus, a lengthy analysis of Greek law regarding the concept of safe third country is not necessary as we have already discussed it in Chapter two of this paper. The focus of current subchapter is regarding its implementation by the competent authority in Greece, more accurately by the Greek Asylum Service (GAS). The Greek Asylum Service has been delivering inadmissibility decision in all most all of the cases submitted by Syrians since

[288] International Protection Act; Greece, [2019] 2019/4636, art. 65.
[289] Ibid., art. 90 (3)
[290] Law on the Organization and Operation of the Asylum Service, the Appeals Authority, the Reception and Identification Service, the establishment of the General Secretariat for Reception the Transposition into Greek Legislation of the Provisions of the Directive 2013/23/EC; Turkey, [2016] 2016/ 4375, art. 60(4)(f).
[291] Ibid. Art. 56

the start of the deal back in 2016[292]. What has been concerning is that many reports in recent years have come out regarding the quality of these decisions. One of many concerns surrounds regarding omittance of assessment of individuals personal circumstances, with combination of usage of old and mostly partisan information about protection system of Turkey[293]. These biased reports provided by the Greek authorities boost nothing else beside their own political agenda of issuing inadmissibility and holding steadfast to the deal rather than upholding their obligation of performing serious interview to determine whether the applicant would be indeed not safe in Turkey if returned.

Such was not the state of the Greek asylum system as always. The Greek Appeals Committees before the composition of the committee was changed overturned 390 out of 393 decisions for the applicant which Turkey was deemed as a safe third country by the Greek Asylum service[294]. The main argument presented by the Committee was that although article 4 of LFIP provides protection against refoulement there was serious risk regarding the implementation of the principle of non-refoulement in practice[295]. This was seen as a huge win for the protection of Syrian national, however the victory did not last long and by 16 June 2016 the composition of the Appeal Committee changed due to the huge pressure by the European Commission and the Government itself to allow for the EU-Turkey deal to be functionable[296].

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[292] Asylum Information Database (AIDA), *Country Report: Greece*, update 2019, https://asylumineurope.org/wp-content/uploads/2020/07/report-download_aida_gr_2019update.pdf (accessed 10 May 2021), p. 128 - 130

[293] AIDA, *Country Report: Greece*, update 2020, https://asylumineurope.org/wp-content/uploads/2020/07/report-download_aida_gr_2019update.pdf (accessed 10 May 2021), p. 128 – 130.

[294] Amnesty International, *Greece: A Blueprint for Despair. Human Rights Impact of EU-Turkey Deal,* 14 February 2017, https://www.amnesty.org/download/Documents/EUR2556642017ENGLISH.PDF, accessed 20 May 2021), p. 14.

[295] H, Kaya., *The EU-Turkey Statement on Refugees*, Cheltenham, Edward Elgar Publishing, 2020, pp.84-85

[296] Amnesty International, *Greece: A Blueprint for Despair. Human Rights Impact of EU-Turkey Deal,* 14 February 2017, p. 14.

It came as no surprise that by the end of 2017 the Appeal committee with different head of appeals upheld all the 20-decision submitted by the Greek Asylum Service which laid down the precedents for Turkey to be accepted as a Safe third country[297].

In recent years the situation has not turned out for the better for asylum seekers both in Greece and Turkey. The Joint Ministerial Decision was published on 7 June 2021, declaring Turkey as de facto safe country for asylum seekers from, Afghanistan, Bangladesh, Pakistan, Somalia and Syria[298]. This decision is supposedly based on Article 86(3) of the new Greek Law 4636/2019 which allows JDM to designate a third country as safe for asylum[299]. However, as many NGOs located in Aegean Islands points out that it is not as simple as JDM makes it sounds as, since the article requires that the decision taken by authorities must be based on the recent up-to-date and objective information[300]. This article resembles the precise wording of Asylum Procedure Directive's Preamble requirement on member states to base the decision of safety of third country on reports gathered by member states, UNHCR, EASO and other local and International Stakeholders[301]. However, JDM fails to explain the basis of the decision and it mainly refers to an internal document which is sadly not available to public or lawyers to be informed and eventually appeal against[302].

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[297] Ibid. p. 15.
[298] Intersos, Refugees in Greece, " Considering Turkey as a Safe Third Country is Unacceptable", 15 June 2021, https://www.intersos.org/en/refugees-in-greece-considering-turkey-a-safe-third-country-is-not-acceptable/ (accessed 1 July 2021).

[299] International Protection Act; Greece, [2019] 2019/4636, arts. 86(3).
[300] Equal Rights Beyond Borders, THE GREEK ASYLUM SERVICE FINALLY SHARES THE "OPINION" ON THE BASIS OF WHICH TURKEY WAS DESIGNATED AS A SAFE THIRD COUNTRY AND IT ONLY SEEMS TO BE SAYING THE CONTRARY, 23 July 2021, https://equal-rights.org/site/assets/files/1303/210722-hiasequalrights-opinion_final-1.pdf (accessed 25 July 2021), p. 2.

[301] Directive 2013/33/EU, [2013], preamble rec. 48.
[302] Equal Rights Beyond Borders, THE GREEK ASYLUM SERVICE FINALLY SHARES THE "OPINION" ON THE BASIS OF WHICH TURKEY WAS DESIGNATED AS A SAFE THIRD COUNTRY AND IT ONLY SEEMS TO BE SAYING THE CONTRARY, 23 July 2021 (accessed 25 July 2021), p.3.

This particular apparently desperate decision by JDM came in light when two NGOs went to extreme lengths for the clients to get access to the "opinion" which they had based their decision on to declare Turkey as a safe country for a family from Syria, a man from Somalia and a family from Afghanistan[303].

Shockingly, or better said expectedly the reasoning behind this decision was technically wrong, legally flawed, and apparently contrary to Article 86(3) of the Greek Law[304].

Let us dissect the "opinion" according to each of the nationality which they had considered Turkey to be a safe third country for. the "opinion" is mostly a compilation of various sources which the authorities use for decision-making.

A) Syrians: the "opinion" with regards Syrian national it mentions how actually difficult it for them to register with DGMM and very big provinces in Turkey has limited registration to only exceptional cases and newborns[305]. The "opinion" further confirms the reports concerning illegal and unlawful deportation of Syrians under the name of Voluntary Return Forms[306].
B) Afghans: the "opinion" also refers to report by ECRE in 2020 that "single Afghan men face particular obstacles to accessing registration compared to other nationalities, as many PDMM are reluctant to register their asylum application[307]. Pakistani and Afghan national are treated as irregular migrants in Turkey and they are barred from registration with the authorities and the repost confirms that there was "confirmed" cases of refoulement in addition to thousands of deportations before they were given access to the asylum procedure[308].

[303] Ibid., p.3.
[304] Ibid., p.2.
[305] Equal Rights Beyond Borders, THE GREEK ASYLUM SERVICE FINALLY SHARES THE "OPINION" ON THE BASIS OF WHICH TURKEY WAS DESIGNATED AS A SAFE THIRD COUNTRY AND IT ONLY SEEMS TO BE SAYING THE CONTRARY, 23 July 2021 *therein see* the "Opinion" p. 20.
[306] Ibid., the "Opinion" p. 22-23.
[307] Ibid., p. 47.
[308] Ibid., p. 77.

What is worrisome by reading of the “opinion” which the decisions of probably many stuck in besides these in Aegean Islands is based on that it contradicts the decision taken by the authorities. The report referred to in the “opinion” does not portray Turkey as a Safe third country for the return of Asylum seekers, and even more so a case could be made with solid arguments that the “opinion” suggest that Turkey is de facto not safe for any returnees to apply for protection in Turkey.

My analysis of this chapter in General brings to the conclusion that the concerns regarding the EU-Turkey deal does not raise from its content of the aspect of its legality. As we examined the deal itself is a mere tool for expulsion of asylum seekers from sending state (Greece) to the receiving state (Turkey) and as such it cannot violate per se international law. The question of compatibility or incompatibility of the deal is directly connected to the protection provided by both party to the deal. The condition in Turkey based on the reports from valid sources can no longer be ignored, Turkey no longer meets the minimum threshold set out in the Asylum Procedure Directive and the obligation listed in the EU-Turkey deal. On the other hand, the poor quality of the decision-making organs in Greece with the recent “opinion” has showcased that their main concern is not whether Turkey is a safe country but the externalization of the Refuge “crisis”. With this I would now move onto the conclusion of this thesis.

6. Conclusion

At the start of this thesis, we asked as to what extend the EU-Turkey deal of 2016 is in compliance with the principle of non-refoulement and other human rights, more accurately the right to seek asylum. And after a thorough examination of legal domain of international law relating to the principle of non-refoulement, the conclusion can be drawn as following:

The principle of non-refoulement belonging to the International Customary Law status, embedded in Refugee Convention and ECHR provides protection to everyone facing either persecution or ill-treatment. The protection form persecution and ill-treatment are not limited to individuals' country of origins, but to anywhere a person faces a real risk of such treatment. As a result, states are prohibited to expel individuals to territories where they could be expose to such risks. This also includes to territories of another intermediate states, i.e., third country.

The EU-Turkey deal function as a mechanism facilitating transfer of either migrants or refugees to an intermediate country or a third country. The Deal per se does not violate International Law since it's not a legal deal and cannot be tried under ECJ as a treaty, despite difference of opinion among legal scholars.

Interestingly, the concept of third country which EU-Turkey deal is based on is not in odds with the International Law while it can be argued that it has its roots in the Refugee Convention. Despite of its origin in international law, it does not contain any rules or procedures as to what constitutes a safe country. This brings us, the EU-Directive where we could find exhausted criterions as what constitute a safe country and how the assessment should be conducted by member states qualifying an intermediate country as safe for the return of individuals. After a long examination of EU secondary legislation, it became clear that both the Asylum Procedure Directive containing the safe third country exception and the Qualification Directive, are in clear conformity with Refugee Convention and ECHR.

The question of compliance of the deal with principle of non-refoulement does not stem from the legal aspect of the safe third country concept, or technical content of the EU-Turkey deal thereafter, as my examination showed in chapter 2 and 4. The concerns regarding protection and the compliance with the principle of non-refoulment is prejudicated on the de facto situation in Turkey and the designation of Turkey as safe third country by the Greek authorities. What has come to light by valid sources shows that the situation of Turkey and the protection provided in Turkey to readmitted refugees under the Deal and refugees already residing in Turkey, does not meet the minimum requirement under International Law. These reports showed that Turkey does not provide effective protections against refoulement while access to asylum procedure is greatly undermined as well.

Moreover, the decision by the Greek authorities to designate Turkey safe, not only for Syrians, but four other nationalities has indeed worsened the already defect system of protection in the region for people in desperate need of international protection.

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Abstract

Refugees transiting through Turkey before applying for protection in Europe constantly face new challenges. Despite the long and perilous journey filled with illegal migration routes, extended borders, and big fences, the EU-Turkey Deal stands as an invisible and invisible wall barring everyone from accessing their fundamental right to be recognized as refugees. This paper thus examines whether states are allowed to expel asylum seekers to an intermediate country within the bulk of International Human Rights Law. Attention will be given to the relevant Convention containing the principle of non-refoulement and the right to seek asylum. Furthermore, the concept of safe third country within the Asylum Procedure Directive, which enabled the expulsion of Asylum seekers from Greece to Turkey, will also be discussed in detail. Among other requirements derived from International and regional legal protection for Refugees, to designate a country as safe for the return of protection seekers, it needs to provide "Effective Protection" against refoulement. Thus, for this reason, Turkey's legal and de facto situation will be a critical deciding factor for the Deal to be in conformity with International Legal standards.

Key words: Principle of non-refoulement, Safe third country, Turkey, effective protection, Refugee Convention, EU-Turkey deal.

Abstrakt

Flüchtlinge, die durch die Türkei reisen, bevor sie in Europa Schutz beantragen, sehen sich ständig neuen Herausforderungen gegenüber. Trotz der langen und gefährlichen Reise voller illegaler Migrationsrouten, erweiterter Grenzen und großer Zäune ist der EU-Türkei-Deal eine unsichtbare und unsichtbare Mauer, die jedem den Zugang zu seinem Grundrecht auf Anerkennung als Flüchtlinge verwehrt. In diesem Papier wird daher untersucht, ob Staaten im Rahmen des Völkerrechts der Menschenrechte Asylsuchende in ein Zwischenlande ausweisen dürfen. Auf das einschlägige Übereinkommen, das den Grundsatz der Nichtzurückweisung und das Recht auf Asylsuche enthält, wird aufmerksam gemacht. Darüber hinaus wird ausführlich auf das Konzept des sicheren Drittstaats im Rahmen der Asylverfahrensrichtlinie eingegangen, dass die Abschiebung von Asylbewerbern aus Griechenland in die Türkei ermöglichte. Neben anderen Anforderungen, die sich aus dem internationalen und regionalen Rechtsschutz für Flüchtlinge ergeben, um ein Land für die Rückkehr von Schutzsuchenden als sicher zu bezeichnen, muss es einen "wirksamen Schutz" gegen Zurückweisung bieten. Aus diesem Grund wird die Rechts- und De-facto-Situation der Türkei ein entscheidender Entscheidungsfaktor dafür sein, ob der Deal den internationalen Rechtsnormen entspricht.

Schlüsselwörter: Grundsatz der Nichtzurückweisung, sicheren Drittstaats, Türkei, wirksamen Schutz, Flüchtlingskonvention, EU-Türkei deal.