The EU-Turkey Agreement on Refugees:

A Critical Evaluation of Its Impact on the Fundamental Rights of Refugees

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I hereby declare that this thesis has not been and will not be, submitted in whole or in part to another University for the award of any other degree.

Signature:.....

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ABSTRACT

This thesis critically evaluates how the implementation of the EU-Turkey Agreement on refugees affects the rights of refugees and asylum seekers, particularly in relation to the application of the principle of *non-refoulement*. Drawing upon the political theory of Arendt, the thesis investigates whether the fundamental rights of refugees and asylum seekers are compromised during the readmission procedure. In seeking to address this issue, the thesis set out two main hypotheses. The first hypothesis is that the EU-Turkey Readmission Agreement falls short of guaranteeing "a right to have rights" for refugees, with notable limitations around the right to seek asylum, protection from *refoulement* and the availability of dignified living conditions as envisioned in the 1951 Refugee Convention and other human rights instruments. The second hypothesis is that Turkey is not a safe country for refugees. These two hypotheses were tested during fieldwork undertaken in Turkey to explore the current situation of refugees and asylum seekers there. Alongside legal and doctrinal analysis, the thesis sets out the results of interviews conducted with representatives of NGOs, judges, lawyers, senior officials and experts in Turkey who shared their experiences and observations and threw light on the practical and legal difficulties that refugees experience in seeking to assert their fundamental human right in Turkey.

The thesis argues that the two hypotheses are confirmed. First, the EU and Turkey Agreement on refugees fails to guarantee the fundamental rights of refugees because Turkey's institutional and legal structures are simply not capable of hosting a large number of refugees. Furthermore, Turkey's security concerns after the failed coup attempt in 2016 have resulted in an increased security-oriented approach and the risk of deportation of asylum seekers and refugees on the ground of public security and public order, resulting also in prolonged detention in inhuman conditions. Secondly, Turkey is not a safe third country for refugees since Turkey cannot provide effective protection to

refugees meaning that nearly three million refugees are struggling to access housing, health, education services and employment opportunities. The thesis suggests that this situation is a further form of violence against refugees and hinders their ability to claim and exercise their rights. Put simply, even though refugees are endowed with natural human rights they have no means of exercising those rights. This situation gives rise to the fundamental condition of "rightlessness" and reduces refugees to "bare humanity".

The thesis finds that the EU-Turkey 'deal' and its implementation provide important evidence to counter the suggestion that refugee protection in the region of origin is an effective solution to the refugee protection crisis. The thesis further casts doubt on the capacity of the Agreement to contribute to fair burden sharing between states. The thesis concludes that there is a need for further research to determine how protection in the region of origin could be facilitated without infringing the fundamental rights of refugees.

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ACRONYMS

AVRR	Assisted Voluntary Return and Reintegration
CAT	The Committee Against Torture
CEECs	Central and Eastern European Countries
CJEU	The Court of Justice of the European Union
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
DGMM	Directorate General of Migration Management
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EEC	European Economic Community
EU	European Union
FRONTEX	European Agency for the Managemenet of Operational Cooperation at the External Borders of the Member States of the European Union
ICCPR	International Covenant on Civil and Political Rights
ISIS	Islamic State in Iraq and Syria
JN	Judgment Number
LFIP	Law on Foreigners and International Protection
NATO	North Atlantic Treaty Organisation
NGO	Non-governmental Organisation
OGT	Official Gazette of Turkey
OJ	Official Journal
PKK	Partiya Karkerén Kurdistan (Kurdistan Workers Party)
RA	Readmission Agreement
RN	Registration Number
TCC	Turkish Constitutional Court

TCS	Turkish Council of State
TPR	Temporary Protection Regulation
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNHCR	The United Nations High Commissioner for Refugees
USA	United States of America

CHAPTER I: Introduction

1. Introduction

This thesis critically evaluates how the implementation of the EU-Turkey Agreement on refugees affects the rights of refugees and asylum seekers, particularly the principle of *non-refoulement*. Drawing upon the political theory of Arendt, the thesis investigates whether the implementation of the EU-Turkey Agreement prevents refugees from accessing their fundamental civil-political and socio-economic rights. With regard to the civil and political rights of refugees, the thesis considers whether refugees can access fair and effective asylum procedures and refugee status determination after their readmission to Turkey. It also assesses whether the Agreement triggers any human rights violations, such as unlawful deportations against the principle of *non-refoulement* or prolonged administrative detention and the availability of an effective remedy against these human rights violations. In relation to the social and economic rights of refugees, the thesis analyses whether Turkey provides dignified living conditions for refugees as envisioned in the 1951 Convention Relating to the Status of Refugees[1] such as access to accommodation, healthcare, education services and the labour market.

The research project has two dimensions that are interrelated. The first concerns the EU-Turkey Readmission Agreement (RA), which was signed on 16th December 2013[2] and came into force after ratification by the Turkish Parliament in June 2014. There was a three-year transition period for readmission of third-country nationals and stateless persons, which meant that the RA would not enter into force for third country nationals and stateless persons until June 2017. However, due to the Syrian refugee crisis, the EU and Turkey agreed to start the implementation of the RA for third-country nationals and stateless persons in June 2016.[3] That said even though the planned new date has passed, the related provision has not come into force due to increasing political tension between the EU and Turkey. The Turkish Government suspended the implementation of the EU-

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1 Henceforth referred to as the 1951 Refugee Convention.

2 Agreement between the European Union and the Republic of Turkey on the Readmission of Persons Residing without Authorisation. OJ L 134/3-27, 07.05.2014.

3 **The Republic of Turkey Ministry of EU Affairs**, EU-Turkey Visa Liberalisation Dialogue, December 2015, p. 5. http://www.ab.gov.tr/files/stib/TR-ABVizeSerbestisi.pdf.

Turkey RA on 1st of June 2016, claiming that the EU had not kept its promise and had not started visa liberalisation for Turkish nationals.[4]

The second dimension of the research project is related to the EU-Turkey Statement,[5] which was concluded in March 2016 to cope with increasing irregular migration and refugee flow into the European territory. It became an integral part of the EU-Turkey RA. It was the Syrian refugee crisis that was the main reason behind the new cooperation between the EU and Turkey. According to the EU-Turkey Statement, the EU will provide an extra € 3 bn of financial support to Turkey until the end of 2018 if Turkey continues to provide temporary protection to Syrian refugees and strengthens its borders to prevent Syrian refugees and other irregular migrants from crossing into the EU. The EU also established a very controversial resettlement scheme with Turkey known as the "one-to-one mechanism".[6] According to the EU-Turkey Statement, "for every Syrian being returned to Turkey from Greek islands, another Syrian will be resettled from Turkey to the EU".[7] The EU-Turkey Statement has been implemented for over 18 months and has affected three million people both in Turkey and Greece. Even though the Turkish government suspended the implementation of the EU-Turkey RA for third country nationals, the EU-Turkey Statement reactivated the Turkey-Greece Readmission Protocol[8] and started readmission procedures for returning irregular migrants and rejected asylum seekers. Accordingly, the EU-Turkey Statement performed the same function as

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4 **AB Haber Brussels**, EU-Turkey Readmission Agreement: Turkey Suspended Readmission Agreement, 5 June 2016, http://www.abhaber.com/turkiye-geri-kabul-anlasmasini-askiya-aldi/: Daily Sabah EU Affairs, Ankara Halts Readmission Agreement with EU, Disagrees on Anti-Terrorism Laws, 6 June 2016, https://www.dailysabah.com/eu-affairs/2016/06/06/ankara-halts-readmission-agreement-with-eu-disagrees-on-anti-terrorism-laws.

5 **The EU-Turkey Statement**, European Council of the European Union, Press Release, 18 March 2016, http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/.

6 **Carrera**, Sergio & **Guild**, Elspeth, EU-Turkey Plan for Handling Refugees is Fraught with Legal and Procedural Challenges, CEPS Commentary, 10 March 2016, https://www.ceps.eu/publications/eu-turkey-plan-handling-refugees-fraught-legal-and-procedural-challenges. **Peers**, Steve, The Final EU/Turkey Refugee Deal: A Legal Assessment, 18 March 2016, http://eulawanalysis.blogspot.co.uk/2016/03/the-final-euturkey-refugee-deal-legal.html?m=1; **Amnesty International**, EU Turkey Summit: EU and Turkey Leaders Deal Death Blow to the Rights to Seek Asylum, 8 March 2016, https://www.amnesty.org/en/latest/news/2016/03/eu-turkey-summit-reaction/.

7 **The EU-Turkey Statement**, European Council of the European Union, Press Release, 18 March 2016, http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/.

8 The Protocol for the Implementation of Article 8 of the Agreement Between the Government of the Republic of Turkey and the Government of the Hellenic Republic on Combating Crime, Especially Terrorism, Organized Crime, Illicit Drug Trafficking and Illegal Migration, OJ, 24.04.2003, No. 24735.

the EU-Turkey RA, but it is only applicable between Turkey and Greece until the EU-Turkey RA comes into force for third country nationals.

It is noteworthy that at first, the researcher aimed to analyse the human rights impact of the EU-Turkey RA but the EU-Turkey Statement brought a different dimension into the thesis and the researcher broadened the scope of the study to include the EU-Turkey Statement in her research project. In the end, this research project encompasses both the EU-Turkey RA and Statement, as both constitute the basis of readmission procedures for third country nationals, especially refugees and asylum seekers. The researcher uses "the EU-Turkey Agreement on refugee issue" when referring to both agreements.

This chapter begins with identifying the main research question, continues with an overview of the background that frames the study before explaining the rationale and significance of the thesis, the research methodology adopted and the structure of the thesis.

2. The Main Research Question

The thesis aims to answer the question 'how does the implementation of the EU-Turkey Agreement on refugee issue affect the rights of asylum seekers and refugees and specifically the principle of *non-refoulement*?' A comprehensive answer to the main research question is premised on three different sub-questions.

The first sub-question is 'why is refugees' and asylum seekers' access to their fundamental human rights problematic and does the implementation of the EU-Turkey Agreement on refugees fall short of guaranteeing "a right to have rights"?' Today this question has become very important because although refugees may have their rights protected in the abstract, everyday experiences of refugees and asylum seekers are very different. Despite some developments at international, regional and national levels, states have continued to construct many barriers to prevent asylum seekers and refugees from accessing their territory. Within these restrictive practices, readmission agreements with safe third country practices have become very significant instruments to contain refugees in the region of origin. This sub-question investigates the background to the contemporary refugee protection crisis and the continuing conflict between human rights and national sovereignty.

The second sub-question is 'what responsibilities does the EU-Turkey Agreement on the refugee issue bring for Turkey in terms of refugee protection?' Answers to this sub-

question aim to discover whether the EU-Turkey Agreement can be implemented successfully without infringing the principle of *non-refoulement*. This is very important for several reasons. First, Turkey has started to function as a safe third country or first country of asylum in accordance with EU law. This requires Turkey to respect the principle of *non-refoulement* and provide fair, effective and accessible refugee status determination. Secondly, this sub-question addresses whether readmitted refugees and asylum seekers are protected from deportation orders or prolonged detention in inhuman conditions and other human rights violations.

The third sub-question is 'what difficulties, if any, do refugees have in accessing their civil-political and socio-economic rights as a result of the implementation of the EU-Turkey Statement?' First, the researcher addresses the availability of civil and political rights for refugees and asylum seekers and whether they have access to fair and effective asylum procedures, legal assistance, translators and effective remedies against deportation and administrative detention decisions. Secondly, the researcher addresses the actual difficulties asylum seekers and refugees face in accessing their socio-economic rights including accommodation, education, health services and employment opportunities.

Two hypotheses underpin this research: the first is that the EU-Turkey Agreement falls short of guaranteeing "a right to have rights" of refugees. The right to have rights of refugees is defined as the right to seek asylum, respect for the principle of *non-refoulement* and access to the dignified living conditions as envisioned in the 1951 Refugee Convention and other human rights instruments.[9] This first hypothesis is based on the fact that the EU-Turkey Agreement does not provide any safeguards or independent monitoring system against human rights infringements or violations. The deficiencies in asylum procedures both in Turkey and Greece pose a threat to the principle of *non-refoulement* and the right to seek asylum. Whereas Greece can reject asylum seekers without allowing access to refugee status determination, Turkey is struggling to provide fair, accessible and efficient asylum procedures due to its institutional and legal deficiencies.[10] In the end, it has triggered what might be described as chain *refoulement*

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[9] See Article 14(1) of the UDHR, Article 3 of the European Convention on Human Rights (ECHR) and Article 7 of the International Covenant on Civil and Political Rights (ICCPR).

[10] **Peers**, Steve, The Final EU/Turkey Refugee Deal: A Legal Assessment, 18 March 2016, http://eulawanalysis.blogspot.co.uk/2016/03/the-final-euturkey-refugee-deal-legal.html?m=1; **Marx**, Reinhard, Legal Opinion on the Admissibility under Union Law of the European Council's

of asylum seekers and refugees to their country of origin. Furthermore, Turkey's security concerns have increased considerably since the failed coup attempt in 2016.[11] According to the new amendment to the Law on Foreigners and International Protection (LFIP), which was made by Decre 676 under the state of emergency, refugees and asylum seekers may be subjected to deportation orders if they are considered to be linked to a terrorist organisation.[12] This security-oriented approach has increased the risk of deportation of asylum seekers and refugees on the ground of public security and public order. Against these deportation decisions, there is no effective remedy or independent monitoring system.[13]

The second hypothesis is that Turkey is not a safe country for refugees because Turkey cannot provide effective protection to refugees. The fieldwork findings, which constitute a key part of this research, reveal that increasing refugee protection responsibility on Turkey has led to the downgrading of refugee protection standards. Due to the country's weak institutional capacity, access to the basic living standards, reception conditions and longer-term integration facilities have become very problematic.[14] Even though it is approaching six years since the first Syrian refugee entered Turkey, they are not able to get refugee status or citizenship status and are struggling to access their socio-economic rights, such as housing, education, health services and the labour market.[15] The thesis

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Plan to Treat Turkey like a "Safe Third State", Commissioned by Pro Asyl, 14 March 2016, pp. 9-10 https://www.proasyl.de/en/material/legal-opinion-on-the-admissibility-under-union-law-of-the-european-councils-plan-to-treat-turkey-like-a-safe-third-state/. **Roman**, Emanuela & **Baird**, Theodore & **Radcliffe**, Talia, Statewatch Analysis, Why Turkey is not a "Safe Country", February 2016, pp. 18-19; **Carrera**, Sergio & **Guild**, Elspeth, EU-Turkey Plan for Handling Refugees is Fraught with Legal and Procedural Challenges, 10 March 2016, https://www.ceps.eu/publications/eu-turkey-plan-handling-refugees-fraught-legal-and-procedural-challenges.

11 **The Guardian**, Turkey MPs Approve State of Emergency Bill Allowing Rule by Decree, 21 July 2016. https://www.theguardian.com/world/2016/jul/21/turkey-parliament-expected-to-pass-erdogan-emergency-measures; **Barbelet**, Veronique, How the Failed Coup Affects Syrian Refugees in Turkey, 25 July 2016, https://www.odi.org/comment/10427-how-failed-coup-affects-syrian-refugees-turkey.

12 In accordance with Article 54(1)(b)(d) and newly added paragraph (k) of the LFIP, foreigners who are "leaders, members or supporters of a terrorist organisation or a benefit-oriented criminal organisation"; "pose a public order or public security or public health threat", and "are assessed by international institutions and organisation as being related to a terrorist organization" will be subjected to deportation.

13 **Soykan**, Cavidan, The EU-Turkey Deal One Year On: The Rise of Walls of Shame, ECRE, 17 March 2017, https://www.ecre.org/op-ed-by-cavidan-soykan-the-eu-turkey-deal-one-year-on-the-rise-of-walls-of-shame/.

14 See Chapter VI and VII Fieldwork Findings.

15 **Skribeland**, Özlem-Gürakar, A Critical Review of Turkey's Asylum Laws and Practices, Seeking Asylum in Turkey, Norwegian Organization for Asylum Seekers, 2016, p. 21. http://www.asylumineurope.org/sites/default/files/resources/noas-rapport-tyrkia-april-2016_0.pdf. ; **Ineli-Ciğer**, Meltem, How Well Protected are Syrians in Turkey? Open Democracy, 17 January 2017,

argues that the EU-Turkey Agreement allows a form of invisible violence to be perpetrated on stateless persons, refugees and asylum seekers in Turkey. It means that even though they have a right to seek asylum and access dignified living conditions in accordance with the international human rights, they are still living outside the "pale of law" [16] and "rightless"[17] due to Turkey's geographical limitation to the 1951 Convention and deficiencies in financial and institutional structures.[18]

3. Background

On the 2nd of September 2015, three-year-old Alan Kurdi, his five-year-old brother, mother, father and at least 12 other people boarded a small plastic inflatable boat. The boat capsized about five minutes after leaving Turkey and Alan, his brothers and mother died. Alan's body was washed up on a Turkish beach, and he was pictured lying down in the sand, dressed in a red shirt, blue shorts and running shoes.[19] Alan's family was ethnic Kurds living in the Kobana area of Syria before the terrorist organisation called ISIS (Islamic State in Iraq and Syria) attacked them. When the violence in the city escalated, the family fled to Turkey along with tens of thousands of others. However, while Turkey's open door policy gave them asylum, it did not give them refugee status, only temporary protection status. They had no money, no jobs and no prospects of a future in Turkey as a safe haven. Alan's aunt, who was living in Canada, had sponsored the family using a "G5" private asylum application, but she could not complete the necessary administrative procedures due to the lack of their passports or official documents. The Canadian

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https://www.opendemocracy.net/mediterranean-journeys-in-hope/meltem-ineli-ciger/how-well-protected-are-syrians-in-turkey.

16 Arendt used this term to address the terrible situation of stateless refugees in Europe in the era before the Second World War. See **Arendt**, Hannah, The Origins of Totalitarianism, Third Edition, George Allen & Unwin Ltd: London, 1966, p. 277.

17 **Arendt**, Hannah, 1966, p. 277.

18 The Turkish Parliament adopted a Law (No. 6547) for ratifying the 1951 Refugee Convention. OGT, 18.06.2001, No: 25142. After ratification, the Convention was also ratified by a Council of Ministers Decree (2003/5923). In accordance with new adopted Turkish asylum law, Turkey maintains a 'geographical limitation to the 1951 Refugee Convention and denies refugees from 'non-European' countries of origin the prospects of long-term legal integration in Turkey. See Asylum Information Database, Introduction to the Asylum Context in Turkey, Refugee Rights Turkey, http://www.asylumineurope.org/reports/country/turkey/introduction-asylum-context-turkey.

19 **BBC News**, Alan Kurdi Death: A Syrian Kurdish Family Forced to Flee, 4 September 2015, http://www.bbc.co.uk/news/world-europe-34141716.

immigration authorities rejected their asylum application. Alan's family had tried twice to flee to Greece and it was on their third attempt that the deaths occurred.[20]

The death of Alan Kurdi is the starting point of my thesis. A few days after Alan Kurdi's death, the EU member states started negotiations with Turkey on the refugee issue and signed a Joint Action Plan on 15th October 2015, alleging that no more deaths would happen in the Aegean Sea.[21] The boy's death became the symbol of the tragedy of Syrian refugees and it resulted in an unprecedented expression of sympathy.[22] As El-Enany explains:

> Aylan Kurdi's light skin colour may have allowed white Europeans to humanise him and partake in large-scale charity giving, petition signing and demonstrations.[23]

His death was shared endlessly on the social media and the #CouldBeMyChild hashtag became trendy on twitter.[24] This tragic incident drew attention to the failure of Western countries to accept international humanitarian responsibility for refugees and it galvanized many questions: What are our moral obligations to refugees like Alan Kurdi who are forced to flea their homes in search of safety? How can we balance the humanitarian responsibilities towards refugees with contradictory political values such as national security and sovereignty?

Today refugee protection is in deep crisis.[25] While human rights abuses, wars and generalized conflicts force many people to flee their home countries, Western states are

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20 **Kingsley**, Patrick, The Deaths of Alan Kurdi: One Year On, Compassion Towards Refugees Fades, The Guardian, 2 September 2016. https://www.theguardian.com/world/2016/sep/01/alan-kurdi-death-one-year-on-compassion-towards-refugees-fades; **Parekh**, Serena, Refugees and the Ethics of Forced Displacement, Routledge Taylor & Francis Group: New York, 2017, pp. 1-2; **BBC News**, Alan Kurdi Death: A Syrian Kurdish Family Forced to Flee, 4 September 2017, http://www.bbc.co.uk/news/world-europe-34141716.

21 **The EU-Turkey Joint Action Plan**, European Commission Fact Sheet, 15 October 2015, http://europa.eu/rapid/press-release_MEMO-15-5860_en.htm.

22 **Kingsley**, 2 September 2016; **Starr**, David, From Bombs to Books, Second Edition, James Lorimer & Company Ltd. Publishers: Toronto, Second Edition, 2016, pp. 11-12.

23 **El-Enany**, Nadine, Asylum in the Context of Immigration Control: Exclusion by Default or Design? Edited by O'Sullivan, Maria & Stevens, Dallal, States, the Law and Access to Refugee Protection: Fortresses and Fairness, Hart Publishing: Oxford, 2017, p. 42.

24 See **Twitter**, 'CouldBeMyChild' (Hastag, Twitter) https://twitter.com/hashtag/CouldBeMyChild?src=hash. **Bozdağ**, Çiğdem & **Smets**, Kevin, Understanding the Images of Alan Kurdi with "Small Data": A Qualitative, Comparative Analysis of Tweets About Refugees in Turkey and Flanders (Belgium), *International Journal of Communication*, 11, 2017, pp. 4046-4048.

25 **UNHCR Press Releases**, Statement by UN High Commissioner for Refugees Filippo Grandi on World Refugee Day 2016, 20 June 2016,

not willing to take responsibility for refugees and seek ways to stem refugee flows.[26] Even though states "trumpet" the importance of the right to seek asylum and the 1951 Refugee Convention,[27] they have chosen to "clip its wings and reduce its scope as much as possible."[28] The death of Alan Kurdi is the result of these restrictive policies that undermine the fundamental right to seek asylum.[29] Alan Kurdi is only the tip of the iceberg amongst the 3,771 people who died crossing the Mediterranean Sea in 2015.[30] Around the world, 65.3 million people live outside the formal nation-state protection, and no state acknowledges political or moral responsibility for this group. Nearly 86 per cent of the world's refugees are hosted by developing countries without any prospect of durable solutions.[31] Once they are displaced from their home countries, the majority of the world's refugees are not offered permanent refugee status or any opportunity to integrate into a host community. They are kept separate and dependent on external assistance provided by international organisations.[32] This prolonged exile represents a significant challenge to the human rights of refugees. In this prolonged exile, refugees find themselves in "a long-lasting and intractable state of limbo."[33] They find a secure place but remain in exile year after year without accessing their fundamental rights. Their economic, social and psychological needs remain unfulfilled for years. A refugee in this situation cannot have an independent life but has to rely on external assistance.[34] Despite

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http://www.unhcr.org/news/press/2016/6/5767ad104/statement-un-high-commissioner-refugees-filippo-grandi-world-refugee-day.html.

26 **Hathaway**, James C. & **Neve**, R. Alexander, Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection, *Harvard Human Rights Journal*, 10, 1997, p. 115; **Anker**, Deborah & **Fitzpatrick**, John & **Shacknove**, Andrew, Crisis and Cure: A Reply to Hathaway/Neve and Schuck, *Harvard Human Rights Journal*, 11, 1998, p. 297.

27 **Gibney**, Matthew J., The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees, Cambridge University Press: Cambridge, 2004. p. 2.

28 **Kjaerum**, Morten, Refugee Protection between State Interests and Human Rights: Where is Europe Heading? *Human Rights Quarterly*, 24(2), 2002, p. 533.

29 **El-Enany**, Nadine, Who Remembers Aylan Kurdi now? Media Diversified, 4 January 2016, https://mediadiversified.org/2016/01/04/who-remembers-aylan-kurdi-now/.

30 **IOM Press Release**, IOM Counts 3,771 Migrant Fatalities in Mediterranean in 2015, 01 May 2016, http://www.iom.int/news/iom-counts-3771-migrant-fatalities-mediterranean-2015.

31 **Edwards**, Adrian, Global Forced Displacement Hits Record High, UNHCR, 20 June 2016, http://www.unhcr.org/afr/news/latest/2016/6/5763b65a4/global-forced-displacement-hits-record-high.html.

32 **Loescher**, Gil, Beyond Charity, International Cooperation and the Global Refugee Crisis, Oxford University Press: Oxford, 1993, pp. 8-9.

33 **UNHCR**, 'Protracted Refugee Situations', Executive Committee of the High Commissioner's Programme, Standing Committee, 30th Meeting, UN Doc. EC/54/SC/CRP.14, 10 June 2004, p. 1.

34 ibid.

the gravity of the refugee problem, there is no current solution; less than one per cent of official refugees are resettled permanently in a new country.[35]

This refugee protection dilemma is a consequence of the continuing conflict between the international humanitarian responsibility of states to help people who are in need of protection and the sovereign power of those states. This conflict is built into the logic of the international human rights and refugee law regime.[36] Arendt's political theory[37] highlights that a refugee protection crisis is made "permanent and insurmountable by the comprehensiveness of the nation-states system"[38] because refugees cannot go elsewhere to set up a new community. Only a state can provide for the basic needs of individuals and protect them from harm. Without any membership status, the refugee finds himself excluded from humanity altogether.[39] Arendt underlines that international law still affirms and upholds the principle of state sovereignty and is not able to solve the refugee problem.[40] Other contemporary scholars reaffirm Arendt's view on the rightless position of refugees. Agier, Aleinikoff and Benhabib emphasise that refugees are left outside of any membership status and forced to spend their entire life as a refugee because state-centred international and human rights law do not guarantee attainment of citizenship status elsewhere.[41] In that contemporary international order, as Benhabib states refugees and asylum seekers remain in the "murky domain between legality and illegality".[42]

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35 **UNHCR**, Refugee Resettlement Facts, http://www.unhcr.org/us-refugee-resettlement-facts.html.

36 **Larking**, Emma, Refugees and the Myth of Human Rights, Life Outside the Pale of the Law, Routledge Taylor & Francis Group: London, 2014, pp. 5-6; **Aleinikoff**, T. Alexander, State-Centred Refugee Law: From Resettlement to Containment, *Michigan Journal of International Law*, 14 (120), Fall, 1992, p. 121; **Goodwin-Gill**, Guy S. & **McAdam**, Jane, The Refugee in International Law, Third Edition, Oxford: Oxford University Press, 2007, p. 415; **Chetail**, Vincent, Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations Between Refugee Law and Human Rights Law, Edited by Ruhubio-Marin, Ruth, Human Rights and İmmigration, Oxford University Press: Oxford, 2014, p. 71; **Benhabib**, Seyla, The Rights of Others, Aliens, Residents and Citizens, Cambridge University Press: Cambridge, 2004, p. 69; **Haddad**, Emma, The Refugee in International Society: Between Sovereigns, Cambridge University Press: Cambridge, 2008, p. 79.

37 The thesis uses Arendt's political theory to explain the refugee protection crisis and their difficulties in accessing their fundamental rights. See Chapter II.

38 **Cotter**, Bridget, Hannah Arendt and "The Right to Have Rights", Edited by Lang, F. Anthony & Williams, John, Hannah Arendt and International Relations, Palgrave Macmillan: US, 2005, p. 104.

39 **Arendt**, 1966, pp. 291-292.

40 **Hayden**, Patrick, Political Evil in a Global Age: Hannah Arendt and International Theory, Routledge: New York, 2010, p. 56; **Cotter**, 2005, p. 104; **Gündoğdu**, Ayten, Rightlessness in an Age of Rights, Oxford University Press: Oxford, 2014, pp. 10-11.

41 **Agier**, Micheal, On the Margins of the World: The Refugee Experience Today, Translated by D. Fernbach, MA Polity Press: MA, 2011, pp. 49-50; **Aleinikoff**, 1992, pp. 120-121; **Benhabib**, Seyla, 2004, p. 69.

42 **Benhabib (b)**, p. 46.

This continuing conflict between human rights and state sovereignty affects the fundamental rights of refugees under three main headings. First, the right to seek asylum is recognised by Article 14 of the Universal Declaration of Human Rights (UDHR) as a fundamental human right, but the obligation to grant asylum continues to be "jealously guarded by states" as a sovereign privilege.[43] As Arendt points out, the right of asylum has never become a law of nation states and has a somewhat "shadowy existence".[44] Accordingly, emigration is a matter of human rights, but immigration remains a concern of state sovereignty.[45] It is contradictory within universalistic human rights because when an individual has lost membership of her/his state, the international state system with its concept of human rights does not provide a membership status for the individual in another state.[46] The international system assumes that all individuals will belong to a state. The irony is however that no state is actually offering membership to refugees within their jurisdiction to correct the current situation of refugees.[47] The right to asylum and naturalisation are not guaranteed as fundamental human rights, and states cannot be forced to do so due to the principle of state sovereignty. Thus a refugee stays as a refugee with a "modicum of rights that form a sub-category of rights generally available to individuals via the institution of citizenship".[48] A refugee may never reach citizenship status but will remain a "quasi-citizen".[49] It is not surprising that millions of refugees around the world are living in camps without any status or a durable solution.[50] Krasner describes this situation as "organised hypocrisy."[51] Aleinikoff states that the refugee problem has been created by states, but states fail to take responsibility for refugees and restore their situation.[52] In this contradictory international state system, as Buzan describes,

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43 **Benhabib**, 2004, p. 69.

44 **Arendt**, 1966, pp. 280-281.

45 **Haddad**, 2008, pp. 87-89.

46 **Chetail**, 2014, p. 71.

47 **Haddad**, Emma, Refugee Protection: A Clash of Values, *The International Journal of Human Rights*, 7(3), 2010, pp. 8-10; **Cotter**, 2005, p. 104.

48 **Haddad**, 2008, p. 88.

49 **Haddad**, 2010, p. 10.

50 **Aleinikoff**, 1992, pp. 120-125.

51 **Krasner**, D. Stephen, Sovereignty: Organized Hypocrisy, Princeton: New Jersey, 1999, pp. 125-126, cited by **Haddad**, 2010, p. 15.

52 **Aleinikoff**, 1992, pp. 120-121.

> The security of individuals is locked into an unbreakable paradigm in which it is partly dependent on, and partly threatened by the state.[53]

The second negative consequence of the continuing conflict between state sovereignty and human rights is the deficiencies in the allocation of refugee responsibility between contracting states. The 1951 Refugee Convention only triggers the responsibility of states when asylum seekers reach the territory of states.[54] Accordingly, states have no responsibility towards refugees who are living outside their territory. This provides states with an incentive to discourage or prevent asylum seekers from seeking protection on their territory.[55] Thus, states are focusing on containment of refugees in the regions of origin under many headings, such as technical cooperation with third countries or readmission agreements with safe third countries.[56]

Today under the 1951 Refugee Convention, it is impossible to share refugee responsibility fairly because there is no strongly institutionalized burden-sharing norm, and it is largely discretionary.[57] States always prefer to benefit from "free riding" opportunities due to the absence of binding institutional mechanisms for burden sharing. Thus the refugee protection regime suffers from "collective action failure."[58] In Suhrke's groundbreaking article, she argues that while states recognise the value of refugee

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53 **Buzan**, Barry, People, States and Fear, Harvester Wheatsheaf: London, 2nd edition, 1991, pp. 363-364.

54 **Gammeltoft-Hansen**, Thomas, Outsourcing Asylum: The Advent of Protection Lite, Edited by Bialasiewicz, Luiza, Critical Geopolitics: Europe in the World: EU Geopolitics and the Making of European Space, Routledge: London, 2011, pp. 129-130.

55 **Thielemann**, Eiko & **El-Enany**, Nadine, Refugee Protection as Collective Action Problems: Is the EU Shirking Its Responsibilities? , *European Security*, 19(2), June 2010, pp. 209-210.

56 **Hyndman**, Jennifer & **Mountz**, Alison, Another Brick in the Wall? *Neo-Refoulement* and the Externalization of Asylum by Australia and Europe, *Government and Opposition*, 43(2), 2008, p. 268; **Cassarino**, Jean-Pierre, Unbalanced Reciprocities: Cooperation on Readmission in the Euro-Mediterranean Area, The Middle East Institute, Special Edition, Viewpoints, Washington D.C., 2010, p. 29, SSRN: https://ssrn.com/abstract=1730633 or http://dx.doi.org/10.2139/ssrn.1730633; **Shacknove**, Andrew, From Asylum to Containments, *International Journal of Refugee Law*, 5(4), 1993, pp. 516-517; **Yazan**, Yeliz, European Union's Irregular Migration "Paradox": The Case of EU-Turkey Readmission Agreement, Edited by Eroğlu, Deniz & Cohen, Jeffrey H & Sirkeci, Ibrahim, Turkish Migration 2016 Selected Papers, Transnational Press London: London, 2016, p. 37.

57 **Betts**, Alexander, International Cooperation in the Refugee Regime, Edited by Betts, Alexander & Gil, Loescher, Refugees in International Relations, Oxford University Press: Oxford, 2004, p. 106; **Uçarer**, M. Emek, Burden Shirking, Burden Shifting, and Burden Sharing in the Emergent European Asylum Regime, *International Politics*, 43 (2), 2006, pp. 223-224; **Thielemann** & **El-Enany**, pp. 209-210; **Kritzman-Amir**, Tally, Not in My Backyard: On the Morality of Responsibility Sharing in Refugee Law, *Brooklyn Journal of International Law*, 34(2), 2008, p. 360.

58 **Suhrke**, Astri, Burden-Sharing During Refugee Emergencies: The Logic of Collective Versus National Action, *Journal of Refugee Studies*, 11(4), 1998, p. 399; **Thielemann** & **El-Enany**, pp. 209-210; **Betts**, p. 106.

protection both for security and humanitarian reasons collectively, states' optimum strategy is to "free ride" on other states' contributions. Refugee protection has some important "public good" characteristics, if one state admits refugees, others benefit from the greater international order without admission of any refugees.[59] She explains this situation with the theoretical analogy of the Prisoner's Dilemma:

> There is a disjuncture between what is rational for an individual state acting in isolation and what would be a rational strategy for states acting collectively.[60]

Betts[61] challenges this thinking and argue that the Prisoner's Dilemma partly misrepresents the reason for the collective action failure in the refugee protection regime. He suggests the "Suasion Game" instead of the Prisoner's Dilemma and argues that States have asymmetrical power relations and use these power relations in refugee responsibility sharing. The Suasion game will arise when one player is stronger and has little interest in cooperation; the other is weaker and has a very little choice either "takes what is on offer" or "hurts itself more by not cooperating at all."[62] This game theory indicates that less developed countries bear the majority of the refugee burden and they cannot compel other countries to take more responsibility due to their weak position in international relations. The large refugee burden on the less developed countries over a long period of time suggest that the Suasion game truly explains the unfair refugee responsibility between the South and the North.

As Gammeltoft and Betts point out, this unfair burden sharing has significant negative impacts on providing an effective, fair and accessible refugee protection regime.[63] Unfortunately, this approach has led to "protracted refugee situations" in which refugees often remain in confined camps or urban settlements in insecure border locations without access to their fundamental rights.[64] In such circumstances, living conditions of refugees, especially in the less developed host countries, are very poor.[65] As the situations of refugees have remained unresolved and increasingly protracted, host states perceive the

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59 **Suhrke**, pp. 399-400.

60 ibid.

61 **Betts**, 2004, pp. 53-54.

62 **Betts**, 2004, pp. 54-55.

63 **Betts**, 2004, pp. 100-110; **Gammeltoft-Hansen**, p. 139.

64 **Betts**, 2004, p. 111; **Betts**, Alexander & **Milner**, James, The Externalisation of EU Asylum Policy: The Position of African States, Working Paper No. 36, University of Oxford, 2006, pp. 27-28.

65 **Gammeltoft-Hansen**, 2011, p. 139.

hosting of large number of refugees as an “unending burden” and they have started to undermine their fundamental responsibility of the principle of *non-refoulement*.[66] As highlighted by Chimni,

> When the link between the two principles [of burden sharing and refugee protection] is snapped what you will witness is the devaluation of the core protection principles, in particular of *non-refoulement*.[67]

The third negative consequence is that despite the global applicability of the 1951 Refugee Convention, the protection of refugees remains dependent on the individual sovereign states. As Haddad highlights, as human rights are cosmopolitan, the refugee is “an expression of positive law”.[68] Thus, the actual protection afforded to refugees is ultimately dependent on individual sovereign states and their enforcement. If we take into account the enforceability of the rights, the 1951 Refugee Convention might not secure the rights of refugees. Although refugees are theoretically endowed with natural rights, they have no means of using their rights. They are caught by the so-called "possession-paradox” of human rights. Refugees do not belong to any state and thus have no means of claiming their rights associated with membership of a political community.[69] As Joppke explains states are free to prescribe the conditions under which the right of asylum is to be enjoyed. This gives states discretion to deny permission to work, confine refugees to certain areas, or even subject them to strict detention. States deliberately provide less attractive reception conditions to deter asylum seekers from coming to their territory.[70]

Furthermore, rights provided to refugees vary according to host states’ social and economic conditions. For example, although social and economic rights are guaranteed under the Convention, there are great variations and great deficiencies especially in the conditions of refugees in the less developed countries. This specifically decreases the quality of protection afforded to refugees in the less developed countries and this will

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66 **Betts**, p. 111; **Betts**, Alexander & **Milner**, James, The Externalisation of EU Asylum Policy: The Position of African States, Working Paper No. 36, University of Oxford, 2006, pp. 27-28.

67 **Chimni**, B.S. The Principle of Burden Sharing: Some Reflections, Presentation to the Summer School in Forced Migration, University of Oxford, July 1999, p. 7, cited by **Betts**, Alexander & **Milner**, James, The Externalisation of EU Asylum Policy: The Position of African States, Working Paper No. 36, University of Oxford, 2006, p. 32.

68 **Haddad**, 2008, p. 85; **Haddad**, 2010, p. 7.

69 **Haddad**, 2008, p. 86; **Haddad**, 2010, p. 8.

70 **Joppke**, Christian, Asylum and State Sovereignty: A Comparison of the United States, Germany, and Britain, *Comparative Political Studies*, 30(3), 1997, p. 262.

result in "protection lite", understood as the presence of formal protection but with a lower certainty and level of rights.[71] This lower level of protection does not meet even the basic necessities of life effectively. As Phuong states "protection that is not effective is simply not protection."[72] Considering restrictive policies of states towards refugees and decreasing quality of protection of refugees, Tuitt argues that contrary to popular belief, refugee law is not motivated exclusively by humanitarian concerns: in fact, refugee law is both directly and indirectly targeted at reducing the overall cost of displacement by restricting the definition of refugee and the application of the concept to limited numbers. It effectively excludes from its scope the majority of the world's displaced people and contains 'costly' refugees within their state of origin. She also highlights that states tend to shift their refugee responsibility on to other states, very often the ones least equipped to deal with them. She describes contemporary refugee protection as the "death of the refugee" concept.[73]

Regarding these state-centred and burden-shifting tendencies of states at the international level, the EU has followed the same path and developed a common asylum policy to externalise its refugee protection regime. Although the EU has a rights based approach for assessing protection claims of asylum seekers within their jurisdiction, it has simultaneously established barriers that prevent asylum seekers from entering EU territory and triggering its protection obligations.[74] To prevent irregular migration and refugee flows, the EU has adopted a new proactive migration regime, which focuses on populations instead of individuals[75] and externalised migration policies under two main components. The first one is the exportation of classical migration control instruments to third countries outside the EU, such as strict border control measures to combat illegal

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71 **Gammeltoft-Hansen**, 2011, p. 133.

72 **Phuong**, Catherine, The Concept of 'Effective Protection' in the Context of Irregular Secondary Movements and Protection Regions of Origin, Global Migration Perspectives, no. 26, April 2005, p. 3.

73 **Tuitt**, Patricia, False Images: The Law's Construction of the Refugee, Pluto Press: London, 1996, p. 7.

74 **Frelick**, Bill & **Kysel**, Ian M. & **Podkul**, Jennifer, The Impact of Externalisation of Migration Controls on the Rights of Asylum Seekers and Other Migrants, *Journal on Migration and Human Security*, 4(4), 2016, p. 191; **Gibney**, 2004, p. 2; **Leiserson**, Elizabeth, Securing the Borders Against Syrian Refugees: When Non-Admission Means Return, Yale Journal of International Law, 42, 2017, pp. 208-209.

75 **Spijkerboer**, Thomas, Changing Paradigms in Migration Law Research, Edited by Carolus, Grütters & Sandra, Mantu & Paul, E. Minderhoud in Migration on the Move: Essays on the Dynamics of Migration, Brill Nijhoff: Leiden, 2017, pp. 17-18.

migration, smuggling and trafficking and strengthening migration management in transit countries. The second component of externalisation is to facilitate the return of irregular migrants and rejected asylum seekers to their country of origin or third countries. In this context, RAs have been seen as the main component of externalisation of refugee protection responsibility[76] and used as a major tool to implement "a new security approach" in the neighbourhood.[77] They are basically used as "an external protection fence" or "contention barrier" for the EU.[78] By signing a RA with source and transit countries, the EU can transfer the management of border controls to third countries. If third countries fail to prevent irregular entry of migrants into the EU, they will have to take back migrants and asylum seekers on the basis of RAs. By doing so, third countries have become the border guards of the EU's external borders.[79]

Readmission agreements with safe third country practices are the main mechanism used by the EU for transferring their legal refugee protection responsibilities to other less developed states.[80] Considering EU's burden shifting tendency in its relations with neighbours, it is not surprising that the EU sought to secure its own external borders by strengthening its cooperation with Turkey due to its proximity to the conflict zones. Under the EU-Turkey RA, Turkey would stem the flow of irregular migrants, particularly asylum seekers and refugees, through an integrated border management, interception operation and visa restriction strategy against refugee producing countries.[81] Turkey was also persuaded to develop a new refugee protection regime through the conditionality driven policy of the EU's membership process and so started to take responsibility for all

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76 **Boswell**, Cristina, The "External Dimension" of EU Immigration and Asylum Policy, *International Affairs*, 79(3), 2003, p. 622.

77 **Trauner**, Florian & **Kruse**, Imke, EC Visa Facilitation and Readmission Agreements: Implementing a New EU Security Approach in the Neighborhood, CEPS Working Document No. 290/April 2008, p. 40.

78 **Morgades**, Silvia, The Externalization of the Asylum Function in the European Union, GRITIM Working Paper Series, Number 4, Spring 2010, p. 16.

79 **Billet**, Carole, EC Readmission Agreements: A Prime Instrument of the External Dimension of the EU's Fight against Irregular Immigration. An Assessment After Ten Years of Practice, European Journal of Migration and Law, 12(1), 2010, p. 74; **Trauner** & **Kruse**, 2008, p. 40; **Betts**, & **Milner**, 2006, p. 8.

80 **Lavenex**, Sandra, Passing the Buck: European Union Refugee Policies towards Central and Eastern Europe, *Journal of Refugee Studies*, 11(2), 1998, pp. 141-142; **Hyndman** & **Mountz**, 2008, p. 268.

81 **Tokuzlu**, Lami Bertan, Burden-Sharing Games for Asylum Seekers between Turkey and the European Union, European University Institute, Florence Robert Schuman Centre for Advanced Studies, EUI Working Paper RSCAS, May 2010, p. 1.

refugees and asylum seekers within its own territory.[82] Therefore, Turkey has been transformed from solely a transit country en route to the EU into "reluctant host" of millions of refugees and asylum seekers.[83]

The Syrian refugee crisis has added a different dimension to the continuing cooperation between the EU and Turkey in managing the refugee flows. After facing an intensive refugee flow into its territory, the EU offered Turkey a new cooperation model in March 2016. In a response to the solidarity crisis among the member states of the EU and increasing far right sentiments in many of them,[84] the EU turned to Turkey in an atmosphere of panic to find a way to prevent new arrivals and facilitate their removal from Greece. On 18 March 2016, the 28 EU heads of state and the Turkish government signed the EU-Turkey Statement, better known today as the 'refugee deal'. The refugee deal is that Turkey readmits all returning refugees and migrants and limits the departure of new ones while Greece must detain all new arrivals and return them to Turkey. There is no doubt that the EU-Turkey refugee deal aims to erect an invisible wall and buffer zone around its territory. Greece and Turkey are positioned as the internal and external buffer zones in this refugee deal. This exclusionary approach of the EU member states also aims to control rising far right sentiments at home through stopping the refugee flows into the EU territory. The EU-Turkey refugee deal signalled to the European populations this message:

> Refugees would not come knocking at their door because someone elsewhere-be it in Greece and Turkey-was doing the dirty job of gatekeeper.[85]

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82 **Kirişçi**, Kemal, Turkey's New Draft Law on Asylum: What to Make of It? Edited by Paçacı Elitok, Seçil, & Straubhaar, Thomas, Turkey, Migration and the EU: Potentials, Challenges and Opportunities, Hamburg: Hamburg University Press, 2012, p. 73; **Paçacı Elitok**, Seçil, Turkish Migration Policy Over the Last Decade: A Gradual Shift Towards Better Management and Good Governance, Turkish Policy Quarterly, Spring 2013, 12(1), p. 170.

83 **Cherti**, Myriam & **Grant**, Peter, The Myths of Transit: Sub-Saharan Migration in Morocco, Institute for Public Policy Research, London, June 2013, p. 65; **Strik**, Tineke, Countries of Transit: Meeting New Migration and Asylum Challenges, Parliamentary Assembly Council of Europe, Doc. 13867, 11 September 2015, paras. 6-9; **Düvell**, Franck, Turkey's Transition to an Immigration Country: A Paradigm Shift, *Insight Turkey*, 16(4), 2014, p. 95.

84 **Foster**, Peter, The Rise of the Far-Right in Europe is not a False Alarm, The Telegraph, 19 May 2016, http://www.telegraph.co.uk/news/2016/05/19/the-rise-of-the-far-right-in-europe-is-not-a-false-alarm/; **Christopoulos**, Dimitris, Refugees are the Bogeyman: the Real Threat is the Far Right, Open Democracy, 9 November 2016, https://www.opendemocracy.net/dimitris-christopoulos/refugees-are-bogeyman-real-threat-is-far-right.

85 **Christopoulos**, 2016.

After the EU-Turkey refugee deal, the daily crossing from Turkey to Greece dropped by 97 per cent.[86] This significant reduction in border crossing was seen by the EU as a success story and they sought to replicate it with other transit countries[87] but Christopoulos describes it as 'cynical' and argues that the EU is "legitimising xenophobia" and poisoning its future through undermining its values and moral grounds.[88]

The EU-Turkey Statement is presented by the EU as a humanitarian act by reducing the tragic deaths of refugees in the sea through providing a dignified life for refugees in Turkey.[89] The EU Commission claims that Turkey provides equivalent rights to conditional refugees and temporary protection status holders as for conventional refugees and Turkey's geographical limitation does not constitute a barrier to be a safe third country for refugees.[90] Thym also argues that the safe third country concept does not require full ratification of the 1951 Refugee Convention as long as the actual practice in the country is consistent with the requirements of the Asylum Procedures Directive.[91] Turkey provides temporary protection to asylum seekers regardless of their country of origin and provides access to education and the labour market. Also, the EU-Turkey Statement is much more than burden shifting; because it contributes to an international solution by providing three billion euro for advancing the living conditions of more than

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86 Report from The Commission to the European Parliament, the European Council and the Council, Fifth Report on the Progress Made in the Implementation of the EU-turkey Statement, COM (2017) 2014 final, 2 March 2017, pp. 2-3.

87 **Giuffré,** G. Maria, From Turkey to Libya: The EU Migration Partnership from Bad to Worse, Eurojus 2017, http://rivista.eurojus.it/from-turkey-to-libya-the-eu-migration-partnership-from-bad-to-worse/; **Knaus**, Gerald, Realism Over Migrant Returns Can Break Deadly Cycle in Mediterranean, Refugees Deeply, 11 July 2017, https://www.newsdeeply.com/refugees/community/2017/07/11/realism-over-migrant-returns-can-break-deadly-cycle-in-mediterranean: **Campbell**, Zach, Europe's Plan to Close Its Borders Relies on Libya's Coast Guard Doing Its Dirty Work, Abusing Migrants, *The Intercept*, November 2017, https://theintercept.com/2017/11/25/libya-coast-guard-europe-refugees/: **Biondi**, Paolo, The Case for Italy's Complicity in Libya Push-Backs, *Refugees Deeply*, 24 November 2017, https://www.newsdeeply.com/refugees/community/2017/11/24/the-case-for-italys-complicity-in-libya-push-backs.

88 **Christopoulos**, Dimitris, EU Deal with Turkey Legitimises Far Right in Europe: Refugees Deeply, 17 March 2017, https://www.newsdeeply.com/refugees/community/2017/03/17/e-u-deal-with-turkey-legitimizes-far-right-in-europe-christopoulos.

89 Report from The Commission to the European Parliament, the European Council and the Council, Fifth Report on the Progress Made in the Implementation of the EU-turkey Statement, COM (2017) 2014 final, 2 March 2017.

90 **European Commission Report** on Progress by Turkey in Fulfilling the Requirements of Its Visa Liberalization Roadmap, COM (2014) 646, 20.10.2014, p. 17.

91 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), OJ L 180/60-95, 29.06.2013.

3 million refugees in Turkey and also extends resettlement opportunities for Syrians in Turkey.[92] In tune with Thym, Hailbronner suggests that Turkey's full ratification of the 1951 Refugee Convention is not required to be a safe third country in accordance with Article 38 of the Asylum Procedures Directive. Turkey must only meet in substance the material standards of the 1951 Refugee Convention.[93]

Against these claims of the European Commission and other scholars, this thesis aims to uncover whether the EU-Turkey Agreement on the refugee issue provides safeguards against human rights violations and whether Turkey is a safe country for refugees. Now more than 18 months since the EU-Turkey Statement was agreed, there is little evidence of the alleged positive effects of the refugee deal in practice. Since Alan Kurdi's death, the dangers faced by those fleeing across the Mediterranean Sea have only worsened. In accordance with the UNHCR's statistics, 5,143 people died or were missing in the Mediterranean in 2016 compared to the death of 3,771 people in 2015.[94] These statistics support the arguments of Frelick & Kysel and Podkul that externalisation of migration policy is often "deceptively framed as …a life-saving humanitarian endeavour rather than a strategy of migration containment and control."[95]

The EU has two hidden strategies under its humanitarian approach: First, the refugee deal with Turkey helps the EU to realise its protection responsibility at lower cost by shifting its refugee protection responsibility to Turkey with limited resettlement opportunities and financial support. That view is also supported by Gammeltoft-Hansen, who argues that outsourcing refugee protection responsibility to less developed countries represents a move to achieve "a market mechanism of rights", in which protection is realised at the

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92 **Thym**, Daniel, Why the EU-Turkey Deal Can be Legal and a Step in the Right Direction, EU Immigration and Asylum Law and Policy, 11 March 2016, http://eumigrationlawblog.eu/why-the-eu-turkey-deal-can-be-legal-and-a-step-in-the-right-direction/.

93 **Hailbronner**, Kay, Legal Requirements for the EU-Turkey Refugee Agreement: A Reply to J. Hathaway, 11 June 2016, VerfBlog, http://verfassungsblog.de/legal-requirements-for-the-eu-turkey-refugee-agreement-a-reply-to-j-hathaway/.

94 **The UNHCR**, Mediterranean Death Toll Soars, 2016 is Deadliest Year Yet, http://www.unhcr.org/news/latest/2016/10/580f3e684/mediterranean-death-toll-soars-2016-deadliest-year.html. : Missing Migrants Tracking Deaths Along Migratory Routes, https://missingmigrants.iom.int/mediterranean; **Spijkerboer**, Thomas, Fact Check: Did the EU-Turkey Deal Bring Down the Number of Migrants and of Border Deaths? 28 September 2016, https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2016/09/fact-check-did-eu.

95 **Frelick** & **Kysel** & **Podkul**, 2016, p. 193.

lowest possible cost.[96] Second, as Lavanex and Hyndman and Mountz highlight, RAs with safe third country practices are burden-sharing games played by the EU for transferring their legal and humanitarian responsibilities to other less developed states.[97] In Betts's Suasion Game, Turkey is a weak player that accepts the EU's offer for burden sharing or "hurts itself more by not cooperating at all."[98] After the refugee deal, anyone who arrives irregularly on the Greek islands after 20 March 2016 is returned to Turkey on the ground of it being a safe country of asylum or first country of asylum. In accordance with inadmissibility procedures, the Greek asylum service only assesses whether Turkey is safe for the applicants on a case-by-case basis, but it does not assess the individual's need of international protection. These procedures aim to deflect responsibility from Europe, which is one of the wealthiest continents in the world to Turkey, a country already hosting 3 million refugees.[99]

There is much criticism by human rights organisations[100] and scholars[101] that the principle of *non-refoulement* and the right to seek asylum has been undermined. Regarding access to fair and effective asylum procedures, Greece cannot provide this due to its institutional deficiencies.[102] Asylum seekers are waiting at least 18 months in the hotspots without access to asylum procedures or dignified reception conditions.[103] Refugees and asylum

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96 **Gammeltoft-Hansen**, 2011, p. 139.

97 **Lavenex**, 1998, p. 142; **Hyndman** & **Mountz**, 2008, p. 268.

98 **Betts**, 2004, pp. 100-110.

99 **Lovertt**, Asleigh & **Whelan**, Claire & **Rendón**, Renata, The Reality of the EU-Turkey Statement**:** How Greece has Become a Testing Ground for Policies that Erode Protection for Refugees, Publishers: International Rescue Committee & Norwegian Refugee Council and Oxfam Joint Agency, Briefing Note, 17 March 2017, p. 2.

100 **Amnesty International**, A Blueprint for Despair: Human Rights Impact of the EU-Turkey Deal, January 2017, http://www.amnesty.eu/content/assets/Reports/EU Turkey_Deal_Briefing_Formatted_Final_P4840-3.pdf.; **Lovertt** & **Whelan** & **Rendón**, 2017, p. 2; **Soykan**, 17 March 2017.

101 **Yabancı**, Bilge, The EU's Self-Inflicted Traps Undermine Its Ability to Respond to Turkey's Creeping Authoritarianism, Open Democracy, 22 March 2017, https://www.opendemocracy.net/author/bilge-yabanci; **Squires**, Nick, A Year on from EU-Turkey Deal, Refugees and Migrants in Limbo Commit Suicide and Suffer From Trauma, The Telegraph, 14 March 2017. http://www.telegraph.co.uk/news/2017/03/14/year-eu-turkey-deal-refugees-migrants-limbo-commit-suicide-suffer/; **Barbulescu**, Roxana, Still a Beacon of Human Rights? Considerations on the EU Response to the Refugee Crisis in the Mediterranean, Mediterranean Politics, 22(2), 2017, p. 307; **Sciurba**, Alessandra & **Furri**, Filippo, Human Rights Beyond Humanitarianism: The Radical Challenge to the Right to Asylum in the Mediterranean Zone, Antipode, 00(0), 2017, p. 7.

102 **Sklerapis**, Dimitris, The Greek Response to the Migration Challenge: 2015-2017, Konrad Adenauer Stiftung, 16 March 2017, pp. 5-7; **Nielsen**, Nikolaj, Greece Paying Asylum Seekers to Reject Appeals, EU Observer, 3 May 2017, https://euobserver.com/migration/137762.

103 **Guild**, Elspeth & **Costello**, Cathryn & **Moreno-Lax**, Violeta, Implementation of the 2015 Council Decisions Establishing Provisional Measures in the Area of International Protection for the Benefit

seekers are stranded and it is hard to claim that the 'refugee deal' respects the rights of refugees and asylum seekers. The reality on the ground is that even though the EU-Turkey Statement aims to "end (...) human suffering", it is actually "prolonging and exacerbating suffering" of asylum seekers.[104] Currently, nearly 60,000 people, including children and vulnerable categories of asylum seekers, are trapped in inhuman and rights abusive conditions in Greece.[105] Despite the European Council's commitment to implement the relocation scheme that aims to share the responsibility of refugees landing on Greek islands, some member states' blunt refusal and the lack of mutual trust between them has left refugees and asylum seekers in a precarious position.[106] Now Greece has turned into "a laboratory" of the EU for deterring irregular arrivals of asylum seekers and creating a fortress Europe.[107]

At the same time, Turkey is left alone with more than 3 million stranded refugees. Even though the EU claims that Turkey is a safe third country for refugees in order to legitimise the return of refugees and asylum seekers, Turkey is struggling to provide them with "effective protection" in practice. The actual situation of refugees is very important for defining the consequences of the refugee deal. This thesis goes further in examining the legal and institutional deficiencies in Turkey and reveals the real consequences of the refugee deal on the rights of refugees and asylum seekers.

4. The Rationale and Significance of the Study

The rationale for this study emanated from the researcher's desire to uncover the compatibility of the EU-Turkey Agreement with human rights and international refugee

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of Italy and of Greece, European Parliament Directorate-General for Internal Policies, Policy Department Cıtizens' Rights and Constitutional Affairs, March 2017, p. 48; **Toygür**, İlke & **Benvenute**, Bianca, One Year on: An Assessment of the EU-Turkey Statement on Refugees, Elcano Royal Institute, 21 March 2017, p. 5; **Refugee Support Aegean**, Serious Gaps in the Care of Refugees in Greek Hotspots; Vulnerability Assessment System is Breaking Down, 17 July 2017, http://rsaegean.org/serious-gaps-in-the-care-of-refugees-in-greek-hotspots-vulnerability-assessment-system-is-breaking-down/.

104 **Lovertt** & **Whelan** & **Rendón**, 2017, p. 6.

105 **European Commission Report**, Annex to the Report from the Commission to the European Parliament, the European Council and the Council, Tenth Report on Relocation and Resettlement, COM (2017) 202 final, 2.3.2017. https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20170302_tenth_report_on_relocation_and_resettlement_annex_3_en.pdf.

106 **Vedsted-Hansen**, Jens, Current Protection Dilemmas in the European Union, Edited by Carolus, Grütters & Sandra, Mantu & Paul, E. Minderhoud in Migration on the Move: Essays on the Dynamics of Migration, Brill Nijhoff: Leiden, 2017, p. 96.

107 **Lovertt** & **Whelan** & **Rendón**, 2017, pp. 8-9.

law. Although human rights organisations, such as Amnesty International, Human Rights Watch and Pro Asylum frequently publish reports and draw attention to the human rights aspects of the Agreement, there is no official report published by the EU considering its impact on human rights, especially its triggering effect on *refoulement* of refugees on border areas.[108] The EU consistently ignores requests to set up a monitoring mechanism to observe the implementation of the refugee deal and its human rights consequences. This lack of any systemic monitoring on readmitted Syrians and other migrants has been officially expressed by the UNHCR which has complained about its difficulties in monitoring the fate of the readmitted migrants in refugee camps and removal centres.[109] Considering the deficiencies in the field, particularly no monitoring activity during the implementation of the agreement, this study aims to fill that gap by providing data from elite interviews with strategic participants who are working with refugees as lawyers, judges, civil servants, NGOs and international organisations in Turkey. The participants have shared their observations and experiences that confirm what refugees and asylum seekers are facing in their daily lives. This research will complement other research by providing a case study of the problems and experiences of refugees in Turkey.

This research study will also provide important evidence to counter the suggestion that protection in the region of origin is an effective solution to the refugee crisis. The EU is presenting the EU-Turkey Agreement on refugees as a success story and looking to replicate it in other less developed countries with development aid or other incentives but this risks setting a dangerous precedent for the rest of the world.[110] At the informal Summit held at La Valletta in February 2017, the European Council agreed on a Malta Declaration to develop new readmission agreements with transit countries. After the Malta Declaration, Italy and Libya signed a Memorandum of Understanding to stem migration flows. Giuffre describes this new migration partnership with Libya as a "Partnership from Bad to Worse" compared to the EU-Turkey Statement. She alleges that Libya is not a safe country for refugees as recognised by international courts, international

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108 **Marx**, 2016, p. 10; **Amnesty International**, Turkey: Illegal Mass Return of Syrian Refuges Expose Fatal Flaws in the EU-Turkey Deal, 1 April 2016; **Human Rights Watch**, Turkey: Syrians Pushed Back at the Border, 23 November 2015; **Asylum Information Database**, Country Report: Turkey, Edited by ECRE, December 2015, p. 32.

109 **Letter from the UNHCR,** Response to query related to UNHCR's observation of Syrians readmitted in Turkey', 23 December 2016, http://www.statewatch.org/news/2017/jan/unhcr-letter-access-syrians-returned-turkey-to-greece-23-12-16.pdf.

110 **Lovertt** & **Whelan** & **Rendón**, 2017, p. 2.

organisations, and NGOs. Libya is a far more unreliable partner than Turkey considering the weak political, economic and security situation in the country.[111] There are many evidences that the cooperation between Italy and Libya violates the principle of *non-refoulement* and put the life of asylum seekers in danger by limiting their access to humanitarian assistance and putting them in inhumane conditions in detention centres in Libya.[112] In the context of these ongoing negotiations between the EU and other third countries, this study sheds light on the EU's cooperation with transit countries on the refugee issue and discloses how these new agreements with transit countries may carry a high risk of human rights violations.

In addition, the research project provides a deep analysis of Turkish asylum law, the ECtHR's and the Turkish Constitutional Court's (TCC) jurisprudence concerning whether Turkey respects the principle of *non-refoulement* and provides the right to an effective remedy against detention and deportation decisions of the Turkish government. This issue has become a very contentious one since Turkey's derogation from the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR) in July 2016.[113] Turkey's list of derogations is clearly too long and includes all the provisions of the ICCPR and the ECHR, related to accessing effective remedy and safeguards against human rights violations which are important for Turkish citizens as well as refugees. After the declaration of a state of emergency in 2016, the Turkish government amended some of the provisions of the LFIP. These changes have given large discretion to the administrative authorities about the deportation of refugees and asylum seekers on the grounds of public order, public security and public health. Since Turkey's derogation from the ECHR and the ICCPR, asylum seekers and refugees cannot apply to the ECtHR. They can still apply to the TCC against deportation decisions but appeal procedure cannot suspend deportation orders if they are given on the ground of public security or public order. These provisions are important in my analysis of whether Turkey respects the principle of *non-refoulement*.

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111 **Giuffré**, 2017.

112 **Campbell**, 2017: **Biondi**, 2017: **United Nations Human Rights Office of the High Commissioner**, UN Human Rights Chief: Suffering of Migrants in Libya Outrage to Conscience of Humanity, 14 November 2017, http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22393&LangID=E.

113 Turkey's Notification to the United Nations about Its Derogation from ICCPR on 21 July 2016. https://treaties.un.org/doc/Publication/CN/2016/CN.580.2016-Eng.pdf. The decision was published in the Official Gazette and approved by the Turkish Grand National Assembly on 21 July 2016.

5. Research Methodology

In order to answer the main research question and sub-questions and test the two major hypotheses, the structure of this thesis consists of two parts presenting different phases of the research. The first phase was started in the UK and involved a literature review on international refugee protection and the European and Turkish asylum laws. A major focus was on the impact of European law on Turkish asylum law whilst analyzing the intricacies of different asylum policies. A detailed study was made on the EU-Turkey Readmission Agreement and Statement by critically analyzing scholars' views and the reports of human rights organisations. The second phase of the research was completed in Turkey and involved interviews with key actors in the field to explore the real situation of refugees and asylum seekers after the implementation of the EU-Turkey Statement.

The researcher adopted the political theory of Arendt as a theoretical framework and analysed her data collection from a human rights perspective. This methodological approach helped the researcher to assess the EU-Turkey Agreement from a fundamental human rights perspective and enables greater transparency and clarity to be brought to the arguments around the rightlessness of refugees.

The thesis consists of different methods of research. The researcher adopted, to some extent, a doctrinal method, looking at the primary legal sources, cases and legislation. She then added a more empirical method, namely qualitative method, to see the practical sides of the EU-Turkey Agreement. This empirical method helped the researcher to demonstrate whether readmitted refugees and asylum seekers in Turkey have access to fair and effective asylum procedures and effective remedies against deportation decisions and administrative detention. The interviewees unexpectedly emphasized the significant importance of the social-economic condition of refugees in Turkey. Even though the researcher did not ask any direct question related to socio-economic condition, but asked whether Turkey is a safe third country for refugees, the majority of the respondents linked this question with the difficulties of refugees and asylum seekers in accessing their socio-economic rights. This led to the categorization of the qualitative data in accessibility of refugees to their civil-political rights and socio-economic rights. These findings are presented in chapter VI and chapter VII respectively.

The researcher also adopted a socio-legal perspective to move beyond legal texts, judicial decisions and secondary sources to look at the socio-politico-economic considerations that affect the enforcement of law and its impact on those refugees and asylum seekers.

This research method helped the researcher to develop a multidisciplinary approach and see how the law viewed in its social context works in reality. The researcher's main interest was to investigate the gap between the law 'on the books' and the law in reality. The fieldwork findings show that even though the European Commission underlines what should be done on the part of Turkey, the law cannot work in practice as expected or hoped for. Rather, it is clearly evident that there are huge differences between what is promised to refugees in law and what is delivered in reality.

Bradshaw explains what distinguishes socio-legal research from traditional legal research in two ways:

> First, socio-legal research considers the law and the process of law (law-making, legal procedure) beyond legal texts – socio-politico-economic considerations that surround and inform the enactment of laws, the operation of procedure, and the result of passage and enforcement of laws. Second in studying the context and result of law, socio-legal research moves beyond the academic, the judicial and the legislative office, chamber, library and committee room to gather data wherever appropriate to the problem.[114]

This description provides a relatively clear answer to why this study adopted socio-legal research methodology instead of a more traditional or doctrinal legal research method. As outlined above, the research moved beyond the literature review to gathering data and carried out in-depth semi-structured interviews[115] with different groups of role holders in Turkey. The data obtained from the fieldwork threw great light on the real situation of refugees in Turkey. Interviewees, who came from different backgrounds, gave their observations and experiences at first hand. This provided the researcher with "a yardstick against which to measure data collected through other methods".[116] This method provided the depth of understanding of the actual situation of refugees in Turkey and can "give a reader a feeling of 'walking in the informants' shoes'- seeing things from their points of view".[117]

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114 **Bradshaw**, Alan, Sense and Sensibility: Debates and Developments in Socio-Legal Research Methods, Edited by Thomas, A. Philip, Socio-Legal Studies, Dartmouth: Aldershot, 1997, p. 99.

115 **Bryman**, Alan, Social Research Methods, Oxford University Press: Oxford, 5th Edition, 2016, pp. 466-475.

116 **Taylor**, J. Steven & **Bogdan**, Robert, Introduction to Qualitative Research Methods: A Guide Book and Resource, John Wiley& Sons, Inc.: New York, Third Edition, 1998, p. 90.

117 ibid, p. 135.

The interviews were carried out after getting ethical approval from the University of Sussex.[118] The researcher conducted interviews with four groups of key participants to discuss the real effects of the EU-Turkey Agreement on refugees and asylum seekers. The interviews were conducted in Ankara and İstanbul during June-September 2016. The first group of interviewees were senior officials and experts, responsible for migration management in Turkey. The second group were judges and lawyers who deal with the cases of refugees and asylum seekers in Administrative Courts, the Council of State and the Turkish Constitutional Court. The third group were from non-governmental organisations, which work for refugees and asylum seekers. The researcher planned to interview 20 key participants, five in each group but due to the failed coup attempt and the declaration of a state of emergency in July 2016; she experienced difficulty in accessing participants, especially judges and senior officials. Two participants, one judge and one senior official, subsequently refused to participate in pre-arranged interviews. Therefore, the researcher interviewed 18 participants including five representatives of NGOs, four judges, five lawyers and four senior officials and experts. The researcher obtained information about their lived experiences and observations of problems occurring during the implementation of the EU-Turkey Statement.

The researcher took notes during the interviews for backup purposes. The audio records of the interviews were locked in the researcher's file cabinet and access to these notes and recordings are only being available to the researcher. To comply with the agreement on confidentiality and anonymity, quotations used in the thesis are ascribed to generic names to assist the reader. The interviews lasted around one hour, depending on the availability of the participant and the issues being discussed. The interviews were semi-structured and Bryman's "interview guide" was used,

> The researcher has a list of questions or fairly specific topics to be covered, often referred to as an interview guide, but the interviewee has a great deal of leeway in how to reply. Questions may not be asked exactly in the way outlined on the schedule. Questions that are not included in the guide may be asked as the interviewer picks up on the interviewees' replies.[119]

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118 Ethical Review Application, ER/HK252/1, Project Start Date 01 August 2016, Project End Date 19 February 2018.

119 **Bryman**, 2016, p. 468.

The researcher chose to use the semi-structured interview, as opposed to a structured interview, because it allowed her to explore the interviewees' experiences and observations on refugees. Taylor and Bogdan describe these semi-structured qualitative interviewing as

> Repeated face-to-face encounters between the researcher and informants directed towards understanding informants' perspectives on their lives, experiences, or situations as expressed in their own words.[120]

During the interviews, even though the researcher had prepared guiding questions, participants tended to lead with their thoughts about the EU-Turkey Statement and its negative impacts on refugees in Turkey. The questions were tailored to the particular participants and their specific roles in Turkey. For instance, questions directed towards lawyers and judges were about whether refugees and asylum seekers can access effective remedies against human rights violations. On the other hand, representatives from NGOs and international refugee organisations were asked whether the Turkish government provides sufficient protection to refugees in accordance with international and national law and how they evaluate the real situation of refugees in Turkey. The other group, senior officials and experts were asked how the fundamental living requirements of refugees are met during their stay in Turkey and whether there is any policy development for facilitating the integration of refugees into society. The researcher requested that she be permitted to record the interviews. Two of the respondents declined to give permission and notes only were made.

Interviews were obtained through a combination of the researcher's professional contacts and snowball sampling. Bryman describes this technique as,

> The researcher makes initial contact with a small group of people who are relevant to the research topic and then uses these to establish contact with others.[121]

The researcher conducted her first interviews with senior officials and experts in the Ministry of Interior Directorate General of Migration Management, where she had worked as a deputy and district governor for nearly 17 years before taking study leave. This facilitated the process of getting interviewees with senior officials and experts in

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120 **Taylor** & **Bogdan**, 1998, p. 88.

121 **Bryman**, 2016, p. 188.

both public and university institutions. Also, being a senior official in the Ministry of Interior enabled the researcher to access judges, lawyers and international organisations.

6. Thesis Plan

The thesis is made up of eight chapters, which can be grouped into two sections.

Section one consists of chapters I, II, III and IV, which provide an introduction followed by a detailed discussion of the theoretical framework, international and regional refugee protection regimes and their deficiencies concerning human rights protection.

Chapter II constructs a theoretical framework that conceptualises the continuing conflict between human rights and state sovereignty. It offers a critical assessment of Arendt's political theory and applies her arguments to the struggles of refugees and asylum seekers today in accessing their fundamental human rights. Arendt's analysis on statelessness helps us to understand how states continue to exercise their sovereign power to exclude refugees and asylum seekers from their territory and contain them in their region of origin even though while officially acknowledging the importance of universal human rights and the right to seek asylum. The main argument here is that the implementation of the EU-Turkey 'refugee deal' provides clear evidence that both the EU and Turkey fall short of guaranteeing the rights of refugees and asylum seekers and leave them in a "rightless" or "precarious" position. Even though refugees by definition have lost their citizenship status, they cannot obtain citizenship or refugee status elsewhere. They are deprived of any "legal personhood" and left to "an ex gratia" act of the Turkish government.

Chapter III evaluates the responsibility of states deriving from the prohibition of *refoulement* in the international and human rights law. Even though the principle of *non-refoulement* has been extended beyond the 1951 Refugee Convention by developing human rights instruments, this extended scope of the principle has been undermined by states using deflective instruments. At the European level, readmission agreements, along with other deflective policies, such as the safe third country concept and accelerated border procedures, have all been developed to contain refugees in the region of origin and shift the European member states' responsibilities towards third countries. The chapter identifies two main problems regarding the implementation of readmission agreements. First, readmission agreements do not provide any safeguards against *refoulement* and there is no monitoring during the implementation of readmission agreements. Second, readmission agreements shift the refugee burden on to third or transit countries and may

lead to the downgrading of refugee protection standards. This burden-shifting attempt fundamentally conflicts with the right to seek asylum and the essence of the 1951 Refugee Convention, which requests states to provide effective protection to refugees. Effective protection not only encompasses protection from *refoulement* but also includes providing dignified living standards to refugees.

Chapter IV focuses on the EU-Turkey Agreement and explores its legal and political background. The chapter is divided into two parts. Part one explains why Turkey signed the RA with the EU and which incentives used by the EU to convince Turkey to readmit irregular migrants and refugees even though it would increase the burden on the country's institutional capacity and financial resources. It addresses whether the EU and Turkey considered international human rights and refugee protection concerns when negotiating and concluding the RA. It explores why the EU needed further cooperation on the refugee issue under the EU-Turkey Statement and how this is affecting the implementation of the EU-Turkey RA. In the second part of the chapter, the researcher examines how the deficiencies of the Greek asylum system is leading to human rights infringements, such as difficulties in accessing refugee status, lack of an effective remedy against removal to Turkey and stranded refugees in detention or reception centres in Greece against Article 3 of the ECHR. The chapter argues that the EU-Turkey RA has led to increases in the deportation of refugees without access to asylum determination procedures and entrapment of asylum seekers and refugees in Greece and in Turkey without any prospect of durable solutions.

Section two of the thesis consists of chapters, V, VI and VII, which presents a detailed examination of Turkish asylum law and the human rights impact of the EU-Turkey Agreement on refugees based on the fieldwork data, the jurisprudence of the ECtHR, the TCC and human rights reports.

Chapter V turns to domestic asylum law to define what awaits asylum seekers and refugees after their readmission to Turkey. It looks at whether readmitted refugees and asylum seekers can avail themselves of effective protection. There is an analysis of three important provisions of Turkish asylum law related to readmitted refugees and asylum seekers. The first section evaluates whether non-European asylum seekers in Turkey can access fair and efficient asylum procedures. The second section evaluates the legal basis of administrative detention, the living conditions of detainees in removal centres and whether detainees can benefit from procedural safeguards, such as access to legal

assistance and translators. The third section analyses the legal grounds for deportation of foreigners, particularly asylum seekers and refugees. The chapter concludes that readmitted refugees and asylum seekers do not have access to fair and effective asylum procedures due to accelerated asylum procedures at the borders or removal centres and institutional deficiencies in the provinces of Turkey. Also, the implementation of the EU-Turkey RA may trigger prolonged detention of asylum seekers in inhuman conditions as irregular migrants because Turkish asylum law gives great discretion to administrative authorities. Furthermore, there is a high risk that after readmission, asylum seekers and refugees may be subjected to deportation orders due to the loosely defined provision of the LFIP, which permits deportation of foreigners on grounds of "public order, public security or public health".

Chapters VI and VII continue to focus on domestic asylum law and analyse the fieldwork findings to reveal the actual problems that readmitted refugees and asylum seekers are facing in Turkey today. These problems are categorised under two main headings: the difficulties in accessing civil-political and socio-economic rights. The first category, civil and political rights are the main focus of chapter VI which takes the approach of Arendt's reflections on statelessness to analyse the statements of the interviewees about refugees and their rightless situation. The fieldwork findings highlight that Arendt's interpretation of statelessness is useful for understanding the precarious situations of refugees in Turkey. The chapter assesses the views of the respondents about the EU-Turkey Statement and the negative consequences of the lack of any legal status of refugees. The chapter concludes that Turkey is struggling to provide fair, efficient and accessible asylum procedures and people who are readmitted to Turkey under the EU-Turkey refugee deal might be detained in inhuman conditions and subjected to onwards *refoulement* without accessing any asylum procedures.

Chapter VII explores the fieldwork findings and addresses the difficulties of refugees in accessing their socio-economic rights, including accommodation, healthcare, education services and labour markets. This categorization is based on the reinterpretation of Arendt's account of "viva active" in her book Human Condition: "labour, work and action" section.[122] The participants indicated that a large number of the refugee populations have continued their lives in dire conditions in designated satellite cities.

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[122] **Arendt**, Hannah, The Human Condition, The University of Chicago Press: Chicago, 1958, p. 7.

Also, the new LFIP does not envisage any welfare and housing assistance during refugees' stay in Turkey. The recent Regulation on work permits of foreigners under temporary protection,[123] which facilitates Syrians' access to the labour market, has not changed their real situation. Although the interviewees came from different backgrounds, the common perception about the safety of Turkey for refugees was negative. The participants overwhelmingly thought that Turkey does not provide effective protection for refugees and asylum seekers as envisioned in the 1951 Refugee Convention and human rights law. Thus the chapter concludes that the EU-Turkey Statement is leading to a breach of Article 3 of the ECHR and Article 33 of the 1951 Refugee Convention.

The findings of the previous chapters are then summarized in the concluding chapter VIII, which seeks to answer the question of how the implementation of the EU-Turkey Agreement on the refugee issue affects the rights of refugees and especially the principle of *non-refoulement*. Even though the EU presents the refugee deal as a humanitarian act to reducing the tragic deaths of refugees in the sea through providing a dignified life for refugees in Turkey,[124] the evidences suggest that the EU-Turkey Agreement is inadequate in providing safeguards against *refoulement* and dignified living condition in Turkey. Returning refugees carries a risk of *refoulement* or degrading treatment under international and human rights law. The respondents in the research interviews overwhelmingly agreed that asylum seekers and refugees are being deprived of any legal personhood. Their lack of legal status prevents their access to fundamental basic services, such as accommodation, education, health and employment. They are living in a precarious 'rightless' position. The fieldwork findings affirm Arendt's observation that deprived of any political community, stateless persons or refugees are continually at risk of "becoming irrelevant to the world in that their actions and opinions no longer matter to anyone; it is as if they cease to exist."[125]

Having introduced the subject matter of the thesis in this chapter, the next chapter moves on to explore the theoretical framework of the study and presents with Arendt's political

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123 OGT, 15.01.2016 No: 29594. Article 5 of the Regulation on Work Permits of Foreigners under Temporary Protection states that temporary protection seekers may apply for work permission after six months of their registration.

124 Report from The Commission to the European Parliament, the European Council and the Council, Fifth Report on the Progress Made in the Implementation of the EU-turkey Statement, COM (2017) 2014 final, 2 March 2017.

125 **Arendt**, Hannah, The Origins of Totalitarianism, Revised Edition, Schocken Books: New York, 2004, p. 376, cited by **Hayden**, 2010, p. 65.

theory and her ideas on the rightless position of refugees. It is these ideas, which provide the theoretical foundation, or lens through which the rights of refugees in Turkey are evaluated, and it is these ideas, which inspire the conclusion of the thesis.

CHAPTER II: Arendt's Political Theory: The Sovereign Power of States and the Rightless Position of Refugees

> Not the loss of specific rights, then, but the loss of a community willing and able to guarantee any rights whatsoever has been the calamity which has befallen ever-increasing numbers of people. Man, it turns out, can lose all so-called Rights of Man without losing his essential quality as man, his human dignity. Only the loss of a polity itself expels him from humanity.[1]

1. Introduction

This chapter constructs a theoretical framework to explain how the implementation of the EU-Turkey Agreement falls short of guaranteeing "a right to have rights" to refugees and asylum seekers. It offers a critical assessment of Arendt's political theory and rethinking her arguments on statelessness applies them to the struggles of refugees and asylum seekers in accessing their fundamental human rights today. Arendt's theory on statelessness helps us to understand how states use their sovereign power to exclude refugees and asylum seekers from their territory whilst officially continuing to emphasise the importance of universal human rights and the right to seek asylum. In contrast to claims that globalisation undermines state's sovereignty and international human rights law recognizes all people as the bearers of "inalienable rights", refugees and asylum seekers are still living outside the pale of law and their "rightlessness" has become normalized in the contemporary international order.[2]

The chapter presents the background to the current refugee protection crisis and explains the contradictory responses of states from a theoretical perspective. As seen in the current Syrian refugee crisis, the refugee protection system is not working. Even though the principle of universal human rights demands that all humans enjoy human rights protection without any exception, there is a huge gap between the promise and the experience of refugees and asylum seekers in practice. From the right to life, the right not

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1 **Arendt**, Hannah, The Origins of Totalitarianism, Third Edition, George Allen & Unwin Ltd: London, 1966, p. 297.

2 **Hayden**, Patrick, From Exclusion to Containment: Arendt, Sovereign Power, and Statelessness, *Societies Without Borders*, 3(2), 2008, p. 248.

to be detained arbitrarily and the right to healthcare and education[3] there is evidence of violation. For Dembour and Tobias, human rights are part of the problem rather than the solution to the exclusion, marginalisation and inequality.[4] Human rights law only provides legal grounds for the injustice faced by many migrants and asylum seekers. If we look states' practices, we can see that even though human right abuses, wars and local conflicts force individuals to flee their home countries, nation states have implemented an array of restrictive measures without considering asylum seekers and their access to safety.[5] Paradoxically these practices have been operated in a context in which states continue publicly to acknowledge legal responsibilities to refugees and "trumpet" the moral importance of universal values. As Gibney writes a "kind of schizophrenia" seems to pervade Western states' responses to asylum seekers as great importance is attached to the principle of asylum but enormous efforts are made to ensure that asylum seekers never reach the territory of the state where they could receive its protection.[6]

Within the context of restrictive immigration policies, states have developed many remote control mechanisms or exclusion methods such as intercepting migrants on the high seas and signing RAs with transit countries. Meanwhile, over the past decades, an invisible policy wall or buffer zone has been erected around the EU with RAs and safe third country practices.[7] Designed to keep all uninvited migrants at bay whether refugees or economic workers, the reality is that "getting in is a greater challenge than "getting heard".[8] These practices have led to deflection of the protection responsibility to less developed countries. This extra-territorilazation of refugee protection has forced most refugees to remain in the less developed world within "right abusive and often literally life threatening" conditions. This raises an important question about the universality of

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3 **Dembour**, Marie-Bénédicte & **Tobias**, Kelly, Are Human Rights for Migrants? Critical Reflections on the Status of Irregular Migrants in Europe and the United States, Routledge Taylor & Francis: New York, 2011, pp. 5-6.

4 ibid. pp. 10-11.

5 **Hathaway**, James C. & **Neve**, R. Alexander, Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection, *Harvard Human Rights Journal*, 10, 1997, p. 115.

6 **Gibney**, Matthew J., The Ethics and Politics of Asylum, Liberal Democracy and the Response to Refugees, Cambridge University Press: Cambridge, 2004, p. 2.

7 **Uçarer**, M. Emek, Burden Shirking, Burden Shifting, and Burden Sharing in the Emergent European Asylum Regime, *International Politics*, 43, 2006, p. 226.

8 **Hyndman**, Jennifer & **Mountz**, Alison, Another Brick in the Wall? Neo-Refoulement and the Externalization of Asylum by Australia and Europe, *Government and Opposition*, 43(2), 2008, p. 250.

human rights.[9] As Gammeltoft acknowledges despite the appearance of universality, the refugee protection regime still depends on nation states' practices. Protection is not guaranteed in a global homogeneous space but undertaken by individual states in a patchwork of commitments. Within this framework, states have been very keen to develop mechanisms preventing asylum seekers even arriving in their territory.[10] Outsourcing and offshoring of refugee protection through readmission agreements can be seen as a strategy by states to "bypass" their responsibility towards refugees and asylum seekers but in the long run, it is not sustainable and ultimately undermines the very concept of asylum.[11]

The EU-Turkey Agreement is the most symbolic case for understanding states' exclusionary approaches towards refugees. This refugee deal has put many refugees and asylum seekers in a "rightless" or "precarious" situation in Turkey without considering inhuman living conditions and lack of legal status. Considering these contradictory responses of the EU, this chapter seeks to answer two questions: first what do universal human rights really mean in practice? And second do refugees and asylum seekers hold inalienable rights without any citizenship status?

The first section of the chapter discusses the continuing conflict between human rights and state sovereignty with the use of contemporary literature. The second section examines Arendt's political theory and how her view on statelessness is still valid in explaining the precarious situation of refugees and asylum seekers in the current refugee protection system. The last section uses Arendt's political theory to understand the "rightless" position of refugees, who are unable to access European territory due to strict border controls and are forced to stay in Turkey in legal limbo.

Hannah Arendt's political theory is used to support my main argument that although international human rights law recognizes all people as the bearers of "inalienable rights" when these rights come into conflict with the rights of sovereign states over refugees and

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9 **Hathaway**, James C., Why Refugee Law Still Matters, *Melbourne International Law*, 8(1), 2007, pp. 89-90.

10 **Gammeltoft-Hansen**, Thomas, Outsourcing Asylum: The Advent of Protection Lite, Edited by Bialasiewicz, Luiza, Critical Geopolitics: Europe in the World: EU Geopolitics and the Making of European Space, Routledge: London, 2011, pp. 129-130.

11 **Gammeltoft-Hansen**, Thomas, Access to Asylum, PhD Thesis, Aarhus University, May 2009, p. 268; **McConnachie**, Kirsten, Refugee Protection and the Art of the Deal, J*ournal of Human Rights Practice*, 2017, p. 1.

migrants, inalienable rights gain a "mythical status".[12] Although there is a claim that the international human rights regime is constraining state sovereignty, there is too much evidence to the contrary. As states increasing insist on maintaining their sovereignty over the determination of entry and expulsion[13] Hirst and Grahame state,

> The state may have lost control over ideas, but it remains a controller of its borders and the movement of people across them. In this respect, despite the rhetoric of globalization, the bulk of the world's population live in closed worlds, trapped by the lottery of their birth.[14]

2. The Paradox of Human Rights: Universal Human Rights versus State Sovereignty

Many refugee studies in the field have tended to portray refugees as an anomaly that is created by illiberal governance in contrast to the "normal" rooted citizen. However, in her pioneering work, Arendt, the political philosopher, challenges this commonly accepted assumption and describes refugees as "the most symptomatic group in contemporary politics".[15] She argues that stateless, refugees and asylum seekers should not be seen as an anomaly but as the by-product of the international state system. In line with Arendt, Haddad also argues that although international society assumes that states are practising liberal democracies and protecting their citizens, the reality is that nation states often fail to protect their citizens and produce refugees. Thus, the refugee issue highlights an inherent failure in the international state system.[16] The existence of refugees is "an inevitable if unintended consequence of the international states system," not the consequence of a breakdown in the system of separate nation-states.[17] As long as there are political borders constructing separate nation-states and creating clear definitions of insiders and outsiders, there will be refugees.[18] They are produced and put into their rightless position by the international state system.

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12 **Larking**, Emma, Refugees and the Myth of Human Rights, Life Outside the Pale of the Law, Routledge Taylor & Francis Group: London, 2014, pp. 137-138.

13 **Joppke**, Christian, Asylum and State Sovereignty: A Comparison of the United States, Germany, and Britain, *Comparative Political Studies*, 30(3), 1997, pp. 260-261.

14 ibid, p. 259.

15 **Arendt**, 1966, p. 277.

16 **Haddad**, Emma, The Refugee in International Society: Between Sovereigns, Cambridge University Press: Cambridge, 2008, pp. 3-7.

17 ibid, pp. 1-2.

18 **Haddad**, Emma, The Refugee: The Individual Between Sovereigns, *Global Study*, 17(3), July 2003, pp. 297-298. See other scholars in the same view; **Soğuk**, Nevzat, States and Strangers, Refugees and Displacements of Statecraft, Volume 11. University of Minnesota Press: London, 1999, pp. 11-14;

Soguk further suggests that refugee is an "aberration of the proper subjectivity of citizenship". Considering the broken relationship between citizen and nation state, a refugee protection regime aims to redefine a refugee's relationship to any sovereignty so that s/he may again properly belong in another national space.[19] Given the world's division into territorial states, having lost the basic level of protection and citizenship from their country of origin, the individual finds herself/himself in the "no man's land" of the international landscape. S/he disrupts the normal conditions of international society in terms of the citizen-state-territory hierarchy. To restore order in the international society, states should take responsibility for redefining the refugee's relationship to any space of sovereignty.[20] However, any attempts of national states at refugee protection are made in the interest of international and national orders, but not for humanitarian reasons.[21] Refugees are seen as a threat to international orders and the sovereign power of national states. Within the international state system, an individual cannot be refused to stay without entry into another country. At the same time, the denial of protection by one host state directly shifts the responsibility to provide shelter to another.[22] This is the most contentious aspect of the refugee protection problem that requires cooperation between nation states within the international state system. As Hoffman states,

> There is no way of isolating oneself from the effects of gross violations abroad: they breed refugees, exiles, and dissidents who come knocking at our doors —and we must choose between bolting the doors, thus increasing misery and violence outside, and opening them, at some cost to our own wellbeing.[23]

From a normative point of view, refugee issues bring to the fore the constitutive dilemma at the heart of modern nation states: between the universality of human rights and norms, which apply to every human being on the one hand, and the sovereignty and self-determination of the state on the other hand. Whereas the principles of human rights and

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Aleinikoff, T. Alexander, State-Centred Refugee Law: From Resettlement to Containment, *Michigan Journal of International Law*, 14 (120), Fall, 1992, pp. 120-121.

19 **Soğuk**, 1999, pp. 11-14.

20 **Haddad**, 2003, pp. 309-310.

21 **Haddad**, Emma, Refugee Protection: A Clash of Values, *The International Journal of Human Rights*, 7(3), 2010, p. 1.

22 **Brubaker**, Rogers, Citizenship and Nationhood in France and Germany, Harvard University Press: Cambridge, 1992, p. 26; **Lavenex**, Sandra, The Europeanisation of Refugee Policies: Between Human Rights and Internal Security, Aldershot/Burlington: Ashgate, 2001, p. 10.

23 **Hoffmann**, Stanley, Duties Beyond Borders: On the Limits and Possibilities of Ethical International Politics, Syracuse University Press: New York, 1981, p. 111, cited by **Haddad**, 2008, p. 3.

territorial sovereignty are conceptually complementary within a given national community, they turn out to be contradictory from an international perspective.[24] In this contradictory situation, a refugee is defined very differently from universalistic and particularistic views.

A universalistic view puts the interest of the individual prior to the potential host community. In this perspective, refugees are seen as individuals who have been violated in their human rights and who are in need of protection. Violations of human rights are not matter of state sovereignty but a common concern of a cosmopolitan community. In accordance with this view, the purpose of the state is not the pursuit of specific national interests but promoting the realisation of universal values.[25] Caren, who is the strongest supporter of universalistic human rights, argues that borders should generally be open and that people should normally be free to leave their country of origin and settle in another country subject only to the sorts of constraints that bind current citizens in their new country. She argues that current restrictions of Western countries on immigration are not justifiable. Like feudal barriers to mobility, they protect unjust privilege.[26] She describes citizenship in Western liberal democracies as "the modern equivalent of feudal privilege —an inherited status that greatly enhances one's life chances".[27]

On the other hand, particularists put the rights of the community prior to the rights of refugees and defend constructing entrance policies into the sovereign territory of states. Accordingly, human rights only apply to citizens of the nation state. This leads to the exclusive control of a state over its territory.[28] In sharp contrast to Caren, Walzer is concerned with the particularism of history, culture and membership instead of universalistic human rights principles. Walzer argues that the admission and exclusion of foreigners are at the core of being a community. Without them:

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24 **Lavenex**, 2001, pp. 8-9; **Benhabib (a)**, Seyla, Borders, Boundaries and Citizenship, Democratic Citizenship and the Crisis of Territory, *Political Science and Politics*, 38(4), 2005, p. 673; **Haddad**, 2008, p. 70.

25 **Lavenex**, 2001, pp. 13-16.

26 **Carens**, H. Joseph, Aliens and Citizens: The Case for Open Borders, *The Review of Politics*, 49(2), 1987, p. 270.

27 ibid, pp. 251-252.

28 **Lavenex**, 2001, p. 13.

> There could not be communities of character, historically stable, ongoing associations of men and women with some special commitment to one another and some special sense of their common life.[29]

Walzer draws a parallel between "affluent and free countries" and "elite universities" and argues, as citizens of such a country, we have to decide whom we should admit in accordance with our own character.[30] Walzer also admits that we have some responsibility towards refugees so long as the number of refugees is small and the cost to our own society is low. This obligation is, therefore, conditional. He defends the exclusionary behaviours of Western countries towards refugees, who come from different cultural and religious backgrounds stating that,

> When the numbers increases, we are forced to choose among the victims, we will look, rightfully, for some more direct connection with our way of life. If, on the other hand, there is no connection at all with particular victims, antipathy rather than affinity, there can't be a requirement to choose them over other people equally in need.[31]

When we look at Walzer's assessment of the responsibility of states towards refugees, as Singer and Singer highlight,

> We find a striking match between what he recommends and what moderately liberal governments, prepared to heed at least some humanitarian sentiments, actually do.[32]

Walzer's analysis matches with the current policies of the EU, the USA and Australia. These countries' admission policies are based on the idea that the right of a community takes precedence over the rights of refugees. For Walzer, if refugees have no political affinity with the receiving country, their claims cannot be accepted and are left to the *ex gratia* act of the receiving country. This forms the "orthodoxy" of current refugee protection policies of western states. Singer and Singer challenge this thinking and argue that Walzer offers no underlying theory for his assertion that the right of the community to determine its membership takes priority over the rights of refugees.[33] Another challenge comes from Universalist theorists, Benhabib and Ignatieff. They argue that we

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29 **Walzer**, Michael, Spheres of Justice: A Defense of Pluralism and Equality, Blackwell: Oxford, 1983, p. 62.

30 ibid, pp. 31-33.

31 ibid, pp. 49-50.

32 **Singer**, Peter & **Singer**, Reneta, The Ethics of Refugee Policy, Edited by Gibney, Mark, Open Borders? Closed Societies? Greenwood Press: London, 1988, p. 121.

33 ibid.

are part of an interconnected global society and when people suffer in Syria, Afghanistan or other parts of the world as a result of the foreign policy decisions of the US or the EU countries, we are all complicit in that suffering. In fact, in many cases, Western countries' failure of humanitarian interventions has been triggering this exodus. Thus, our moral obligations are the result of our transnational connectedness.[34] Furthermore, Benhabib finds Walzer's theory unjustifiable on ethical grounds and argues that we have a robust obligation to allow refugees into our community. We are justified in excluding refugees only if we are able to show good grounds for their exclusion. The reason for closing the door to potential refugees and asylum seekers "must be based on the grounds that 'you would accept if you were in my situation and I were in yours'."[35] This criterion puts Benhabib in a different place from Walzer even if she opens the way to closing the door on defined ethical grounds.

Both Universalist and particularist explanations of states' responsibilities towards refugees are challenged by Gibney's different theoretical perspective. He defines the boundaries of states' responsibility towards refugees in the context of a "harm" principle. He stresses the importance of states as agents in the creation of the refugee problem. Claiming a causal link between states' actions and the refugee status, Gibney affirms the existence of certain responsibilities owed by states to refugees by virtue of shared membership in a global society.[36] He proposes a humanitarianism principle to circumvent the continuing conflict between state sovereignty and human rights in the contemporary world. However, Gibney draws attention to the conflicting structure of the liberal democratic states and the constraints faced by governments in today's political environment[37] where states follow the interests of their own citizens:

> The state emerges as an intractably *particularistic* agent, one informed by a rationale for action that has as its goals both the protecting of the security needs of its citizens and the ensuring of its own reproduction. It is by acting in pursuit of these ends that the

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34 **Benhabib**, Seyla, The Rights of Others, Aliens, Residents and Citizens, Cambridge University Press: Cambridge, 2004, pp. 9-10; **Ignatieff**, Micheal, The Rights to Have Rights: Migrants, Refugees and the Duties of States, Lecture delivered at Central European University in Budapest, uploaded YouTube on 7 March 2016. It is available online https://www.youtube.com/watch?v=1PMD1onFIvc.

35 **Benhabib**, 2004, p. 138.

36 **Gibney**, Matthew J., Liberal Democratic States and Responsibilities to Refugees, *American Political Science Review*, 93(1), 1999, p. 180.

37 **Gibney**, Matthew J., The Ethics and Politics of Asylum, Liberal Democracy and the Response to Refugees, Cambridge University Press: Cambridge, 2004, p. 197.

> state derives and maintains its authority. Consequently, for the state to cater for the needs of outsiders would constitute a misuse of its authority, especially if the pursuit of the interests and needs of outsiders came at some cost to the interest of the citizenry over which it has charge.[38]

Gibney's resolution to resolve the conflict between the rights of citizens and the fundamental rights of refugees and asylum seekers is his humanitarian principle. In accordance with Gibney, states are only obliged to accept "as many refugees as they can without undermining the civil, political and, importantly, the social rights" of their citizens.[39] Gibney's humanitarianism principle provides a less comprehensive protection to refugees than universalistic theories and puts only a minimal responsibility on states.[40] He attempts to provide a normative prescription for the contemporary refugee protection crisis but he could not differentiate his humanitarianism principle from Walzer's theory, which claims that states are obliged to accept as many refugees as they can without disturbing the cultural life of the community. Like Walzer Gibney argues that "states have an obligation to assist refugees when the costs of doing so are low[41] but the cost of refugees to the host community is quite open to interpretation. The current Syrian refugee crisis reveals that many European member states have closed their borders arguing that they are "overwhelmed" by the cost of refugees. This raises the question is the 3 million refugees in Turkey with just over 76 million population too many? Are the 1 million refugees in the EU member states with 493 million populations too many?[42] It is very difficult in practice to use Gibney's humanitarianism principle because there is no monitoring mechanism or provision in the international refugee protection regime that obliges states to take their fair share of the refugee burden.

The other weakness of the humanitarianism principle is that it does not see refugees as equal right holders but always puts the interest of citizens above that of the refugees. Refugee protection is seen as a form of charity instead of the obligation of states. Gibney also defends "closed borders" for controlling entry into state territory arguing that if there

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38 ibid, 2004, pp. 200-201.

39 ibid, 2004, p. 230.

40 ibid, 2004, p. 231.

41 ibid, 2004, p. 231.

42 **Betts**, Alexander, The Normative Terrain of the Global Refugee Regime, Ethics& International Affairs, Carnegie Council, 7 October 2015, Ethics International Affairs. https://www.ethicsandinternationalaffairs.org/2015/the-normative-terrain-of-the-global-refugee-regime/.

was no restriction on a state's territory, this could lead to inequality between states on a global scale because the burden of refugee responsibility would fall inequitably on specific states. He suggests resettlement of refugees from a country of origin or neighbouring country as the only politically available solution to reduce the expenditure on refugee determination systems. Resettlement programs may allow governments to manage their refugee commitments with greater predictability and less risk.[43] Although the humanitarianism principle seems to provide an alternative way to overcome the contemporary refugee crisis, it will end up containing refugees in their region of origin or neighbouring countries. The implementation of the EU-Turkey refugee deal affirms that the promises of resettlement of Syrian refugees from Turkey into the EU member states remain on paper. The stark fact is that there is no incentive or obligation forcing member states to take significant numbers of refugees from Turkey, which is bearing the cost of hosting millions of refugees.

3. The Collapse of the Right to Have Rights: Is Arendt's Political Theory Still Valid?

As seen above, no solution has been found to resolve the conflict between universalistic human rights and territorial sovereignty of nation states, which is inherent in the structure of the international state system. This contradictory nature of the nation state system is termed "Janus-faced" by Habermas.[44] Today the increasing scope of displacement, the cost of hosting refugees and the blurred distinction between refugees and migrants leaves us with an inescapable dilemma: whether the right to have rights is the right of refugees and asylum seekers or only the right of citizens. What does universal human rights really mean in practice? Do refugees and asylum seekers hold inalienable rights as human beings without any country's citizenship?

Jeremy Bentham dismissed the idea of "inalienable" or "natural" rights as "nonsense upon stilts", arguing that the only real rights are the legal ones that are established and upheld by a government and system of law.[45] Edmund Burke also attacked the idea of natural

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43 **Gibney**, 2004, pp. 239-247.

44 **Habermas**, Jürgen, The European Nation-State: On the Past and Future of Sovereignty and Citizenship, Edited by Cronin, Ciaran & De Greiff, Pablo, The Inclusion of the Other: Studies in Political Theory, The MIT Press: Cambridge, 1999, p. 115; **Habermas**, Jürgen, Human Rights and Popular Sovereignty: The Liberal and Republican Versions, Ratio Juris, 7(1), 1994, p. 1.

45 **Bentham**, Anarchical Fallacies: Being an Examination of the Declaration of Rights Issued During the French Revolution, 1791, cited by **Gündoğdu**, Ayten, Rightlessness in an Age of Rights, Oxford University Press: Oxford, 2014, p. 27.

rights and argued that rights proclaimed as universal do not pertain to human beings but pertain to citizens of a political community. The rights of man are "abstract principles" and without any citizenship status, individuals cannot do anything to protect or enforce their rights.[46] The political theorist Hannah Arendt also acknowledged this during her exile as she pointed to the existence of a 'right to have rights' asserting:

> We become aware of the existence of a right to have rights … and a right to belong to some kind of organized community, only when millions of people emerged who had lost and could not regain these rights because of the new global political situation.[47]

She argues that the rights of man had been defined as "inalienable" but it turned out that "the moment human beings lacked their own government and had to fall back upon their minimum rights, no authority was left to protect them".[48] Therefore, the rights of man are not the rights of man but the rights of the citizen who already had rights. Individuals need to belong to a state both to ensure their protection and acquisition of their rights. Refugees who lose the protection of their state are deprived of a political community willing and able to guarantee their rights. Arendt reflects on the precarious situation of statelessness:

> Not the loss of specific rights, then, but the loss of a community willing and able to guarantee any rights whatsoever, has been the calamity which has befallen ever-increasing numbers of people. Man, it turns out, can lose all so-called Rights of Man without losing his essential quality as man, his human dignity.[49]

This means that in the absence of a political community that could recognise and guarantee their rights, the stateless were deprived of legal personhood as well as a right to action, opinion, and speech. She asserts that the French Revolution, in declaring the rights of man and yet demanding national sovereignty, contained a contradiction, which ensured that human rights are protected and enforced only as national rights. The people and not the individual becomes the "image of man".[50] Ironically, the rights of man, therefore, become dependent upon, rather than independent of governments. Therefore,

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46 **Burke**, Reflections, on the Revolution in France, cited by **Gündoğdu**, 2014, p. 27.

47 **Arendt**, 1966, pp. 296-297.

48 ibid, pp. 291-292.

49 ibid, p. 297.

50 ibid, p. 293.

"the Rights of Man, supposedly, inalienable, proved not to be enforceable" compared to the rights of citizens protected by their governments.[51]

In a number of rich and thought-provoking texts, Arendt provides a critique of human rights and an analysis of the situation of "stateless" persons. For Arendt, there is no clear distinction between refugees and stateless persons because while refugees may not be *de jure* stateless persons, they are *de facto* stateless. She used the term "stateless" to refer not only to those who have formally lost their nationality but also to those who do not enjoy the normal rights of citizenship. Accordingly, Arendt points to refugees and asylum seekers when she uses "stateless"[52] stating that:

> The stateless person, without right to residence and without the right to work, had of course constantly to transgress the law. He was liable to jail sentences without ever committing a crime.[53]

A stateless person lacks any form of legal, social or economic protection because s/he is forced to live beyond the pale of law and is often seen as "the scum of the earth". The stateless person is left "completely at the mercy of police", who "did not worry too much about committing a few illegal acts in order to diminish the country's burden of undésirables".[54] From Arendt's perspective, stateless persons cannot claim and exercise the rights that one is entitled to by virtue of being human.

Today perhaps more than ever before, we are living in a situation that Arendt wrote about statelessness.[55] Her analysis is even more relevant in our globalizing world where it is becoming the "order of the day".[56] However, there are differences between the

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51 Ibid, p. 293.

52 **Gündoğdu**, 2014, p. 3; **Cotter**, Bridget, Hannah Arendt and "The Right to Have Rights", Edited by Lang, F. Anthony & Williams, John, Hannah Arendt and International Relations, Palgrave Macmillan: US, 2005, p. 96.

53 **Arendt**, 1966, p. 286.

54 ibid, p. 283.

55 **Krause**, Monika, Undocumented Migrants, An Arendtian Perspective, *European Journal of Political Theory*, 7(3), 2008, p. 331; **Hirsch**, Asher Lazarus & **Bell**, Nathan, The Right to Have Rights as a Right to Enter: Addressing a Lacuna in the International Refugee Protection Regime, *Human Rights Review*, 2017, p. 1; **Mackereth**, Kerry, "Nothing is More Dangerous for Human Beings than to be forgotten": Seyla Benhabib on Donald Trump, Hannah Arendt, and the Refugee Crisis, 10 March 2017, http://inthelongrun.org/articles/article/nothing-is-more-dangerous-for-human-beings-than-to-be-forgotten-seyla-benha.

56 **Hayden**, Patrick, Political Evil in a Global Age: Hannah Arendt and International Theory, Routledge: New York, 2010, p. 56.

contemporary landscape and the one Arendt observed. [57] When she wrote about statelessness, she was pointing to the "somewhat shadowy existence" of human rights and that they "never became law".[58] Since the end of the Second World War, international human rights law has been established in the international arena and there has been a shift from citizenship to legal personhood as the basis of the entitlement to rights. For example, the ICCPR states that human rights "derive from the inherent dignity of the human person". [59] With the advent of international human rights law, individuals are recognised as human rights holders directly under international law. In accordance with this shifting approach, now States have international obligations to accord rights to all individuals within their jurisdiction regardless of their nationality or citizenship status.[60]

In the light of these developments, some political theorists have advocated the emergence of 'global' or 'cosmopolitan' citizenship and allege that there has been a shift from citizenship to universal legal personhood as the basis of the entitlements of rights. This has resulted in migrants and refugees standing before the law and demanding education, healthcare, family unification and political participation as fundamental human rights.[61] Soysal highlights that the notion of human rights has become a pervasive element of the contemporary international order and citizenship emphasizes universal personhood rather than nationality. In Soysal account, "postnational citizenship confers upon every person the right and duty of participation regardless of their historical or cultural ties to that community".[62] Habermas also argues that our contemporary world is becoming cosmopolitan rather than national and he supports a revised version of Kant's cosmopolitan law. He also argues that the individual is gradually acquiring "the status of a subject of international law and a cosmopolitan citizen". Today, international human rights have steadily increased their weight and this has started to temper the sovereign

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57 **Gündoğdu**, 2014, p. 120.

58 **Arendt**, Hannah, and The Origins of Totalitarianism**,** 1951 (2004 rev. ed), Schocken: New York, cited by **Gündoğdu**, Ayten, Statelessness and the Right to Have Rights, Edited by Hayden, Patrick, Hannah Arendt: Key Concepts, Routledge: London, 2014, p. 120.

59 **Internatıonal Covenant on Civil and Political Rights, Preamble, para. 2.**

60 **Larking**, 2014, pp. 119-120; **Kesby**, Alison, The Right to Have Rights: Citizenship, Humanity, and International Law, Oxford University Press: Oxford, 2012, p. 93; **Gündoğdu**, 2014, p. 92.

61 **Gündoğdu**, 2014, p. 92.

62 **Soysal**, Yasemin Nuhoğlu, Limits of Citizenship: Migrants and Postnational Membership in Europe, University of Chicago Press: Chicago, 1994, pp. 3-7.

power of states.[63] We can no longer say that the international order is exclusively determined by state sovereignty.

However, these developments might give the misleading impression that the condition of rightlessness that Arendt described in her analysis has altogether disappeared from the contemporary landscape. Despite considerable developments at the international level, there is a serious gap between the rights enjoyed under international human rights law and the realities refugees and asylum seekers face in practice.[64] International human rights law still upholds the sovereign power of states and leaves refugees without effective guarantees against violent border control or restrictive refugee protection policies of states. As many scholars have highlighted, Arendt's analyses of statelessness still help our understanding of the contemporary refugee protection crisis.[65] As Adelman wrote: "Arendt's voice is one we can turn to as we grapple with the spread of statelessness in our day. Camps and pariahs are still with us".[66]

For Gündoğdu, Arendt's view on the rightless position of refugees has found a new meaning within the contemporary context. [67] Considering recent changes in the field of human rights, rightlessness cannot be described as an absolute loss or lack of rights but instead indicates the precarious legal, political, and human standing of refugees and asylum seekers. The term "precarious" is used to highlight the vulnerability of the individual who is "dependent on the favours, privileges, or discretions of compassionate others".[68] According to Gündoğdu, border controls are justified as a legitimate act of sovereignty of states, but it "ends up creating division within humanity itself". These restrictive migration policies have rendered the legal personhood of individuals irrelevant

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63 **Habermas**, Jürgen, Between Naturalism and Religion: Philosophical Essays, Translated by Ciaran, Cronin, Polity Press: Cambridge, 2008, p. 335.

64 **Grant**, Stefanie, The Recognition of Migrants' Rights Within the UN Human Rights System, Edited by Dembour, Marie-Bénédicte & Tobias, Kelly, Are Human Rights for Migrants? Critical Reflections on the Status of Irregular Migrants in Europe and the United States, Routledge Taylor & Francis: New York, 2011, p. 31.

65 **Kesby**, 2012, pp. 2-3; **Owens**, Patricia, 'Beyond Bare Life': Refugees and the 'Right to Have Rights', In Refugees in International Relations, Edited by Betts, Alexander & Loescher, Gil, Refugees in International Relations, Oxford University Press: Oxford, 2004; **Krause**, 2008.

66 **Adelman**, Jeremy, Pariah. Can Hannah Arendt Help Us Rethink Our Global Refugee Crisis? *Wilson Quarterly*, June 2016, http://wilsonquarterly.com/quarterly/looking-back-moving-forward/pariah-can-hannah-arendt-help-us-rethink-our-global-refugee-crisis/.

67 **Gündoğdu**, 2014, p. 93.

68 ibid, p. 93.

and put them into an increasingly precarious position.[69] Regarding exclusionary powers of sovereign states, refugees and asylum seekers still are subjected to numerous forms of violence and abusive treatment such as arbitrary detention and deportation, no access to asylum procedures, and confinement in inhuman conditions at reception centres. These problems are further complicated by the fact that most of the refugees and asylum seekers cannot access legal assistance effectively to challenge discrimination or abuse they are facing. In fact, they are very often hesitant to use their rights in fear of deportation.[70] This evidence indicates that many refugees continue to live outside the protection of the law.

Benhabib also underlines the continuing conflict between universal human rights and sovereignty at the heart of the contemporary international order.[71] For her, the irony of current political developments is that while state sovereignty in economic and technological domains has been greatly eroded, nonetheless national borders still keep aliens and refugees out. She describes this situation in a very creative way:

> Old political structures may have waned but the new political forms of globalisation are not yet in sight. We are like travellers navigating an unknown terrain with the help of old maps, drawn at a different time and in response to different needs. While the terrain we are travelling on, the world-society of states, has changed our normative map has not.[72]

She also argues that despite some developments in human rights instruments, "the condition of undocumented aliens, as well as refugees and asylum seekers…remains in that murky domain between legality and illegality".[73] It means that refugees find themselves outside the framework of state-people-territory with a precarious legal, political and human standing. Contrary to the claims of cosmopolitanism, the conflict between sovereignty and human rights has weakened in intensity but has by no means been eliminated. Within this context, she criticizes the EU's policies for their discriminative approach towards refugees:

> The EU is caught in contradictory currents which move it toward norms of cosmopolitan justice in the treatment of those who are within its boundaries, while leading it to act in

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69 ibid. pp. 93-95.

70 **Gündoğdu**, 2014, pp. 10-11.

71 **Benhabib**, 2004, p. 69.

72 **Benhabib (a)**, 2005, p. 674.

73 **Benhabib (b)**, Seyla, Another Cosmopolitanism, Oxford University Press: New York, 2005, p. 46.

> accordance with outmoded Westphalian conceptions of unbridled sovereignty toward those who are on the outside. The negotiation between insider and outsider status has become tense and almost warlike.[74]

Along with Benhabib, Joppke argues that considering the challenges to sovereignty and citizenship, current diagnosis of the decline of the national state is premature. States' willingness and the capacity of states to control the determination of entry and expulsion are not declining.[75] Also, he further argues that the claim of an international human rights regime constraining state sovereignty is wrong in two respects: First, "it is too pessimistic about nation-states drained of internal human rights principles; second, it is too optimistic about the effectiveness of the international human rights regime."[76] Contrary to the arguments that international human rights law restricts the sovereign power of states, such human rights constraints are more national than international. In the case of liberal states, the protection of human rights is embedded in national law and traditions. If liberal states accept unwanted immigration, then it is because of "self-limited rather than globally limited sovereignty".[77] Regarding increasing internal pressure of human rights law on nation states, states have started to see exclusion as the key element of their asylum policies. For example, safe third country practices with readmission agreements or interception operations at sea works discriminately against genuine refugees and economic migrants.[78] For Joppke, these remote mechanisms are used to "neutralize" both international and domestic legal obligations without openly violating them. There are many clear evidences that prosperous countries continue to employ exclusionary policies or remote control mechanisms towards refugees and asylum seekers to abstain from their human rights responsibilities.[79]

Along with Joppke, Hyndman and Mountz also highlight states' exclusionary approaches towards refugees and asylum seekers. They state that the most pressing problem is the

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74 **Benhabib (a)**, 2005, pp. 674-675.

75 **Joppke**, 1997, pp. 260-261; **Joppke**, Christian, Immigration and the Nation-State: The United States, Germany, and Great Britain, Oxford University Press: New York, 1999, p. 4.

76 **Joppke**, 1997, p. 261.

77 **Joppke**, 1999, p. 263.

78 **Joppke**, 1997, p. 295.

79 ibid, p. 295. Brubaker also underlines the same approach; "prosperous and peaceful states of the world remain powerfully exclusionary." **Brubaker**, Rogers, Are Immigration Control Efforts Really Failing? Edited by W. Cornelius, P.L. Martin & J.F. Hollifield, Controlling Immigration, Stanford: Stanford University Press, 1994, p. 230.

loss of access to the territory of sovereign states that prevents asylum seekers from mobilise their rights. Contrary to the widespread use of the principle of "*non-refoulement*, they used "*neo-refoulement*" to describe a new form of exclusion mechanism that states have developed in the last three decades.[80] The difference between the principle of *non-refoulement* and *neo-refoulement* is based on the access of the asylum seeker to the territory of host state. The principle of *non-refoulement* protects the individual from forced return to their country of origin but it is only triggered when the individual reaches the territory of a sovereign country. If states want to circumvent their protection responsibility, they may take measures to stop refugees' reaching their territory. This constitutes "*neo-refoulement*" and is described by Marchetti as "*preventive refoulement*." According to international law, no expulsion occurs in the territory of the state but the preventive operations can be carried out outside the national territory with the help of third countries.[81] As Arendt had realised it is impossible to "get rid of refugees" or transform them into the host country. In that condition what is left when voluntary repatriation is impossible and *refoulement* is prohibited by international conventions? States are trying to solve the problem at the source through non-arrival policies: "no entry, no repatriation is needed."[82]

The main aim of the EU and Australian government today is to contain asylum seekers and other migrants in transit countries or regions of origin before they reach a sovereign territory in which they could make an asylum claim. [83] The protection of refugees has been shifted into transit countries through bilateral RAs that aim to prevent asylum seekers from ever landing on the territory of a signatory state to the 1951 Refugee Convention. *Neo-refoulement* represents a new invisible wall that has been erected around the EU. The RA with safe third country practices creates "a geographical game of hopscotch for asylum seekers, with fewer and fewer spaces through which to pass to make a refugee claim." [84] The countries of the EU may argue that they observe their commitment to the 1951 Refugee Convention and the 1967 Protocol, but access to the

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80 **Hyndman** & **Mountz**, 2008, p. 252.

81 **Marchetti**, Chiara, Expanded Borders: Policies and Practices of Preventive Refoulement in Italy, Edited by Geiger, Martin & Pécoud, Antoine, The Politics of International Migration Management, Palgrave Macmillan: New York, 2010, p. 161.

82 ibid, p. 178.

83 **Hyndman** & **Mountz**, 2008, p. 252.

84 **ibid**, p. 252.

rights and safeguards enshrined therein is increasingly limited. Respatialization of asylum is a deliberate political project buttressed by RAs and development funds that ensure cooperation of donor states and transit countries".[85] The 'respatialization' of asylum also advocates helping would be refugees at home before they leave their countries of origin.[86] Aleinikoff supported the claim of Hyndman and Mountz arguing that Western countries are much more interested in replacing "an exilic bias with a source-control bias". These policies do appear more humanitarian as they aim to contain refugees in their region of origin or neighbouring countries but give little concern to the actual difficulties of refugees.[87]

Italian philosopher, Agamben has followed the work of Arendt and reinterpreted her views on stateless persons. He claims that Arendt's view is still valid in the contemporary international order because refugees are still subjected to a permanent state of exclusion from political life. He adopted Aristotle's famous distinction between two forms of life. "Zoe"; where life is rooted in nature and is common with all living creatures and "bios": "the good life", which is understood as the political way of life. Agamben distinguishes political life and biopolitical life in his well-known book "Homo Sacer".[88] He claims that refugees are reduced to "naked life" which represents survival as animals without any political rights or citizenship. Refugee camps are used to contain refugees without access to any political and socio-economic rights.[89] Agamben and Arendt both see refugees as a symbol of the systemic failure of the international system. Contrary to Benhabib, they both reject the assimilation of refugees into the old model of nation/territory/citizen triangle. They argue that humanitarian efforts cannot solve the refugee problem but only helps to continue the "naked life" of refugees. Both Arendt and Agamben are accused of

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85 ibid, p. 268.

86 **Hyndman**, Jenifer, Conflict, Citizenship and Human Security: Geographies of Protection, Edited by Cowen, Deborah & Gilbert, Emily, War, Citizenship, Territory, Routledge Taylor & Francis Group: London, 2008, pp. 243-244.

87 **Aleinikoff**, 1992, p. 121.

88 **Agamben**, Giorgio, Homo Sacer: Sovereign Power and Bare Life, Translated by Heller-Roazen, Daniel, Stanford University Press: Stanford, 1998, pp. 71-74; **Agamben**, Giorgio, Means Without End: Notes on Politics. Translated by Binetti, Vincenzo & Casarino, Cesare, University of Minnesota Press: Minneapolis, 2000, pp. 3-12.

89 **Agamben**, 2000, pp. 36-44.

"arrogance" and "irrelevance" to the real life of refugees and their incredible effort to integrate with their new host community.[90]

For Kesby, despite the changes brought by globalisation, international human rights law is still "notoriously" weak. The conflict between universalism of rights and the sovereignty of the nation state is obvious in our current international state system. Although as shown above some scholars claim that human rights are progressively "humanizing" international law and tempering the influence of sovereignty, this claim is largely true with respect to the lawful residents living within their borders but it has little bearing on the arena of refugee protection and migration. State sovereignty remains largely unfettered in respect to immigration and asylum issues**.** Human rights norms cannot erase territorial borders and the significance of citizenship. States continue to be principal guarantors of human rights and human rights can only be claimed at the national level. At present, this leaves non-citizens in a precarious position: they are recognised as the bearers of rights on the basis of humanity but at the national level, they are reduced to deportable aliens and denied recognition as the subject of rights. Thus, Kesby asserts, "Humanity is not the answer to the right to have rights but the site of its contestation".[91]

Nash has also drawn attention to the contradictory nature of universal human rights. She alleges that

> Far from inaugurating a new era of genuinely universal human rights, in some cases cosmopolitan law may even contribute to the creation of conditions in which fundamental human rights are violated.[92]

This is so evident in the cosmopolitan world and even in Europe that universal human rights have not resulted in the elimination of inequalities between citizens and non-citizens. Adopting a sociological approach to rights, Nash claims that the application of human rights contributes to the creation and the multiplication of differences and inequalities between citizens and non-citizens, creating very different categories, including "super-citizens, marginal citizens, quasi-citizens, sub-citizens and un-citizens".[93] Even though the legalization of human rights seems to make equal non-

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90 **Owens**, 2009, p. 579.

91 **Kesby**, 2012, pp. 116-117.

92 **Nash**, Kate, Between Citizenship and Human Rights, *Sociology*, 43(6), 2009, p. 1067.

93 ibid. p. 1067.

citizens, they do not enjoy the same legal and socio-economic rights as citizens. Today human rights for non-citizens are far from popular; Politicians seeking re-election are following populist policies to gain approval of their citizens rather than protecting non-citizens. Judges are rarely trained in human rights law while the media is not keen to defend non-citizens' rights. Under such circumstances, it is extremely difficult to create the political will to secure the equality of citizens and non-citizens. In addition, a cosmopolitan law is extraordinarily slow, complex and multilayered. The result is that the proliferation of citizenship statuses in relation to human rights has not achieved a breakthrough in the distinction between the citizen and non-citizen on which the nation-state was founded.[94]

4. The Relevance of Arendt's Political Theory to the Refugee Protection Crisis: The EU-Turkey Agreement on Refugees

This section seeks to answer the question why did the researcher choose to use Arendt's political theory to explain the struggles of refugees in accessing their fundamental rights. As demonstrated above in Arendt's political theory, human rights are bound up with the structures of the nation state and its form of citizenship. From this perspective, the inherent link between human rights and the nation state makes refugees' and asylum seekers' access to human rights problematic.

Other theorists have sought a resolution of that conundrum. There are three different explanations about the rightless situation of refugees in the literature.[95] The first lies in the structures of liberal democracies. According to Dembour and Tobias, the problem is not one of the nation states because not all states have at their core a nation that is exclusionary in its conception. The proponents of this view, especially Benhabib, argue that liberal democracies contain a constitutive dilemma at the heart of their structures. On the one hand, they have to respect the universal human rights principles without any distinction of membership status but on the other hand, liberal democracies have sovereign power of self-determination and set limits that lead to the exclusion of foreigners from entering their territory. This leads to boundaries and conceptual exclusion of refugees and asylum seekers in the name of the people within its jurisdiction.[96]

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94 ibid, pp. 1079-1080.

95 **Dembour**, & **Tobias**, 2011, p. 9.

96 **Benhabib (a)**, 2005, p. 673.

The second perspective argues that refugees and asylum seekers have lost their right to have rights, not so much because they have crossed an international border some time in their lifetime but because they are politically and socially marginalized.[97] As Somers argues legal citizenship may have been necessary for securing individual rights but possessing formal nation state citizenship alone is an inadequate foundation for being recognised as a fully rights-bearing person. If the access of migrants and refugees to human rights is problematic, it is because the people we are talking about are predominantly poor and black, linked to a long history of political and economic exploitation.[98]

The third perspective suggests that human rights are not meant to deliver the equal treatment and dignity they seem to promise. In fact, the protection available to the powerless under the guise of human rights constitutes a form of regulation rather than seriously challenging the status quo of current inequalities in the world. Human rights have been constructed by powerful states to continue their status quo.[99] As Wolcher argues "No legal system is perfect" and mistakes are frequently made by law-doers but they "blinker their vision so as not to see law's costs."[100] Human rights are therefore part of the problem rather than the solution to the exclusion, marginalisation and inequality faced by many refugees and asylum seekers in the contemporary refugee protection regime.[101]

All these perspectives have underlined the same deficiencies that refugees and asylum seekers have problematic access to their fundamental human rights.[102] All criticisms address the same idea that the universality of human rights is a flawed idea. For Donnelly, "the universality of human rights is a moral claim about the proper way to organise social and political relations in the contemporary world, not an historical or anthropological

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97 **Dembour** & **Tobias**, 2011, p. 9.

98 **Somers**, R. Margaret, Genealogies of Citizenship: Markets, Statelessness, and the Right to Have Rights, Cambridge University Press: Cambridge, 2008, pp. 26-27.

99 **Dembour** & **Tobias**, 2011, p. 11.

100 **Wolcher**, E. Louis, Law's Task: The Tragic Circle of Law, Justice and Human Suffering, Ashgate: Aldershot, 2008, p. 11.

101 **Dembour** & **Tobias**, 2011, p. 11.

102 ibid. p. 11.

fact".[103] The answer to the question why the researcher chose to use Arendt's political theory is related to how Arendt conceptualizes the rightless position of refugees and asylum seekers. Her interpretation of stateless persons and their struggles in accessing their fundamental rights provide a framework for the researcher to use in defining how the recent refugee agreement between the EU and Turkey affects refugees and their access to their fundamental human rights. Although other critical perspectives have focused on the reasons behind the rightless position of refugees and asylum seekers, Arendt focused on the harm of statelessness including both legal harm (the loss of citizenship) and an ontological harm, deprivation of fundamental human qualities. She defines the ontological deprivation in three interconnected dimensions: the loss of identity and reduction to merely human or bare life: a separation from the common realm of humanity and abandonment, finally loss of a person's ability to speak and act in a meaningful way.[104]

For Arendt, the deprivation of identity has led stateless or refugees to fall "outside the pale of law"[105] and appear as "naked human beings".[106] This means that the stateless and refugees lose their political status and they cannot regain it. They appear to the outside world of human beings "without a profession, without a citizenship, without an opinion, without a deed by which to identify and specify himself".[107] As Agier underlines, today refugees and the stateless "are certainly alive, but they no longer "exist".[108] Whatever their national identity, ethnicity or religion, their "social identity is now put in brackets for as long as they are confined to camps. They have only "bare lives" which depend on humanitarian aid. They spend months and years, sometimes their entire life cycle outside of any membership status.[109]

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103 **Donnelly**, Jack, The Social Construction of International Human Rights, Edited by Dunne, Tim, Dunne & Wheeler, J. Nicholas, Human Rights in Global Politics, Cambridge University Press: Cambridge, 1999, p. 81.

104 **Parekh**, Serena, Beyond the Ethics of Admission: Stateless People, Refugee Camps and Moral Obligations, *Philosophy and Social Criticism*, 40(7), 2014, p. 651.

105 **Arendt**, 1966, p. 277.

106 ibid, p. 301.

107 **Arendt**, Hannah, The Origins of Totalitarianism, Meridian Books: New York, 1978, p. 302, cited by **Parekh**, 2014, p. 651.

108 **Agier**, Micheal, On the Margins of the World: The Refugee Experience Today, Translated by D. Fernbach, 2011, Polity Press: MA, p. 49.

109 ibid, pp. 49-50.

Refugee camps are often used to exclude refugees from the common public space. They are excluded physically, economically, socially and politically from their host community. They are denied social integration where they reside. Although it is morally problematic, sovereign states see refugee camps in the transit countries as the only solution to increasing numbers of refugees and asylum seekers without violating their universalistic human rights.[110]

Arendt's third dimension of ontological deprivation arises directly as a result of the first two dimensions: Being a refugee or stateless diminishes a person's ability to speak and act in a meaningful way.[111] For Arendt, the loss of membership in a political community is equivalent to the loss of all human rights and dignity. Arendt dismisses any theory that considers human rights as inalienable and possessed naturally because such rights cannot be exercised or protected outside the political community. In accordance with Arendt, "we are not born equal; we become equal as members of a group on the strengths of our decision to guarantee ourselves mutually equal rights". [112] Deprived of a political community, stateless or refugees are continually at risk of "becoming irrelevant to the world in that their actions and opinions no longer matter to anyone; it is as if they cease to exist".[113]

The EU-Turkey RA is "the most emblematic case" that affirms the continuing relevance of Arendt's arguments about the harm of statelessness including both the loss of citizenship and deprivation of fundamental human qualities. With the increasing Syrian refugee flow into the EU territory, the EU desperately needed "Turkey to serve as a migrant waiting room on its borders".[114] To reach its aims, the EU signed a refugee deal with Turkey and deployed huge resources to stop refugees and vulnerable migrants from reaching the EU by sealing the Aegean route. Since the refugee deal, many asylum seekers and refugees who arrived in Greece have been subjected to prolonged mandatory detention in inhuman conditions.[115] These facilities are being used to break refugee's

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110 **Parekh**, 2014, pp. 653-654.

111 ibid, p. 654.

112 ibid, p. 654.

113 **Hayden**, 2010, p. 65.

114 **Wilczek**, Maria, When the EU is No Longer Able to Bribe Turkey, The Blackmail will Begin', The Spectator, 4 March 2016, available at http://blogs.spectator.co.uk/2016/03/when-the-eu-is-no-longer-able-to-bribe turkey-theblackmail- will-begin/.

115 **Amnesty International**, A Blue Print for Despair, human Rights Impact of the EU-Turkey Deal, January 2017, p. 9.

hopes to access a dignified life in Europe or forced them to return to Turkey. Recent reports about Greek hotspots have revealed that every asylum seekers, even vulnerable ones, are subjected to automatic detention under inadequate standards and without accessing asylum. The systemic use of safe third country concept has also been violating the fundamental rights of asylum seekers and refugees under both international human rights and EU law.[116]

The refugee deal created legal "holes of oblivion" according to Arendt. This means that signing a refugee deal with Turkey, the EU is deliberately creating sophisticated barriers to prevent asylum seekers' access to its territory. Refugees and asylum seekers are "smuggled across borders by Western officials" collaborating with Turkey and are forced to stay in Turkey within "darkness" as they do not know their fate.[117] The implementation of the EU-Turkey refugee deal has revealed that Turkey cannot guarantee the rights of refugees and asylum seekers due to deficiencies in its refugee protection system. They are excluded from participation in the ordinary functioning of society. In many respects, their situation in Turkey is quite similar to the one that Arendt describes in her book, the Origins of Totalitarianism. "Internment camp…has become the routine solution for the domicile of the "displaced persons"[118] and "the only practical substitute for a non-existent homeland".[119] Today, as described by Arendt, many refugees and asylum seekers are "liable to jail sentences without committing crime"[120] and rarely can they access the protections guaranteed under the rule of law. This situation indicates that even though the RA is presented as the only technical solution or "lesser evil"[121] to combat "illegal migration", the acceptance of "lesser evil" has weakened the enforceability of universal

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116 **Amnesty International**, January 2017, p. 9; **ECRE**, The Implementation of the Hotspots in Italy and Greece, 2017, p. 34, http://www.ecre.org/wp-content/uploads/2016/12/HOTSPOTS-Report-5.12.2016.pdf.

117 **Mackereth**: **Larking**, Emma, Human Rights, the Rights to Have Rights, and Life Beyond the Pale of the Law, *Australian Journal of Human Rights*, 18(1), 2012, p. 70; **Hirsch** & **Bell**, 2017, p. 1.

118 **Arendt**, 1966, p. 279.

119 ibid, p. 284.

120 ibid, p. 286.

121 Arendt described some of the darkest times of Europe's recent history writing, "acceptance of lesser evil is consciously used in conditioning the government officials as well as at large at the acceptance of evil as such." **Arendt**, Hannah, Responsibility and Judgment, Edited by Kohn, Jerome, Schoken Books: New York, 2003, pp. 36-37, cited by **Cassarino**, Jean-Pierre, Unbalanced Reciprocities: Cooperation on Readmission in the Euro-Mediterranean Area, The Middle East Institute, Special Edition, Viewpoints, Washington D.C., 2010, p. 29, https://ssrn.com/abstract=1730633 or http://dx.doi.org/10.2139/ssrn.1730633

norms and standards of human rights without necessarily ignoring or denying their existence.[122]

In addition, the EU-Turkey RA leaves refugees and asylum seekers in "a Kafkaesque legal vacuum" which reduces them to "non-persons, legal ghosts".[123] From Arendt's perspective, it means that deprivation of civil-political and socio-economic rights undermines the possibilities of establishing a reliable and durable life for refugees and gives rise to a fundamental condition of "rightlessness". As seen in the experience of Syrian refugees in Turkey, they are not able to get refugee status or any other legal status due to Turkey's geographical limitation to 1951 Refugee Convention. Thus, they are struggling to access their basic human rights such as accommodation, food, health and education services. The fieldwork findings in chapters VI and VII highlight that they are not seen as right holders but as "passive beneficiary"[124] at the discretion of the Turkish government.

Arendt's political theory also offers a clear picture of how rightlessness constitutes the loss of action and the right to work.[125] Asylum seekers and refugees stay rightless because they are forced to live in camps or urban areas that make it difficult to establish a relatively durable world with their own work. These forms of invisible violence hinder the efforts of asylum seekers and refugees to claim and exercise their human rights.[126] In the "We Refugees", Arendt reminded us that establishing a durable life is very important for refugees. She insists that the right to work is very important for human beings because it instills a "trust in reality of life." By being able to work and pay for their daily needs, refugees do not have to depend on aid from host state or other international organizations. The dependency on aid agencies or host communities has led to the alienation of refugees from host communities and prevents them from settling as a normal member of human society. In Turkey, refugees have a right to work officially but they cannot use that right

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122 **Cassarino**, 2010, p. 29.

123 **UNHCR**, September 2006, "Refugees by Numbers 2006 Edition", cited by **Hayden**, 2008, p. 249.

124 **Gündoğdu**, 2014, p. 93.

125 **Arendt**, Hannah, The Human Condition, The University of Chicago Press: Chicago, 1958, p. 7.

126 **Arendt**, Hannah, We Refugees, The Jewish Writings, Edited by Kohn, Jerome & Feldmen, H. Ron, Schocken Books: New York, 2007, p. 264. In the "We Refugees", Arendt described the arrival of refugees from Europe and their precarious situation: "We lost our home, which means the familiarity of daily life. We lost our occupation, which means the confidence that we are of some use in this world. We lost our language, which means the naturalness of reactions, the simplicity of gestures, the unaffected expression of feelings. We left our relatives in the Polish ghettos and our best friends have been killed in concentration camps, and that means the rupture of our private lives*"*.

due to bureaucratic obstacles, the high unemployment rate in the labour market or because of institutional deficiencies. The problems in exercising their right to work have been preventing refugees and asylum seekers from establishing a relatively durable life and thus amounts to their expulsion from the political community. Without belonging to a political community, they have nothing left but their "bare humanity.[127]

5. Conclusion

This chapter sought to examine why refugees and asylum seekers find it so difficult to access their fundamental human rights. The researcher used the arguments put forward by Hannah Arendt to answer this question. According to Arendt's political theory, human rights remain bound up with the nation state and citizenship status. This inherent link is problematic as when an individual loses that citizenship status they lose all the benefits that are attached to it. Arendt points out that human rights are only "enjoyed by citizens of the most prosperous and civilised countries."[128] Despite the claims of universal human rights, nation states can and still do exclude those who are not citizens from access to their fundamental human rights. The continuing conflict between human rights and state sovereignty cannot be overcome by globalisation. The EU-Turkey refugee deal is a reflection of this continuing conflict between human rights and state sovereignty. Even though the EU is presenting the refugee deal as a humanitarian action and success story in reducing the deadly journey of refugees to the EU territory, the deal aims to contain refugees in their region of origin. Whilst EU officials have been expressing condemnation of the US President Donald Trump's permanent ban on Syrian refugees, the US and the EU differ only in rhetoric as in reality, the EU has been doing this under the guise of the RA with Turkey and other less developed countries. This is hypocrisy. The attitude of the EU affirms Gibney's observation that

> Human right has evolved into something that it was never intended to become. Rather than being based firmly on universal principles and values, "human rights" has instead become parochial, territorial, and ultimately self-serving. Much worse, and in large part as a result of this approach, "human rights" has offered none of the protection that it promises or that its framers intended. [129]

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127 **Gündoğdu**, 2014, pp. 128-129.

128 **Arendt**, 1966, p. 279.

129 **Gibney**, Mark, International Human Rights Law: Returning to Universal Principles, Rowman & Littlefield Publishers: New York 2008, p. 2.

After constructing a theoretical framework, examining the debates about refugees' rights and rightlesness and their link to the current RA between the EU and Turkey, it is time now to move on to evaluate the compatibility of the readmission agreements with the fundamental principle of *non-refoulement*, the right to seek asylum and the obligation to provide effective refugee protection within international refugee and human rights law.

CHAPTER III: Why are Readmission Agreements a Threat to the Principle of *Non-Refoulement* and the Right to Asylum?

> Refugee protection is a human rights issue, rather than principally an act of charity at the discretion of States.[1]

1. Introduction

This chapter analyses RAs and their compatibility with the principle of *non-refoulement*, the right to seek asylum and the effective protection of refugees. It draws attention to the contradictory responses of nation states towards refugees and asylum seekers. Even though the principle of *non-refoulement* and the right to seek asylum are accepted as a fundamental human rights, refugees and asylum seekers still face barriers to their access to safe havens and even if they do gain access to safe countries, they are often subjected to a number of refugee "deals", "swaps" or "bargains".[2] These political arrangements undermine the fundamental rights of refugees and asylum seekers, especially the right to seek asylum.[3]

Today the status of refugees and the consensus on the collective responsibility of the international community towards refugees are starting to lose their strength. Increases in forced and economic migration flows all around the world are affecting Western states, and they have started to see asylum seekers and refugees as a threat to their national solidarity, the economic well-being of their communities and their political self-determination.[4] In this environment, respecting the right to seek asylum and the principle

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1 **Feller**, Erika, The Evolution of the International Refugee Protection Regime, *Washington University Journal of Law & Policy*, 5, 2001, p. 129.

2 **McConnachie**, Kirsten, Refugee Protection and the Art of the Deal, *Journal of Human Rights Practice*, 2017, p. 1.

3 **Grant**, Stefanie, The Recognition of Migrants' Rights Within the UN Human Rights System, Edited by Dembour, Marie-Bénédicte & Tobias, Kelly, Are Human Rights for Migrants? Critical Reflections on the Status of Irregular Migrants in Europe and the United States, Routledge Taylor & Francis: New York, 2011, p. 31; **Hirsch**, Asher Lazarus & **Bell**, Nathan, The Right to Have Rights as a Right to Enter: Addressing a Lacuna in the International Refugee Protection Regime, *Human Rights Review*, 2017, p. 1.

4 **Hathaway**, James C., A Reconsideration of the Underlying Premise of Refugee Law, *Harvard Journal of International Law*, 31(1), 1990, pp. 134-135; **Noll,** Gregor, Negotiating Asylum**:** The EU Acquis, Extraterritorial Protection and the Common Market of Deflection, Martinus Nijhoff Publishers: London, 2000, p. 75; **Marx**, Reinhard, *Non-Refoulement*, Access to Procedures, and

of *non-refoulement* have become a challenge for states.[5] As Van Der Klaauw points out migration and asylum have been "married forcibly"[6] and the line between migration control and refugee protection is "blurring".[7] Today as a consequence,

> Access to international protection has been made dependent not on the refugees' need for protection, but on his or her own ability to enter clandestinely the territory of the targeted state.[8]

This restrictive approach has also become more visible in the EU. Within an internal borderless Europe, uncontrolled floods of refugees have become a key issue for EU member states, and this is perceived as a threat to the security of the common area regarding increasing linkage with organized crime and terrorism.[9] In this context, a European common asylum policy has been developed as "a reaction" to the opening up of internal borders, rather than providing protection for individuals. It is mainly concerned with the national interests of EU member states and preserving sovereign control over the entry of asylum seekers and refugees. Little attention has been paid to the issue of whether the European common asylum policy is compatible with the fundamental human rights of refugees. With this shift in perspective, the EU has started to redefine its fundamental principles against the background of the principles of an international refugee protection regime based on human rights, international solidarity, and collective responsibility.[10]

In the framework of its common asylum policy, the EU has developed an external dimension to integrate third countries into its migration management. The EU Justice and

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Responsibility for Determining Refugee Claims, *International Journal of Refugee Law*, 7(3), 1995, pp. 384-385.

5 **Van Der Klaauw**, Johannes, Refugee Rights in Times of Mixed Migration: Evolving Status and Protection Issues, *Refugee Survey Quarterly*, 28(4), 2009, p. 59; **Moreno Lax**, Violeta, Must EU Borders Have Doors for Refugees? On the Compatibility of Schengen Visas with EU Member States' Obligations to Provide International Protection to Refugees, CRIDHO Working Paper 2008/03, p. 4.

6 **Van Der Klaauw**, Johannes, Irregular Migration and Asylum-Seeking: Forced Marriage or Reason For Divorce, Edited by Bogusz, Barbara & Cholewinski, Ryszard & Cygan, Adam & Szysczak, Erika, Irregular Migration and Human Rights: Theoretical, European and International Perspectives, Martinus Nijhoff Publishers: Leiden, 2004, p. 116.

7 **Feller**, Erika, Refugees are not Migrants, *Refugee Survey Quarterly*, 24(4), 2005, p. 27.

8 **Moreno Lax**, 2008, p. 4.

9 **Lavenex**, Sandra, Shifting Up and Out: The Foreign Policy of European Immigration Control, *West European Politics*, 29(2), 2006, pp. 329-330; **Leiserson**, Elizabeth, Securing the Borders Against Syrian Refugees: When Non-Admission Means Return, *Yale Journal of International Law*, 42, pp. 189-193.

10 **Lavenex**, Sandra, Safe Third Countries: Extending the EU Asylum and Immigration Policies to Central and Eastern Europe, Central European University Press: New York, 1999, pp. 162-163.

Home Affairs external dimension aims at extending its asylum and migration policies beyond its borders by incorporating third countries.[11] These third countries are being supported financially and technically to contain refugee movements in their regions of origin and to strengthen border controls to the advantage of the EU. Instead of addressing the root causes, which lead people to leave their countries of origin, European policies have focused on stemming migration flows. From a member state's perspective, the externalization of EU asylum policy is very logical because if engagement with third countries is successful, it will reduce the burden of control at their own borders and curtail further unwanted inflows.[12] Zolberg describes the externalization of asylum policy as "remote control", since its primary aim is to "shift the locus of control" further away from the common territory.[13]

This chapter is divided into three sections. The first section explains the principle of *non-refoulement*, its scope and its de facto extension within the developing jurisprudence of the ECtHR. The principle of *non-refoulement* has been extended beyond the 1951 Refugee Convention and puts a negative obligation on states not to send an asylum seeker back to face persecution or another third country where there is a threat of persecution, but some gaps in the 1951 Refugee Convention allow states to take the initiative and shift their responsibilities onto neighbouring countries and thus abstain from responsibilities under the refugee protection regime. Especially, safe third country practices along with readmission agreements put a huge burden on developing countries without taking into account their institutional and financial resources. In this section, the protection elsewhere notion and its alleged legal basis, Article 31 of the 1951 Refugee Convention, will be examined via a literature review.

The second section critically analyses the compatibility of readmission agreements with the principle of *refoulement* looking through the common EU asylum policy on "safe third country" practices. The relationship between readmission agreements and "safe third country concepts" constitutes the fundamental basis of protection concerns,

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11 **Gil-Bazo**, Maria-Teresa, The Practice of Mediterranean States in the Context of the European Union's Justice and Home Affairs External Dimension: The Safe Third Country Concept Revisited, *International Journal of Refugee Law*, 18(3-4), 2006, p. 581.

12 **Lavenex**, 2006, p. 337; **Haddad**, Emma, The External Dimension of EU Refugee Policy: A New Approach to Asylum? *Government and Opposition*, 43(2), 2008, p. 197.

13 **Zolberg**, Aristide, The Archeology of "Remote Control", Edited by Fahrmeir, Andreas & Faron, Olivier & Weil, Patrick, Migration Control in North Atlantic World, New York: Berghahn Books, 2003, cited by **Lavenex**, 2006, p. 334.

especially the principle of *non-refoulement*. The "safe third country" concept in the context of EU common asylum policy and its possible effect on refugee protection regimes will be evaluated in the context of refugee protection and human rights instruments. Also, it is crucial to examine whether the existence of a readmission agreement may trigger the practice of border return against the principle of *non-refoulement*. States have developed special border procedures for individuals apprehended at their borders or in international zones. Member states have significant discretion to define asylum procedures with fewer safeguards and accelerated determination.

The last section evaluates the principle of effective protection, which constitutes the legal basis for transferring the responsibility for asylum seekers to third countries, in the light of international law and the jurisprudence of the ECtHR. These criteria determined by the UNHCR expert roundtable and the EU Commission identify legal constraints, which are binding upon states wishing to return refugees and asylum seekers to third countries according to readmission agreements. These criteria will be used to evaluate if Turkey is a safe third country for refugees and asylum seekers transferred by EU member states according to a readmission agreement in chapters six and seven.

This chapter argues that the implementation of readmission agreements violates the prohibition on *refoulement,* the right to seek asylum and results in "dilution of hard law commitments via soft law implementation".[14] Furthermore, these refugee agreements mainly aim to shift the refugee burden on to third countries and lead to downgrading refugee protection standards. These refugee protection approaches in the region of origin involve inhuman conditions and conflict with the principles of effective protection and dignified living conditions.

2. The Principle of *Non-Refoulement:* Cornerstone of Refugee Protection

Refugee protection is as old as "the history of mankind" but its legal codification goes back only to the middle of the twentieth century.[15] The UN accepted the right to seek

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[14] **Gammeltoft-Hansen**, Thomas & **Guild**, Elspeth & **Moreno-Lax**, Violeta & **Panizzon**, Marion and **Roele**, Isobel, What is a Compact? Migrants' Rights and State Responsibilities Regarding the Design of the UN Global Compact for Safe, Orderly and Regular Migration, Raoul Wallenberg Institute, 2017, p. 31.

[15] **Lavenex**, Sandra, The Europeanization of Refugee Policies: Between Human Rights and Internal Security, Aldershot: Ashgate Publishing Company, 2001, p. 28.

asylum as a fundamental human right within the Universal Declaration of Human Rights (UDHR) in 1948. Accordingly, Article 14(1) of the UDHR recognizes that "everyone has the right to seek and to enjoy in other countries asylum from persecution.*"* Just a few years later, in 1951, the UN adopted the principle of *non-refoulement* in the 1951 Refugee Convention. Article 33(1) stipulates that:

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

The principle of *non-refoulement* has been referred to as the cardinal and non-derogable principle of international refugee protection[16] but it has an inevitable relationship with the right to seek asylum. The right to seek asylum and the principle of *non-refoulement* constitute the fundamental legal basis of international refugee protection. They are universally accepted principles and have been described as the Magna Carta for refugees.[17] National and international courts, most notably the European Court of Human Rights (ECtHR), always refer to these cornerstone principles in their jurisprudence regarding the fundamental human rights of refugees. Therefore, before examining the principle of *non-refoulement*, it is necessary to examine the right to seek asylum.

2.1. The Right to Seek Asylum: A Mythical Status?

Article 14 of the UDHR provides the right to seek asylum from persecution. It is the first established fundamental human rights instrument regarding refugee protection.[18] It is known as the "chief" among other refugee protection instruments[19] and strengthens the argument that the "refugee protection regime...has its origins in general principles of

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16 **Kâlin**, Walter & **Coroni**, Martina & **Heim**, Lukas, Article 33, Para.1 (Prohibition of Expulsion or Return (*Refoulement*), Edited by Zimmermann, Andreas & Andreas & Jonas, Dörschner & Machts, Felix, The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol, A Commentary, Oxford University Press: Oxford, 2011, p. 1335.

17 **Hyndman**, Patricia, Asylum and *Non-Refoulement*: Are These Obligations Owed to Refugees Under International Law, *Philippine Law Journal*, 57, 1982, p. 46; **Zimmermann**, Andreas & **Mahler**, Claudia, Article 1 A, Edited by Zimmermann, Andreas & Jonas, Dörschner & Machts, Felix, The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary, Oxford University Press: Oxford, 2011, p. 464.

18 **Edwards**, 2005, p. 301.

19 **Plender**, Richard & **Mole**, Nuala, "Beyond the Geneva Convention: Constructing a *de facto* Right of Asylum from International Human Rights Instruments", Edited by Nicholson, Frances & Twomey, Patrick M., Refugee Rights and Realities: Evolving International Concepts and Regimes, Cambridge University Press: Cambridge, 1999, pp. 81-82.

human rights".[20] Nevertheless, Article 14 only provides the right to seek asylum, not the right to receive or be granted asylum. In other words, it does not impose a duty upon contracting states to grant asylum to refugees arriving at their borders.[21] Although the proposed first version stated "everyone has the right to seek and to be granted asylum from persecution", states avoided the implementation of such a substantive right and the final version underlined the importance of state sovereignty.[22] Thus, refugee protection is highly dependent on the sovereign right of states to grant asylum rather than the right of refugees to be granted asylum.[23]

Individuals may not able to claim a right to asylum under Article 14 of the UDHR, but states have a duty under international law not to prevent the individual's right to seek asylum.[24] As Gammeltoft-Hansen contends, there is no international, substantive right to be granted asylum, but it can be understood from the wording of Article 14 that the right to access an asylum process is established. Therefore, the international community and states should not prevent asylum seekers from accessing refugee status determination. This procedural right has been substantially supported by the binding principle of *non-refoulement*, as enshrined in Article 33 of the 1951 Refugee Convention.[25] Therefore, when the right to seek asylum is coupled with Article 33 of the 1951 Refugee Convention, it gains more strength than before.[26]

In this regard, states' restrictive policies, such as rejection at the border, transit zones or border closures without giving an opportunity to claim asylum, undermine the right to seek asylum and the principle of *non-refoulement*.[27] For instance, Hungary closed its borders to thousands of Syrian refugees fleeing from Syria and they were trapped in

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20 **Feller**, Erika, International Refugee Protection 50 Years on: The Protection Challenges of the Past, Present and Future, *International Law Review of the Red Cross*, 83, September, 2001, p. 582.

21 **Hyndman**, 1982, p. 48; **Kjaerum**, Morten, The Concept of Country of First Asylum, *International Journal of Refugee Law*, 4(4), 1992, p. 514.

22 **Goodwin-Gill**, Guy S. & **McAdam**, Jane, The Refugee in International Law, Third Edition, Oxford University Press: Oxford, 2007, pp. 358-361.

23 **Lavenex**, 1999, pp. 11-12.

24 **Goodwin-Gill** & **McAdam**, p. 368.

25 **Gammeltoft-Hansen**, Thomas & **Gammeltoft-Hansen**, Hans, The Right to Seek- Revisited. On the UN Human Rights Declaration Article 14 and Access to Asylum Procedures in the EU, *European Journal of Migration and Law*, 10(4), 2008, p. 446.

26 **O'niens**, Helen, Asylum –A Right Denied, A Critical Analysis of European Asylum Policy, Ashgate: London, 2014, pp. 39-40; **Edwards**, 2005, p. 301; **Kjaerum** 1992, p. 514.

27 **Sciurba**, Alessandra & **Furri**, Filippo, Human Rights Beyond Humanitarianism: The Radical Challenge to the Right to Asylum in the Mediterranean Zone, *Antipode*, 2017, p. 3.

Serbia.[28] In that case, Hungary breached the principle of *non-refoulement* and the right to seek asylum by rejecting individuals at the frontier of the country without asking if they were seeking asylum.[29] As the UNHCR has firmly stated,[30]

> Whenever refugees – or asylum seekers who may be refugees – are subjected, either directly or indirectly, to rejection, expulsion and return to territories where their life or freedom is threatened, [this is] in violations of the principle of *non-refoulement*.

A UN sub-commission further confirmed that asylum seekers are continuously subjected to restrictive policies while trying to reach asylum states and escaping from persecution or human rights violations. Particularly, visa restrictions on refugee producing countries may be incompatible with the right to seek asylum.[31] In this regard, EU member states' visa restrictions on 132 states, including refugee-producing countries, such as Afghanistan, Iraq, Somalia and Sudan, constitute a "serious threat to the personal mobility" of people.[32] In response to the Syrian refugee crisis, the European Commission addressed external challenges to access to asylum procedures in the EU and its report suggested humanitarian visas with resettlement opportunities as a solution to ensure a more orderly arrival of people in need of international protection.[33] Nevertheless, so far, no general solution has been found as EU member states rarely grant humanitarian visas only in exceptional situations. Taken as a whole, it explains why refugees are not able to "buy relatively cheap tickets to travel instead of paying smugglers a large amount of

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28 **Human Rights Watch**, Hungary: New Border Regime Threatens Asylum Seekers, 19 September 2015, https://www.hrw.org/news/2015/09/19/hungary-new-border-regime-threatens-asylum-seekers.

29 **Lauterpacht**, Elihu & **Bethlehem**, Daniel, The Scope and Content of the Principle of *non-refoulement*: Opinion. Edited by Feller, Erika & Türk, Volker & Nicholson, Frances, Refugee Protection in International Law, Cambridge: Cambridge University Press, 2003, pp. 113-114; **Hyndman**, 1982, p. 50.

30 **UNHCR**, Executive Committee of the High Commissioner's Programme, Forty-fourth session, Note on International Protection, 31 August 1993, (A/AC.96/815), para. 23.

31 **UNHCR**, Sub-Commission on Human Rights Resolution 2000/20. The Right to Seek and Enjoy Asylum, 18 August 2000, 27th Meeting.

32 **Noll**, 2000, p. 181.

33 **European Commission**, An Open and Secure Europe: Making It Happen, Communication From the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, SWD, 2014, 63 Final, p. 7; **Guild**, Elspeth & **Costello**, Cathryn & **Garlick**, Madeline & **Moreno-Lax**, Violeta & **Mouzourakis**, Minos, New Approaches, Alternative Avenues and Means of Access to Asylum Procedures for Persons Seeking International Protection, CEPS Paper in Liberty and Security in Europe, No. 77, January 2015, p. 1.

money for unsafe journeys".[34] Thus, most asylum seekers suffer human rights violations, and many die on their way to the EU.[35]

There is no doubt that the implementation of restrictive policies has blocked the asylum channel for people escaping from persecution and forcing them to use irregular channels.[36] At the same time, such restrictive policies have fuelled the human smuggling industry and encouraged asylum seekers to go "underground" rather than approach competent authorities and submit a claim for refugee status.[37] Nevertheless, their irregular position brings them within the scope of readmission agreements, although they are in genuine need of international protection. Readmission agreements as administrative instruments have been used for the forcible return of this group of asylum seekers as irregular migrants without considering their asylum claims. It is generally accepted that even though states have the right to regulate entry to their territory, they cannot use this right to deny the right to seek asylum. If states develop restrictive policies to abstain from their protection responsibilities to refugees, this definitely contravenes the spirit of the right to seek asylum and the principle of *non-refoulement*.[38]

2.2. The Fundamental Status of the Principle of *Non-Refoulement*

The principle of *non-refoulement* is vital, given the non-existence of the right to obtain asylum. In the absence of an individual right to be granted asylum, the principle of *non-refoulement* is one of the few protections that asylum seekers can make use of.[39] As a customary international law principle, *non-refoulement* is universally binding on all

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34 **Peers**, Steve, The Refugee Crisis: What Should the EU Do Next? EU Law Analysis, Expert Insight into EU Law Developments, 8 September 2015, http://eulawanalysis.blogspot.co.uk/2015/09/the-refugee-crisis-what-should-eu-do.html.

35 **Morrison**, John & **Crosland**, Beth, The Trafficking and Smuggling of Refugees: the End Game in European Asylum Policy?, New Issues in Refugee Research, Working Paper No. 39, April 2001, pp. 1-2, **ECRE**, Defending Refugees' Access to Protection in Europe, December 2007, p. 4.

36 **Gammeltoft-Hansen** & **Gammeltoft-Hansen**, 2008, p. 450; **Morrison** & **Crosland**, 2001, p. 28.

37 **Crisp**, Jeff, Refugee Protection in Regions of Origin: Potential and Challenges, December 2003, Migration Policy Institute**,** http://www.migrationpolicy.org/article/refugee-protection-regions-origin-potential-and-challenges.

38 **Gilbert**, Geoff, Is Europe Living Up to Its Obligations to Refugees, *European Journal of International Law*, 15(5), 2004, p. 972; **Costello**, Cathryn & **Hancox**, Emily, The Recast Asylum Procedures Directive 2013/32/EU: Caught Between the Stereotypes of the Abusive Asylum Seeker and the Vulnerable Refugee, Draft Paper, 5 February 2015, forthcoming in Reforming the Common European Asylum System: The New European Refugee Law, Edited by Chatail, V & De Bruycker, P & Maiani, F., Martinus Nijhoff, 2015, p. 9; **Gammeltoft-Hansen** & **Gammeltoft-Hansen**, 2008, p. 450.

39 **Abell**, Nazaré Albuquerque, The Compatibility of Readmission Agreements with the 1951 Convention Relating to the Status of Refugees, *International Journal of Refugee*, 11(1), 1999, p. 70.

states, irrespective of their consent to the 1951 Refugee Convention.[40] While the principle does not oblige states to grant asylum, it guarantees that such persons must be allowed to stay, unless they are sent to a third country where they are safe from persecution rather than being returned to the country of persecution. Although a right to asylum would create a positive obligation, the prohibition of *refoulement* imposes a negative duty to refrain from certain actions.[41]

The principle of *non-refoulement* represents a central limit on state sovereignty to decide on the entry and stay of persons escaping from persecution.[42] Article 33 of the 1951 Refugee Convention stipulates that no contracting state may expel or return a refugee to the frontiers of territories where his life or freedom are threatened on account of race, religion, nationality, membership of a particular social group or political opinion in "*any manner whatsoever*". In this regard, the expression "*in any manner whatsoever*" implies that the principle of *non-refoulement* does not only prohibit the return of an asylum seeker to their country of origin where they would be persecuted but also to another third country if there is a risk of persecution or *refoulement* to their country of origin. It means that transferring responsibility for an asylum seeker to another third country does not remove the obligation of a first country of asylum to respect the principle of *non-refoulement*, even though they have made an agreement.[43] In the *T.I. v. the United Kingdom* case, the ECtHR ruled that

> Indirect removal…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.[44]

If a State decides to expel an asylum seeker to a third country, it is still in principle under a duty to examine whether this might result in *refoulement*. To comply with this duty, the

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40 **Goodwin-Gill**, Guy S., The Principle of *Non-Refoulement*: Its Standing and Scope in International Law, A Study Prepared for the Division of International Protection Office of the UNHCR, July 1993, p. 21; **Da Lomba**, Sylvie, The Right to Seek Refugee Status in the European Union. Intersentia Publishers: London 2004, p. 4; **Allain**, Jean, The Jus Cogens Nature of *Non-refoulement*, *International Journal of Refugee Law*, 13(4), 2001, p. 533.

41 **Kâlin** & **Coroni** & **Heim**, 2011, p. 1335.

42 **Kjaerum** 1992, p. 514; **Lavenex**, 1999, p. 12; **Lauterpacht** & **Bethlehem**, 2003, p. 119.

43 **Marx**, 1995, p. 394; **UNHCR**, Considerations on the "Safe Third Country" Concept, Vienna, 8-11 July 1996, p. 2; **Hyndman**, Patricia, The 1951 Convention and Its Implications for Procedural Questions, *International Journal of Refugee Law*, 6, 1994, p. 252.

44 **T.I. v. the United Kingdom**, Application no. 43844/98, 7 March 2000, p. 15.

state should consider the safety of the asylum seeker in the third country, in particular, the protection s/he will receive there against *refoulement*.[45] It is worth noting here that in the *M.S.S. v. Belgium and Greece* case, the ECtHR ruled that if the third country does not provide asylum seekers with fair refugee status determination or basic subsistence living standards but leaves them in a destitute situation, a transfer of responsibility may invoke the responsibility of a state, no matter what agreements are made between the two states regarding an asylum seeker.[46]

Furthermore, it is crucial to underline that the personal scope of Article 33(1) includes not only persons defined as recognized refugees within the meaning of Article 1(A)(2) of the 1951 Refugee Convention but also asylum seekers whose status has not been determined.[47] It is widely accepted[48] that the status of refugees is of a declaratory nature, and a status determination procedure according to the 1951 Refugee Convention does not have a constitutive effect. A person is a refugee the moment s/he meets the criteria of Article 1(A) of the 1951 Refugee Convention, which occurs when crossing the border of a country of persecution into the territory of another state. An asylum seeker receives "presumptive" or "prima facie" refugee status until the determination of her/his status discredits this claim. An asylum seeker is covered by the protection of Article 33(1) as if s/he is a refugee until a status determination discredits this claim.[49] The UNHCR affirms that[50] a proper interpretation of the principle of *non-refoulement* requires that asylum seekers who claim to be refugees should be admitted into a state's territory until their status has been reliably assessed. Protection from *refoulement* is not limited to persons formally recognized as refugees; the principle of *non-refoulement* applies to all persons, irrespective of whether or not they have been officially recognized as refugees, and protects both refugees and asylum seekers.[51]

Nevertheless, the 1951 Refugee Convention does not stipulate that states must determine

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45 **Coleman**, Nils, European Readmission Policy: Third Country Interests and Refugee Rights, Martinus Nijhoff Publishers, Leiden & Boston 2009, p. 235.

46 **M.S.S. v. Belgium and Greece**, Application no. 30696/09, 21 January 2011, paras. 161-162.

47 **Gammeltoft-Hansen** & **Hathaway**, 2014, pp. 237-238; **Kâlin** & **Coroni** & **Heim**, 2011, p. 1342.

48 **Lauterpacht** & **Bethlehem**, 2003, p. 119; **UNHCR**, Note on Determination of Refugee Status under International Instruments, EC/SCP/5, 24 August 1977, para. 5; **Coleman**, 2009, pp. 236-237.

49 **Coleman**, 2009, pp. 236-237.

50 **UNHCR**, Executive Committee of the High Commissioner's Programme, Forty-fourth session, Note on International Protection, 31 August 1993, (A/AC.96/815), para. 11.

51 **Lauterpacht** & **Bethlehem**, 2003, p. 119.

the status of persons claiming asylum. The *Travaux Préparatoires* confirm that the 1951 Refugee Convention does not imply a positive obligation to determine the status of refugees. Article 33(1) of the 1951 Refugee Convention requires a state to examine the merits of an asylum claim only if it wishes to deport asylum seekers to their country of origin without infringing the principle of *non-refoulement*. In other words, applying for asylum in a country does not guarantee that such an application must be decided or even examined on its merits. In this situation, states have two options in accordance with Article 33(1) of the 1951 Refugee Convention. One is to allow an asylum seeker to stay in its territory without any status determination. Another is to deport the asylum seeker to a safe third country without any substantive examination of their asylum claim.[52] However, there is always a risk of indirect *refoulement* to the country of origin. The receiving country is responsible for sending an asylum seeker to a third country where there is always a risk of sending the asylum seeker back to persecution.

However, the prohibition on *refoulement* is not absolute in all cases as Article 33(2) of the 1951 Convention stipulates that

> The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

This Article disregards the benefits of *non-refoulement* for a group of people, even though they satisfy the requirements set out in the refugee definition in Article 1(A)(2) of the 1951 Refugee Convention. In contrast, Article 3 of the European Convention on Human Rights (ECHR) provides protection against *refoulement* even if the asylum seeker has committed a serious crime or constitutes a danger to the community of that country.[53] For this reason, the 1951 Refugee Convention stands in sharp contrast to human rights laws, such as the ECHR, the UN Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT) and the ICCPR.[54] Furthermore, the wording of Article 33(2) is vague in two ways:[55] First, it is not clear when a person is to be regarded

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52 **Coleman**, 2009, pp. 236-238.

53 **Soering v. The United Kingdom**, Application no. 14038/88, 7 July 1989, para. 111.

54 **Harvey**, Colin, Dissident Voices: Refugees, Human Rights and Asylum in Europe, *Social & Legal Studies*, 9(3), 2000, p. 369.

55 **Noll**, 2000, p. 363.

as a "danger to the security" or a "danger to the community" of a host country. Second, the phrases "reasonable grounds" and "particularly serious crime" are not very clear, giving much more discretion to states to exclude a person in need of protection and return him/her to the country of origin in which the individual's life is under threat.

2.3. De Facto Extension of the Principle of *Non-Refoulement* against Reluctant States

Due to its narrow refugee definition, the 1951 Refugee Convention excludes the vast majority of asylum seekers who escaped from civil wars, natural disasters, general violence, military occupation and economic turmoil, since it only covers those persons whose migration is prompted by a fear of persecution in relation to civil and political rights. Indeed, in order to be eligible for refugee status under the 1951 Refugee Convention,[56] an asylum seeker must be outside of her/his country, have a well-founded fear of persecution based on conventional grounds, namely race, religion, nationality, membership of a particular social group or holding a particular political opinion, and be unwilling or unable to avail him/herself of the protection of the state in question. This means that the scope of Article 33(1) of the 1951 Refugee Convention is quite narrow when compared to other international instruments.

It is for this reason that the context of the principle of *non-refoulement* was de facto extended beyond the 1951 Refugee Convention to include asylum seekers escaping for other humanitarian reasons.[57] This informal extension of the principle of *non-refoulement* was accomplished by human rights instruments, such as the ECHR,[58] CAT[59] and the ICCPR.[60] They impose an obligation on states not to return people demanding protection to countries where they would face serious human rights violations. In contrast to the 1951 Refugee Convention, this de facto extension, in other words, complementary

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56 Article 1(A)(2) of the 1951 Refugee Convention.

57 **Goodwin-Gill**, Guy S., *Non-Refoulement* and the New Asylum Seekers, *Virginia Journal of International Law*, 26(4), 1986, pp. 135-136; **Giuffré**, Mariagiulia, Watered-Down Rights on the High Seas: Hirsi Jamaa and Others v. Italy, *International and Comparative Law Quarterly*, 61(3), 2012, p. 748; **Siderenko**, Olga Ferguson, The Common European Asylum System: Background, Current State Affairs, Future Direction. London: Cambridge University Press, 2007, p. 217.

58 Article 3 of the ECHR stipulates, "No one shall be subjected to torture or to inhuman or degrading treatment or punishment".

59 Article 3(1) of the CAT specifies as follows: "No State Party shall expel, return (refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture".

60 Article 7 of the ICCPR states that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation".

protection is "non-discretionary" and protects all persons qua human beings, without distinguishing between refugees, migrants or according to any other legal status. In this respect, the principle of *non-refoulement* applies to every person within the territory of a state.[61] Goodwill Gill evaluated the extension of the principle of *non-refoulement* over the years and states that although the 1951 Refugee Convention cannot meet the needs of the reality; *non-refoulement* was developed over the years to "deal with the humanitarian reality of refugee movements".[62] Regarding its de facto broadened scope, it is a most important avenue from which asylum seekers can benefit. In this regard, the ECHR as a regional fundamental human rights instrument has become the main avenue for refugees and asylum seekers seeking a remedy. Unlike other human rights instruments, e.g. CAT and ICCPR, it provides more effective protection against human rights violations. Therefore, in this section, the ECHR and the jurisprudence of the ECtHR will be examined.

As one of the most important sources of human rights instruments, the ECHR has had a significant influence on the development of the principle of *non-refoulement,* which goes beyond Article 33(1) of the 1951 Refugee Convention. Although the ECHR does not make any particular reference to asylum seekers and refugees, the ECHR applies to everyone, irrespective of her/his status or nationality, including rejected asylum seekers, provided they are present in the jurisdiction of a contracting state.[63] Article 3 of the ECHR states that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment". Article 3 of the ECHR provides absolute and unconditional protection for asylum seekers who claim that they will suffer inhuman or degrading treatment if they are sent back to their country of origin.[64]

The ECHR also complements the protection granted by the 1951 Refugee Convention.[65] For example, while Article 33(2) of the 1951 Refugee Convention permits states to make

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61 **Rohl**, Katharina, Fleeing Violence and Poverty: *Non-refoulement* obligations under the European Convention of Human Rights, UNHCR, Working Paper No. 111, January 2005, pp. 6-7.

62 **Goodwin-Gill**, Guy S., Asylum: The Law and Politics of Change, *International Journal of Refugee Law*, 1995, 7(1), p. 9.

63 **Lambert**, Hélène, The European Convention on Human Rights and the Protection of Refugees: Limits and Opportunities, *Refugee Survey Quarterly*, 24(2), 2005, p. 39; **Peers**, Steve, EU Justice and Home Affairs Law (2nd ed.). Oxford University Press: New York, 2006, p. 311.

64 **Kengerlinsky**, Marat, Restrictions in the EU Immigration and Asylum Policies in the Light of International Human Rights Standards, *Essex Human Rights Review*, 4(2), 2007, p. 4.

65 **Da Lomba**, 2004, p. 11.

exceptions to the principle of *non-refoulement* in times of war or when an applicant has committed a serious crime, Article 3 of the ECHR does not permit any derogation or exception.[66] Moreover, the ECHR envisages an appeal mechanism that does not exist in the 1951 Refugee Convention. Thus, asylum seekers confronting state restrictions increasingly move towards the mechanisms foreseen by the ECHR.[67] In fact, the EU's restrictive policies vis-à-vis asylum seekers have led to an increase in the number of cases coming before the ECtHR since the 1990s.[68] Lambert found out that relying on the ECtHR is the best option for rejected asylum seekers to appeal against their deportation compared to the ICCPR or CAT. The main reason for this is that the principle of *non-refoulement* under the ECHR provides asylum seekers extensive protection from inhuman and degrading treatment whatever the source.[69]

In this regard, the first landmark decision on Article 3 before the ECtHR was the *Soering v. The United Kingdom* case that related to the extradition of a suspected murderer to the United States of America, where he faced the risk of capital punishment and placement in a special prison wing known as "death row". The Court unanimously held that, in the event of the Secretary of State's decision to extradite the applicant to the USA being implemented, there would be a violation of Article 3.[70] This is a crucial case for asylum seekers and refugees because it "unlocked the protective potential of Article 3 ECHR for asylum as well".[71] Article, as interpreted by the ECtHR, has developed obligations for contracting states similar to the principle of *non-refoulement*.[72]

In later cases, the principles developed in the *Soering* case have also been applied to cases of deportation. In 1996, the ECtHR had to decide whether the UK would violate the ECHR by executing a deportation order for Mr Chahal to India. Mr Chahal was a Sikh separatist and accused of being a threat to the "public good for reasons of national security

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66 **Lambert**, Hélène, Protection against Refoulement from Europe: Human Rights Law Comes to the Rescue, *International and Comparative Law Quarterly*, 48(3), 1999, pp. 516-519; **Guild**, Elspeth, Seeking Asylum: Storm Clouds between International Commitments and EU Legislative Measures, *European Law Review*, 29(2), 2004, p. 204.

67 **Harvey**, 2000, pp. 379-382.

68 **Kjaerum**, Morten, Refugee Protection between State Interests and Human Rights: Where is Europe Heading? Human Rights Quarterly, 24(2), 2002, p. 525.

69 **Lambert**, 1999, p. 543.

70 **Soering v. The United Kingdom**, Application no. 14038/88, 7 July 1989, para. 111.

71 **Noll**, 2000, p. 383.

72 **Lambert**, 2005, p. 41.

and other reasons of a public nature, namely the international fight against terrorism".[73] The ECtHR found by 12 votes to 7 that implementation of the deportation order would infringe Article 3 of the ECHR. The ECtHR considered the prohibition to be of an absolute character, applying even to states wishing to protect their community from terrorist attacks.[74] A Court minority, however, held that the UK could legitimately weigh the interest of national security against the individual's interest not to be ill-treated.[75] The Chahal case poses a dilemma between state security and an individual's human rights. In other words, the ECtHR had to make a choice between two risks: torture and terrorism. As seen in this case, the issue of refugee protection is situated in a conflict zone between universalism, which gives priority to the global realization of human rights, and particularism, which gives primacy to the interest of the community. The Court majority stood up for universalism while the minority opted for particularism.[76] The Chahal case reveals that the protection against *refoulement* under Article 3 of the ECHR is absolute and wider than the 1951 Refugee Convention. It is clear that states are responsible for examining the conditions of the country of origin or another third country before sending back asylum seekers. Otherwise, they would infringe the principle of *non-refoulement*.

Another de facto extension of the principle of *non-refoulement* has been the extension of state responsibility outside its territory by the jurisprudence of the ECtHR. In this regard, the *Hirsi Jamaa and Others v. Italy* case[77] was a watershed judgment of the ECtHR, and illustrates how a states' responsibility is activated when they engage in extraterritorial action beyond their borders.[78] Hirsi Jamaa and other applicants, all of Somali or Eritrean nationality, left Libya with the aim of reaching the Italian coast. They were intercepted on the high seas by the Italian Revenue Police, transferred to an Italian vessel and deported back to Tripoli in Libya. However, Italian officers did not accept the intercepted persons' asylum applications in accordance with the 1951 Refugee Convention.[79]

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73 **Chahal v. The United Kingdom**, Application no. 22414/93, 15 November 1996, para. 25.

74 ibid, paras. 75-82.

75 ibid, paras. 1-10.

76 **Noll**, 2000, p. 74.

77 **Hirsi Jamaa and Others v. Italy**, Application no. 27765/09, 23 February 2012.

78 **Guild**, Elspeth & **Moreno-Lax**, Violeta, Current Challenges for International Refugee Law, With A Focus On EU Policies and EU Co-Operation with the UNHCR, Briefing Paper, Directorate General for External Policies of the Union, EXPO/B/DROI/2012/15, December 2013, p. 4; **Gammeltoft-Hansen** & **Gammeltoft-Hansen**, p. 448.

79 **Hirsi Jamaa and Others v. Italy**, Application no. 27765/09, 23 February 2012, paras. 9-14.

Therefore, they applied to the ECtHR on 26 May 2009[80] and alleged that Italy had violated Articles 1, 3 and 13 of the ECHR, as well as Article 4 of Protocol No. 4. Relying on Article 3, the applicants claimed that they were exposed to the risk of torture or inhuman or degrading treatment in Libya as a result of having been returned to Libya. The applicants also complained that they were in danger of subsequently being deported to their countries of origin using readmission agreements.[81] The Court unanimously found that Italy was in violation of the human rights of the refugees because it had returned intercepted persons to Libya in the absence of any procedural safeguards against *refoulement*. Furthermore, the Court stated that Italy could not "evade its own responsibility by relying on its obligations arising out of bilateral agreements with Libya".[82]

The *Hirsi Jamaa and others v. Italy* case is one of the most important judgments of the ECtHR relating to the interception operations of states at sea. It was the first case in which the Court unanimously found an EU country to be in violation of the human rights of migrants and refugees intercepted on the high seas and returned to a third country in the absence of any procedural safeguards. This landmark judgment underlines the importance of ensuring access to protection for people at sea without any territorial limitation.[83] To be effective, international protection must "encrypt not only guarantees of *non-refoulement*, but also access to refugee determination procedures, both equipped with effective remedies".[84] In this case, the Court also found that precarious living conditions, lack of appropriate medical care and poor hygiene conditions as a result of asylum seekers' irregular, marginal and isolated position in Libya constituted a breach of Article 3.[85] It can be concluded that the Court affirmed the importance of the socio-economic rights in the framework of Article 3 and under the principle of *non-refoulement*.

The ECHR offers wider protection for asylum seekers, such as in the *Chahal, Soering and Hirsi Jamaa* cases, but does not lead to refugee status being obtained, because the

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80 ibid, paras. 9-14.

81 ibid, paras. 83 et seq. At a press conference, the Italian Minister of Interior stated that "the operation to intercept the vessels on the high seas and to push the migrants back to Libya was the consequence of the entry into force…of bilateral agreements with Libya." para. 13.

82 ibid, para. 129.

83 **Giuffré**, 2012, p. 729.

84 ibid, p. 748.

85 **Hirsi Jamaa and Others v. Italy**, para. 125.

ECHR does not impose any duty upon the contracting states to grant asylum.[86] Refugee status granted under the 1951 Refugee Convention still depends on states' discretion. This confirms the allegation in Arendt's political theory that international human rights still uphold the exclusive power of sovereign states even though that conflicts with the principles of the human rights.[87]

Two categories of protection are provided under international refugee law and human rights instruments. On the one hand, under Article 1(2) of the 1951 Refugee Convention, there are individual refugees who are granted asylum because they have been persecuted on the grounds of race, religion, nationality, or membership of a particular social or political group. On the other hand, a large number of refugees do not strictly fulfil the criteria of Article 1(2) of the 1951 Refugee Convention. Therefore, Article 3 of the ECHR offers complementary protection to such asylum seekers who cannot be sent back to their country of origin for humanitarian reasons. Thus, they can get "de facto" or "humanitarian refugee status". However, these terms, de facto or humanitarian refugee status, are not interpreted uniformly by contracting states but on an ad hoc basis.[88] This practice leaves a large number of asylum seekers in legal limbo for years. To solve this problem, the EU adopted the Qualification Directive of 2011[89] to harmonize member states' different practices and interpretations. It offers "subsidiary protection" to those who have humanitarian refugee status and affords the same rights to subsidiary protection holders as refugees under Article 1(2)(A) of the 1951 Refugee Convention. However, the legal acceptance has not changed the real experience of these people. The rightless position of asylum seekers remains acute in practice.[90]

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86 **Einarsen**, Terje, The European Convention on Human Rights and the Notion of an Implied Right to de Facto Asylum, International Journal of Refugee Law, 2(3), 1999, p. 364.

87 **Grant**, 2011, p. 31.

88 **Lambert**, 2005, p. 39; **Peers**, 2006, p. 311; **Lavenex**, 1999, pp. 13-14.

89 Directive 2011/95/EU of the European Union Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted. OJ L 337/9-26, 20.12.2011.

90 **Grant**, 2011, p. 47.

2.4. Bypassing Refugee Protection Responsibility: Developing Legal Grounds for Protection Elsewhere

In theory international human rights offer an extensive protection to refugees and asylum seekers but the practice is paradoxical. In the case of refugee protection, states have developed protection elsewhere notions, in other words, safe third country[91] practices to bypass their refugee protection responsibility. This safe third country practice constitutes the main legal basis of readmission agreements and it needs to be analysed before examining the EU-Turkey Agreement on the refugee issue. Safe third country practice is based on the idea that people who have fled from persecution, armed conflict or human rights violence should be able to seek asylum in territories that are as close as possible to their country of origin without making difficult, dangerous or costly journeys to remote and unfamiliar cultures.[92] The improvisation of this legal instrument enables states to reject asylum seekers and refugees who have not come directly from their country of origin. This practice, unfortunately, has increased human suffering and left millions of people in legal limbo. In the past 20 years tightened border controls using safe third country practices has made access to Europe more difficult and resulted in the emergence of new routes, which are harder, longer and more dangerous.[93] Safe third country practice mainly gives states an opportunity for rejecting asylum seeker's claims and shifting refugee protection responsibility onto third countries without considering their lack of infrastructure or the social and economic deprivation of the individual refugees. Due to the increasing numbers of asylum seekers and refugees, this practice has been seen as an effective instrument to contain refugees in their region of origin.[94]

Refugees are often returned to 'safe third countries' without any substantive examination of their claims on the ground that the third country is a safe one and where asylum seeker should have requested protection or the third country is a "first country of asylum",

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91 The country of origin is labeled the first country, the State where s/he made an asylum application the second, and the state to which he is expelled, the third country. See **Battjes**, Hemme, European Asylum Law and Its Relation to International Law, Amsterdam: Kloof Booksellers & Scientia Verlag, 2006, p. 385.

92 **Crisp**, Refugee Protection, 2003.

93 **Guild** & **Moreno-Lax**, 2013, p. 9.

94 **Shacknove**, Andrew, From Asylum to Containment, International Journal of Refugee Law, 5(4), 1993, p. 516; **Den Heijer**, Maarten & **Rijpma**, Jorrit & **Spijkerboer**, Thomas, Coercion, Prohibition, and Great Expectations: The Continuing Failure of the Common European Asylum System, Common Market Law Review, 53, 2016, pp. 616-617; **Guild** & **Moreno-Lax**, 2013, p. 11.

having already granted adequate protection.[95] From a state's perspective, asylum seekers and refugees are rational actors "acting as law consumers" who would like to select a country offering the highest level of protection.[96] For this reason, states may refuse to examine asylum applications if asylum seekers have passed through another safe third country in which they could have sought protection or been granted protection before reaching the refusing state.[97]

Contrary to this state perspective, the secondary movements of asylum seekers and refugees do not always aim for the highest level of protection. They are sometimes forced to leave the first country of asylum due to "the absence of educational and employment possibilities and non-availability of durable solutions".[98] Noll rightly argues that if the same material and procedural conditions are applied to asylum seekers and refugees, their secondary movements will not take place anymore. Nevertheless, EU member states have intensified their procedural policies to restrict the movements of asylum seekers, instead of intensifying the harmonization of refugee protection systems to eliminate differences in living conditions and durable solutions.[99] This attitude shows states' decreasing commitment to the spirit of the 1951 Refugee Convention and human rights protection.[100] With the safe third country practice,

> The principle of the responsible State has thus been turned upside down; expulsion to a third State is no longer the exception but the rule.[101]

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95 **Legomsky**, Stephen H, Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection, *International Journal of Refugee Law*, 15(4), 2003, p. 567.

96 **Costello**, 2005, pp. 37-38; **Abell**, 1999, pp. 61-62.

97 **Abell**, 1999, pp. 61-62.

98 **UNHCR** EXCOM Conclusions, No. 58 (XL), Problem of Refugees and Asylum Seekers Who Move in an Irregular Manner from a Country in Which They Had Already Found Protection, 13 October 1989, para. b.

99 **Noll**, 2000, p. 183.

100 **Byrne**, Rosemary & **Noll**, Gregor & **Vedsted-Hansen**, Jens, Western European Asylum Policies for Export: The Transfer of Protection and Deflection Formulas to Central Europe and the Baltics, Edited by Byrne, Rosemary & Noll, Gregor & Vedsted-Hansen, Jens, New Asylum Countries?, Migration Control and Refugee Protection in an Enlarged European Union, Kluwer Law International: London, 2002, pp. 27-28.

101 **Achermann**, Alberto & **Gattiker**, Mario, Safe Third Countries: European Developments, *International Journal of Refugee Law*, 7(1), 1995, p. 23.

In spite of its widespread practice, the legal basis of the safe third concept under international refugee law remains controversial. Some believe its basis is linked to the vague formula in Article 31(1) of 1951 Refugee Convention, which states that

> Contracting Parties shall not impose penalties, on account of their illegal entry or presence, on refugees who, **coming directly**[102] from a territory whether their life or freedom is threatened in the sense of Article 1, enter or is present in their territory without authorization, provided that they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

From the wording of this provision, states argue that a refugee who does not come directly from a country where her/his life or freedom is threatened should be sent back to the first safe third country in which s/he could have applied for asylum or been granted protection. Therefore, the movements of an asylum seeker from her/his country of origin should end in the first safe country. In other words, under this interpretation of Article 31(1) of the 1951 Refugee Convention, states claim that they have a right to refuse asylum seekers and refugees not arriving directly from their country of origin but having passed through a safe third country,[103] since any secondary movement of asylum seekers is seen as migration rather than seeking protection.[104]

In contrast, some believe that the safe third country concept does not have a legal basis under international and refugee law but it has "emerged from States' national legislation and administrative practice".[105] Neither the text nor the legislative history of the 1951 Refugee Convention imposes an obligation on asylum seekers to apply for asylum in the first safe country where they arrive.[106] If the 1951 Refugee Convention had intended to impose a heavy duty on refugees in that regard, it would have stated it clearly in the

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102 Emphasis added.

103 **Vedsted-Hansen**, Jens, Europe's Response to the Arrival of Asylum Seekers: Refugee Protection and Immigration Control, New Issues in Refugee Research, Working Paper No. 6, 1999, p. 277; **Kjaerum**, 1992, p. 515; **Goodwin-Gill**, Guy S., Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection, Edited by Feller, Erika & Türk, Volker & Nicholson, Frances, Refugee Protection in International Law, Cambridge: Cambridge University Press, 2003, p. 218.

104 **Lambert**, Hélène, Seeking Asylum, Comparative Law and Practice in Selected European Countries. The Hague: Martinus Nijhoff Publishers, 1995, p. 91; **John-Hopkins**, Michael, The Emperor's New Safe Country Concepts: A UK Perspective on Sacrificing Fairness on the Altar of Efficiency, *International Journal of Refugee Law*, 2009, 21(2), p. 218; **Hurwitz**, Agnes, The Collective Responsibility of States to Protect Refugees, Oxford University Press: New York, 2009, pp. 46-47.

105 **Marx**, 1995, p. 392.

106 **Goodwin-Gill**, Article 31, p. 218.

provisions of the Convention. Also, it would have imposed an obligation on the first country or state to readmit the refugee.[107] The main aim of Article 31 of the 1951 Refugee Convention is to protect asylum seekers from penalties due to illegal entry as long as they present themselves to the authorities "without delay" and "show good cause" for their illegal entry or presence.[108] More importantly, the 1951 Refugee Convention does not express any clear rules in the definition or exclusion of a refugee, as set out in Articles 1(A) and 1(F), that a refugee who comes from a safe country should be excluded from being a refugee. The rules on the definition, exclusion and protection from penalization of refugees are quite separate from each other. Therefore, as Peers rightly points out,

> Refugees' failure to satisfy this condition only permits States to prosecute them for breach of immigration law; it does not allow those states to exclude the refugees from persecution.[109]

Moreover, at much the same time, Fortîn argues that states seek to resolve this lack of legal basis by the conclusion of bilateral readmission agreements between the member states and third countries. However, the obligations applying to States from the 1951 Refugee Convention and other human rights instruments remain unchanged after the conclusion of bilateral readmission agreements.[110] In fact, the 1951 Refugee Convention's acceptance of refugee status is only of a declaratory nature;[111] in other words, a person is seen as a refugee as soon as s/he fulfils the criteria in accordance with Article 1(A) of the 1951 Refugee Convention. The recognition as a refugee does not make a person a refugee, rather it declares to her/him to be one. Therefore, there is no specific refugee status determination procedure envisaged in the 1951 Refugee Convention. For this reason, Fortîn argues that a person can exercise the right to seek asylum under the terms of the 1951 Refugee Convention in any contracting state without being limited to the first safe third country. Likewise, none of the internationally accepted principles

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107 **Peers**, 2015.

108 **Goodwin-Gill**, Article 31, p. 218.

109 **Peers**, 2015.

110 **Fortîn**, Antonio, The "Safe Third Country" Policy in the Lights of the International Obligations of Countries vis-â-vis Refugees and Asylum Seekers, UNHCR, London, 1993, paras. 1.1-1.2. and 2.2.-2-3. See similar view **Giuffré**, Mariagiulia, Readmission Agreements and Refugee Rights: From A Critique to a Proposal, *Refugee Survey Quarterly*, 32(3), 2013, p. 92.

111 See **UNHCR**, Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, 2011, UN Doc. HCR/1P/4/ENG/REV.3, Geneva, December 2011, para. 28.

relating to asylum suggests that the right to seek asylum has to be exercised in any particular country.[112]

It is a fact that although there is no clear rule that refugees always have to apply for asylum in the first safe country, the 1951 Refugee Convention's vague term, "coming directly" in Article 31(1), provides states with a degree of flexibility to apply the safe third country concept.[113] Nevertheless, restrictive interpretation of Article 31(1) by member states is being placed on refugees and asylum seekers against the spirit of the Article 31(1) by UK, Germany and Norway.[114] This application of Article 31(1) can also impose a heavy burden on countries neighbouring conflict areas and cause tension between states in contrast to the spirit of the 1951 Refugee Convention, which refers to international cooperation to avoid refugees becoming a source of tension between states.

3. The Erosion of the Fundamental Principle of *Non-refoulement*

The scope of the principle of *non-refoulement* has been extended beyond the 1951 Refugee Convention by the jurisprudence of the ECHR, but EU member states have adopted a wide range of restrictive policies to reduce the ability of asylum seekers to access EU territory and to abstain from their responsibility regarding the principle of *non-refoulement*. Due to these practices, it is acknowledged that today, the most significant challenge facing asylum seekers is to access asylum.[115] Byrne, Noll, and Vedsted-Hansen label these policies "deflection policies", in which the main aim of states is to keep asylum seekers at a safe distance from their "territory and jurisdiction".[116] In this way, states' obligations towards refugees are not entirely engaged as long as refugees do not managed to enter the territory of a EU member state.[117]

These policies can be classified in two ways:[118] non-arrival and non-admission policies.

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112 **Fortîn**, 1993, paras. 1.1-1.2. and 2.2.-2-3.

113 **Peers**, 2015.

114 **Holiday**, Yewa, Penalising Refugees: When Should the CJEU have Jurisdiction to Interpret Article 31 of the Refugee Convention?, Saturday, 19 July 2014, http://eulawanalysis.blogspot.com.tr/2014/07/penalising-refugees-when-should-cjeu.html**.**

115 **Shacknove**, 1993, p. 516; **Guild** & **Moreno-Lax**, 2013, p. 10; **Gammeltoft-Hansen**, Thomas, Access to Asylum, International Refugee Law and the Globalization of Migration Control, Cambridge University Press: Cambridge, 2011, pp. 14-17; **Den Heijer**, Maarteen, Europe and Extraterritorial Asylum, Bloomsbury Publishing: Oxford, 2012, pp. 11-17; **Moreno Lax**, 2008, p. 4.

116 **Byrne** & **Noll** & **Vedsted-Hansen**, p. 291.

117 **Gil-Bazo**, 2006, p. 593.

118 **Edwards**, p. 293; **Loescher** & **Milner**, p. 595; **Morrison** & **Crosland**, 2001, pp. 1-2.

The first group, non-arrival policies, consists of EU visa restrictions on refugee producing countries as well as norms complementing it, for example, carrier liability on carrier firms and pre-frontier training and assistance programmes for third countries. The second group, non-admission policies, has traditionally raised a legal barrier to entry into Europe.[119] Readmission agreements coupled with the practice of a "safe third country" and "accelerated border procedures" constitute non-admission policies and aim to keep asylum seekers away from a procedural door.[120] Readmission agreements do not refer explicitly to asylum seekers and refugees in their texts but, in practice, they are used to facilitate the deportation of an asylum seeker to a safe third country via the safe third country concept. States will readmit asylum seekers and refugees to third countries without making a distinction as unauthorized immigrants. They will be readmitted as nationals or third country nationals depending on whether readmission takes place to the country of origin or a third country.[121]

A readmission agreement is signed on the basis of the principle of reciprocity, which means that all contracting states must readmit both their own nationals and third-country nationals in the same manner. However, in practice, the argument of reciprocity is "hypocritical",[122] since no one believes that there will be a flow of irregular migrants from the EU towards third countries and, at the end of the day, a readmission agreement will only force third countries to readmit third country nationals and stateless persons who pass through their territory alongside their own nationals. While admitting that one's own nationals are accepted is a customary international rule,[123] the existence of a general international law of obligation to readmit third country nationals is not accepted as a rule. There is no corresponding international legal obligation for states to admit non-nationals, even persons who have transited through the territory of a state *en route* to another destination.[124] A readmission agreement establishes a legal basis, which is not present in international law and imposes an obligation on third countries to accept third-country nationals.

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119 **Noll**, pp. 161-182.

120 **ECRE**, Defending Refugees' Access to Protection in Europe, December 2007, p. 8.

121 **Coleman**, 2009, p. 224.

122 **Trauner** & **Kruse**, 2008, p. 9.

123 See Article 13 of the 1948 UN Universal Declaration of Human Rights.

124 **Roig**, Annabella & **Huddleston**, Thomas, EC Readmission Agreements: A Re-evaluation of the Political Impasse, *European Journal of Migration and Law*, 9(3), 2007, p. 364.

The first generation of readmission agreements aimed to control irregular movements of persons amongst member states of the European Economic Community (EEC). After the fall of the Berlin Wall and the opening of borders in the East, EU member states signed second-generation readmission agreements with Central and Eastern European Countries (CEECs) to create a "buffer zone"[125] or "cordon sanitaire"[126] along the EU's eastern border in the early 1990s. With the entry into force of the Amsterdam Treaty and later the Lisbon Treaty,[127] the EU acquired the competence to sign readmission agreements with third countries, and the third generation of agreements began to be signed with third countries, which are seen as transit countries or source countries of migration. Although EU member states have maintained their competence regarding signing readmission agreements with third countries, the EU has harmonized the content of readmission agreements and formulated a standard agreement to be used by all member states or the EU itself.

The need for the harmonization of bilateral readmission agreements emerged from the need for a comprehensive approach to migration and asylum at all stages. This comprehensive approach ranges from defining the root causes of irregular migration to enhancing the capacity of the countries of origin and transit and regions of origin within the field of human rights and the socio-economic structure. Nevertheless, so far, this comprehensive approach to migration management has not been implemented, and the overall implementation of EU readmission policy does not fundamentally depart from the one initially executed by member states. The fact is that readmission agreements, which have been presented as valuable instruments, were not as effective as expected in combating irregular migration.[128]

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125 **Coleman**, 2009, p. 61.

126 **Landgren**, Karin, Deflecting International Protection by Treaty: Bilateral and Multilateral Accords on Extradition, Readmission and the Inadmissibility of Asylum Requests, UNHCR Working Paper No. 10, June 1999, p. 41.

127 Article 79(3), which amended Article 63(3) of the TEC, identifies the competence of the EU in the field of readmission: "The Union may conclude agreements with third countries for the readmission to their countries of origin or provenance of third-country nationals who do no not or who no longer fulfil the conditions for entry, presence or residence in the territory of one of the Member States".

128 **Bouteillet-Paquet**, Daphné, Passing the Buck: A Critical Analysis of the Readmission Policy Implemented by the European Union and Its Member States, *European Journal of Migration and Law*, 5(3) 2003, pp. 360-361.

3.1. Do Readmission Agreements Conflict with the Principle of Non-Refoulement?

Readmision agreements have been formulated as a consequence of the externalisation of migration policies. In contrast to an earlier generation of non-entrée policies, such as visa control, carrier sanctions and interception operations at sea,[129] which have increasingly brought responsibility to member states, the EU has developed new forms of non-admission policies to obstruct asylum seekers and refugees from reaching the territory of the EU.[130] Through this new form of non-admission measures, such as readmission agreements with safe third country practices, the EU member states aim to avoid the duty of *non-refoulement*. They have resorted to strict deterrent measures to keep most refugees from accessing their jurisdiction.[131] It is clear that readmission agreements through with transit countries have been leaving many asylum seekers and refugees in a rightless position. Even though the EU knows that transit countries cannot provide effective protection to increasing numbers of refugees, the EU has been using both soft and hard power to put pressure on third countries to readmit both irregular migrants[132] and asylum seekers. This approach actively exacerbates the misdistribution of refugee protection responsibility[133]and triggers human rights violations.

Readmission agreements have given rise to a series of concerns regarding the principle of *non-refoulement*. A general concern raised in the literature is that readmission agreements do not make any special reference to or separate provisions for asylum seekers and refugees, but states have used them to readmit asylum seekers and refugees

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129 **Edwards**, Alice, Human Rights, Refugees, and the Right 'to Enjoy' Asylum, *International Journal of Refugee Law*, 17(2), 2005, p. 293; **Loescher**, Gil & **Milner**, James, The Missing Link: The Need for Comprehensive Engagement in Regions of Refugee Origin, *International Affairs*, 79(3), 2003, p. 595.

130 **Gammeltoft-Hansen**, Thomas & **Hathaway,** C. James, *Non-Refoulement* in a World of Cooperative Deterrence, *Columbia Journal of Transnational Law*, 53, 2014, p. 235.

131 **Gammeltoft-Hansen** & **Hathaway**, 2014, p. 241.

132 Irregular migration as a concept covers a number of different issues. There are three different explanations: a foreigner arriving clandestinely on the territory of a state; staying beyond his or her permitted period of entry or residence; working when not permitted to do so. See **Guild**, Elspeth, Who is Irregular Migrant? Edited by Bogusz, Barbara & Cholewinski, Ryszard & Cygan, Adam & Szysczak, Erika, Irregular Migration and Human Rights: Theoretical, European and International Perspectives, Martinus Nijhoff Publishers: Leiden, 2004, p. 3.

133 **Gammeltoft-Hansen** & **Hathaway**, 2014, p. 242; **Peers**, Steve, Readmission Agreements and EC External Migration Law, Statewatch Analysis, No. 17, 2003, pp. 1-2. http://www.statewatch.org/news/2003/may/12readmission.htm (27.10.2015); **Costello**, Cathryn, 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*, 7(1), 2005, pp. 44-45.

to third countries without making a distinction of irregular migrants. Also, readmission agreements have been concluded with refugee producing countries without taking into account the general safety of asylum seekers and refugees. These countries are generally not a party to international conventions relevant to refugee protection, or their actual practice does not match their legal framework.[134]

Another important concern related to readmission agreements is that they have led to the expulsion of asylum seekers to alleged safe third countries without any substantive examination of asylum claims. In this way, readmission agreements are used as an instrument to reduce the numbers of asylum seekers within the asylum procedure.[135] However, there is no guarantee that a third country will accept an asylum seeker into its territory and provide access to refugee status determination. These agreements only promote the cooperation between member states and third countries; they do not provide a guarantee against the expulsion of asylum seekers and refugees to another third country or country of origin. Also, there is no monitoring system in place to ensure that readmission agreements do not violate the human rights of refugees and asylum seekers. Although forced migration should be monitored by member states in accordance with Article 8(6) of the Return Directive,[136] member states deliberately ignore the monitoring system and do not check whether third countries give effective protection to refugees and asylum seekers subjected to a forced return process.

The experience of readmission agreements also supports the argument that the implementation of readmission agreements infringes the principle of *non-refoulement*. The Turkey and Greece Readmission Agreement signed in 2003[137] shows how readmission agreements have created a risk of *refoulement* of asylum seekers and refugees and constitute a significant obstacle to access to refugee protection. The evidences suggest that there have been continual deportations and push back operations have taken place between the two countries without respecting the principle of *non-*

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134 **Coleman**, 2009, p. 224; **Landgren**, 1999, pp. 28-29; **Lavenex**, 2006, p. 23; **Morrison** & **Crosland**, 2001, pp. 36-38.

135 **Coleman**, 2009, pp. 225-226.

136 **Strik**, Tineke, Readmission Agreements: A Mechanism for Return Irregular Migrants, Council of Europe Parliamentary Assembly, Doc. 12168, 17 March 2010, pp. 18-19.

137 Protocol for the Implementation of Article 8 of the Agreement Between the Government of the Republic of Turkey and the Government of the Hellenic Republic on Combating Crime, Especially Terrorism, Organized Crime, Illicit Drug Trafficking and Illegal Migration, OJ, 24.04.2003, No. 24735.

refoulement. In 2007, Greece deported Iraqi asylum seekers to Turkey on the basis of the readmission agreement without giving them any opportunity to express their protection needs.[138] Also, 135 Iraqi asylum seekers were forcibly deported to Iraq after arriving in Turkey even though they expressed their wish to apply for asylum in Turkey. The UNHCR was extremely concerned about the safety of these people and stated that their deportations clearly violated the principle of *non-refoulement*.[139] It is worrying that such deportations are not exceptional because informal border deportations and push back operations continually take place between Turkey and Greece.

In the *M.S.S. v. Belgium and Greece* case, the ECtHR drew attention to the risk of *refoulement* of asylum seekers by referencing the Turkey and Greece Readmission Agreement and concluded that:

> The risk of refoulement of asylum-seekers by the Greek authorities, be it indirectly, to Turkey, or directly to the country of origin, is a constant concern…Expulsions to Turkey are effected either at the unilateral initiative of the Greek authorities, at the border with Turkey, or in the framework of the readmission agreement between Greece and Turkey. It has been established that several of the people thus expelled were then sent back to Afghanistan by the Turkish authorities without their applications for asylum being considered.[140]

The EU-Turkey RA[141] has raised the same concerns regarding the past experience of the Turkey and Greece Readmission Agreement. The important point is that, after coming into force of the EU-Turkey Statement, Turkey has started to function as a "safe third country" or "first country of asylum" in accordance with the Asylum Procedures Directive. In this context, Syrian refugees who have already entered the territory of the EU after having stayed in, or transited through Turkey, can be returned to Turkey with the help of this readmission agreement.[142] In this regard, the EU-Turkey Agreement on

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138 **ECRE**, Defending Refugees' Access to Protection in Europe, December 2007, p. 45.

139 **UNHCR Press Release**, 26 July 2007, UNHCR Deplores Forced Return of 135 Iraqis by Turkey.

140 **M.S.S. v. Belgium and Greece**, Application no. 30696/09, 21 January 2011, para. 192.

141 Signed on 16.12.2013, ratified by the Law of 6547. Official Gazette, 28.06.2014, No: 29044. And then Council of Ministers approved the Agreement. See. Council of Ministers Decree No: 2014/6652 on Ratification of the Agreement between the Republic of Turkey and the European Union on the Readmission of Persons Residing Without Authorization. Official Gazette, 02.08.2014, No: 29076.

142 **Farcy**, Jean-Baptiste, EU-Turkey Agreement: Solving the EU Asylum Crisis or Creating a New Calais in Bodrum? 07 Monday 2015, http://eumigrationlawblog.eu/eu-turkey-agreement-solving-the-eu-asylum-crisis-or-creating-a-new-calais-in-bodrum/.

refugees imposes an enormous burden on Turkey and constitutes a serious threat to the fundamental rights of refugees.[143] Currently, approximately 3 million Syrian refugees are being hosted in Turkey, waiting for resettlement in another country; but so far, according to the fifth report of the European Commission, only 8,268 people have been resettled into European Member states after the EU-Turkey Statement.[144] Without an effective burden-sharing mechanism, the designation of Turkey as a safe third country or first country of asylum has resulted in stranded refugees and asylum seekers who are not able to go back to their country of origin; and because of Turkey's refugee protection regime they will not find durable solutions or other refugee rights as stated in the 1951 Refugee Convention.

Also, it is argued that an accelerated border procedure might pose a threat to the principle of *non-refoulement* because the time during which a person is allowed to physically to stay in the country of destination might be too short for her/him to lodge an asylum application. In the case of accelerated procedures, asylum seekers do not have a chance to apply for international protection.[145] For instance, Article 7(4) of the EU and Turkey Readmission Agreement lays out an exceptional procedure, called the "*accelerated border procedure*"; if a person has been apprehended in the "border region" of an EU member state's territory, extending inwards up to 20 kilometres, including seaports, customs zones and international airports. Under this procedure, readmission applications have to be submitted within three working days. Given this very short timeframe, it is not difficult to predict the adverse effects of readmission agreements on the right to seek asylum and the principle of *non-refoulement*.

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143 **Mutlu**, Can, The Status of Syrian Nationals Residing in Turkey, September 3, 2015. http://thedisorderofthings.com/2015/09/03/the-status-of-syrian-nationals-residing-in-turkey/. (27.12.2015).

144 **European Commission Fifth Report** on Relocation and Resettlement, Communication from the Commission to the European Parliament, the European Council and the Council, COM (2016) 480 Final, 13, 7, 2016, p. 9. https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160713/fifth_report_on_relocation_and_resettlement_en.pdf.

145 **Strik**, 2010, p. 18.

3.1.1. Application of the Safe Third Country Practice by the EU

Increasing asylum seeker applications forced the EU to develop a responsibility-sharing mechanism between member states and third countries under the Dublin III Regulations.[146] According to Article 3(3) of those Regulations,

> Any Member State shall retain the right to send an applicant to a safe third country, subject to the rules and safeguards laid down in [Asylum Procedures] Directive 2013/32/EU.

Accordingly, if an asylum seeker is coming from, or has transited through any safe third country, member states may send her/him to another member state or non-European safe third country without examining her/his claim. In this context, an asylum seeker may be sent back and forth between member states and third countries without any substantial refugee status determination.

The Asylum Procedures Directive[147] offers three arrangements for the designation of non-EU member states as safe third countries, namely, the concepts of the first country of asylum (Article 35), a safe country of origin (Article 36 and Annex II) and a safe third country (Article 38). Article 38 addresses the "safe third country" concept and this applies to any third country and any applicant who is seeking asylum. Article 35 lays down the "first country of asylum concept" and applies it to any third country as long as an applicant for asylum has already found a form of protection. Finally, according to Article 36, which establishes the "safe country of origin" concept, an application may be subjected to an accelerated procedure if an asylum seeker comes from a non-refugee producing country.

Article 33 of the Directive also enables member states to consider an application as inadmissible in the case of a safe third country and the first country of asylum concepts. Furthermore, Article 31(8)(b) of the Directive gives member states permission to apply an accelerated examination procedure in the case of a safe country of origin. In this regard, the first country of asylum, safe country of origin and safe third country concepts

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146 **Regulation** (EU) no. 604/2013 of the European Parliament and of the Council of 26 June 2013, Establishing the Criteria and Mechanism for Determining the Member State Responsible for Examining an Application for International Protection Lodged in One of the Member States by a Third-Country National or a Stateless Person (Recast), OJ, L 180/31-59, 29.06.2013.

147 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), OJ L 180/60-95, 29.06.2013.

constitute the main legal framework for transferring responsibility for examining asylum applications to a third country. These concepts also have a close link to readmission agreements on the basis of deportations of rejected asylum seekers to safe third countries.

a. First Country of Asylum Concept

Member states may apply the first country of asylum concept to those asylum seekers who have already been granted refugee status in that third country and they can still avail themselves of this protection or enjoy "sufficient protection" in that third country, including benefiting from the principle of *non-refoulement*.[148] In this context, member states may consider their application inadmissible and send them back to that third country without a substantive examination of their asylum claims.[149] The Asylum Procedures Directive allows an asylum seeker to challenge the application of the first country of asylum concept to her/his particular circumstances[150] but, nevertheless, there is no suspension effect that applies in the case of any appeal against such a decision based on the first country of asylum. Asylum seekers can only ask a court to permit them to remain pending the outcome. However, they can be sent back to the first country of asylum before the court decision is given.[151] Therefore, this avenue is not sufficient to protect the rights of asylum seekers against *refoulement*. It is also against the right of an effective remedy according to Article 13 of the ECHR regarding the vulnerability of refugees and asylum seekers.

The UNHCR has found acceptable the application of first country asylum as long as asylum seekers and refugees are protected against *refoulement* and permitted to remain there until a durable solution is found for them.[152] Nevertheless, although the Asylum Procedures Directive refers to "sufficient protection" as a criterion for transferring responsibility for asylum seekers to another third country, there is no clear definition of what constitutes "sufficient protection".[153] The UNHCR has suggested replacing this term

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148 Article 35(a)(b) of the Asylum Procedures Directive.

149 Article 35 last paragraph of the Asylum Procedures Directive.

150 Article 33(2)(b) of the Asylum Procedures Directive.

151 Article 46(6)(b) of the Asylum Procedures Directive.

152 **UNHCR** EXCOM Conclusions, No. 58 (XL), Problem of Refugees and Asylum Seekers Who Move in an Irregular Manner from a Country in Which They Had Already Found Protection, 13 October 1989, para.f.

153 **Strik**, Tineke, Procedures Directive: An Overview, Edited by Zwaan, Karin, The Procedures Directive: Central Themes, Problem Issues, and Implementation in the Selected Member States, Wolf Legal Publishers: Netherlands, 2010, p. 15; **ECRE**, The Way Forward Europe's Role in the Global

with "effective protection", but it was not accepted in the recasting process.[154] According to the UNHCR,[155] effective protection covers both the concept of *non-refoulement* and also treatment in accordance with "basic human rights standards" until a durable solution is found. Fundamental human rights standards include the social and economic elements of protection for the survival of refugees, such as access to shelter, employment and primary education as citizens of the host state, and relief until work is found.[156]

Whereas the UNHCR has welcomed the application of the first country of asylum concept as long as the rights of asylum seekers are respected, most academic commentary regarding this concept has been overwhelmingly negative. Borchelt argues that the first country of asylum concept and the safe third country concept constitute fundamentally "flawed" practice and create the very real possibility of *refoulement* to the country of origin or through a third country to the country of origin. The lack of any communication between requesting and requested state may put asylum seekers into a position of legal uncertainty. Readmission agreements do not provide safeguards against *refoulement* and asylum seekers may be transferred to a third country as rejected asylum seekers on the ground of the first country of asylum concept or the safe third country concept without informing third country authorities. If it is not made clear to the authorities of the requested state that an asylum seeker made an asylum application which has not been decided in substance, there is a risk that such a case will be treated simply as an irregular migrant who can be returned to the country of origin. In this context, asylum seekers may thus fall under the third country's readmission umbrella intended for irregular migrants. For this reason, the first country of asylum and safe third country practices must be

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Refugee Protection System, Guarding Refugee Protection Standards in Regions of Origin, European Council on Refugees and Exiles, December 2005, p. 6; **House of Lords Select Committee on the European Union**, Handling EU Asylum Claims: New Approaches Examined 11th Report 30 April 2004, p. 26.

154 **UNHCR** Comments on the European Commission's Amended Proposal for a Directive of the European Parliament and of the Council on Common Procedures for granting and Withdrawing International Protection Status. (Recast) COM (2011) 319 final.

155 **UNHCR** EXCOM Conclusions, No. 58 (XL), Problem of Refugees and Asylum Seekers Who Move in an Irregular Manner from a Country in Which They Had Already Found Protection, 13 October 1989, paras. f, i and ii.

156 **Hathaway**, James C., What is a Label? *European Journal of Migration and Law*, 5(1), 2003, pp. 3-4.

eradicated rather than being modified.[157]

Legomsky does not totally reject the application of the safe third country practice, but he does not accept the distinction between the first country of asylum and the safe third country concepts. He states that the two concepts are quite different from each other in theory. One is for a person who has "actually received" protection while the other applies when a person "should have requested" protection elsewhere. But the two strategies "occupy two points on the same continuum".[158] In the context of returning an asylum seeker to a third country, a key issue is what the third country owes the asylum seeker now, instead of what happened in the past. Certainly, recent events can be seen as evidence of whether effective protection is now available, but it is not conclusive. The important thing is whether a safe third country provides effective protection and a durable solution for asylum seekers without infringing asylum seekers' fundamental human rights and the principle of *non-refoulement*.[159] Legomsky persistently uses the term effective protection to cover the requirements of the transferring state's responsibility on the ground of the first country of asylum practice.

Van Selm argues that the first country of asylum concept has negative aspects in third countries. The practice of the first country of asylum has led to "a kind of non-solidarity" by shifting the burden onto countries neighbouring the conflict areas rather than sharing the burden. Before applying the first country of asylum rule, a country's economic, social and political capacity should be considered by requesting countries.[160] The use of the first country of asylum concept allows the economically and politically strong countries to shift their responsibilities regarding refugee protection to less powerful ones.[161] This inequitable distribution of the burden amongst states put dangerous pressure on third countries, which already have fragile asylum determination systems. It might reach such a level that the affected third states have to develop unduly harsh measures against refugees and asylum seekers.[162] As a Turkish representative said in 1987, the first country

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157 **Borchelt**, Gretchen, The Safe Third Country Practice in the European Union: A Misguided Approach to Asylum Law and A Violation of the International Human Rights Standards, *Columbia Human Rights Law Review*, 33, 2001, pp. 515-517.

158 **Legomsky**, 2003, pp. 570-571.

159 ibid, pp. 570-571.

160 **Van Selm**, Joanne, Access to Procedures "Safe Third Countries", "Safe Countries of Origin" and "Time Limits", Background Paper Global Consultations, Geneva, 2001, p. 4.

161 **Abell**, 1999, p. 68.

162 **Legomsky**, 2003, p. 588.

of asylum concept puts a huge financial burden on developing countries that are located near conflict zones and those countries might find themselves unable to continue to bear the burden, and so sometimes they will regard *refoulement* as the only possible solution. Moreover, he went further, saying that:

> If that should occur, they would not be the only ones at fault, since the responsibility for ensuring the conditions necessary for the observance of the *non-refoulement* principle rested with the international community as a whole.[163]

b. The Safe Third Country Concept

The safe third country concept developed out of the first country of asylum concept, but the scope of a safe third country is broader than a first country of asylum. It applies where an asylum seeker might have requested protection in a third state, which is safe, and able to offer protection in line with the 1951 Refugee Convention. Contrary to the first country of asylum, there is no stipulation that an asylum seeker has already been granted refugee status or another form of protection from the third country. Member states can reject an asylum application as inadmissible if there is a safe third country in which the applicant will not be at risk of persecution, *refoulement* or degrading treatment, and will have the possibility[164] to apply for refugee status.[165]

Member States have to adopt national "rules requiring a connection between the applicant and the third country concerned on the basis of which it would be reasonable" to send the asylum seeker to the alleged safe third country.[166] Regarding establishing a link between the applicant and a third country, member states has the initiative to define what kinds of links are required. Nevertheless, the Directive legitimizes member states' questionable practices, which vary according to country and generally have a "lack of necessary detail" to establish a link between the applicant and the third country.[167]

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163 **Mr Yavuzalp** (Turkey) UN. Doc. A/AC. 96/SR.418, para.74, 1987, cited by **Goodwin-Gill**, 1993, p. 37.

164 It seems that a language used in the Directive seeks to "dilute" the international standards. **Hurwitz**, 2009, p. 53.

165 Article 38(1)(a-e) of the Asylum Procedures Directive.

166 Article 38(2)(a) of the Asylum Procedures Directive.

167 **COM (2010)**, Commission Report on the Application of Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, 465, p. 11; **Hurwitz**, 2009, p. 59.

The Asylum Procedures Directive gives asylum seekers an opportunity to rebut the application of the safe third country concept during a first instance examination on the grounds that the third country is not safe in her/his particular circumstances, and there is no substantial connection between her/him and the third country.[168] This is a very important safeguard against *refoulement*, but member states' practice in this area does not consistently match the legal framework, since the UNHCR report revealed that

> If the concept were applied in practice, [national states' authorities] would not inform the applicant prior to the decision that they considered a certain safe third country for the applicant. This dramatically limits the applicant's possibilities in practice to rebut the presumption at an early stage, or at all.[169]

And, more importantly, some member states have omitted the personal interview in the case of a safe third country.[170] Therefore, this clearly conflicts with the intention of the Asylum Procedures Directive regarding safeguards against the principle of *non-refoulement*.

The UNHCR is concerned with having clearly identifiable safeguards for transferring responsibility on the basis of the safe third country concept. It states that a destination country should "take into account the duration and nature of any sojourn of the asylum seeker in other countries" and "as far as possible" the asylum seeker's preference regarding the country of asylum before being sent back to a third country.[171] Also, the UNHCR warns states against refusing asylum seekers solely because asylum "could be sought from another State." However, if an asylum seeker "already has a connection or close links" with a third country, then her/his transfer to that country would be "fair and reasonable".[172]

The safe third country practice also puts an enormous burden on neighbouring countries, which do not have enough infrastructures to deal with a large number of asylum seekers. For instance, Hungary's 2015 safe third countries list illustrates the difficulties faced by

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168 Article 38(2)(c) of the Asylum Procedures Directive.

169 **UNHCR**, Improving Asylum Procedures Comparative Analysis and Recommendations for Law and Practice, March 2010, p. 63.

170 ibid, p. 63.

171 **UNHCR** EXCOM Conclusions, No. 15 (XXX), Refugees without an Asylum Country, 16 October 1979, paras. h. and i.

172 ibid, paras. h(iv).

refugees and neighbouring countries.[173] The list accepted Serbia as a safe third country, which enabled Hungary to dismiss asylum applications as inadmissible on the presumption that applicants transiting through such a state have had a genuine opportunity to seek and obtain protection. However, the problem was that the designation of Serbia, which was the transit point for approximately 99 per cent of around 86,000 persons who applied for asylum in Hungary, effectively enabled Hungary to refuse to examine almost all applications for international protection made on its territory. Such a designation also departs from previous pronouncements by UNHCR that Serbia's asylum system has been unable to cope with the increases in numbers of asylum applications and so this does not offer genuine opportunities for those in need of international protection. Serbia should not be considered a "safe third country".[174]

c. Safe Country of Origin Concept

The safe country of origin concept has been applied to countries, which are considered to be non-refugee-producing. If an asylum seeker comes from such a country, s/he will be returned to her/his country of origin without a substantive examination of her/his asylum claim. The safe country of origin concept is applied as long as an asylum seeker has the nationality of that country or is a stateless person but was formerly habitually resident there.[175] The main aim of this concept is to reduce the number of economic migrants, who are seen as using the asylum system as an "immigration back door" to get into European countries. According to the Asylum Procedures Directive, member states may adopt a national list for the designation of safe countries of origin in accordance with the criteria in Annex I.[176] However, national designations of safe countries of origin lists have led to increasingly different recognition rates in similar asylum applications.[177] To achieve a fair, an equal and effective working asylum system, and to reduce secondary movements

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173 Hungarian's safe third country list includes EEA Member States, Canada, Australia, New Zealand, USA, Albania, Bosnia and Herzegovina, Former Yugoslav Republic of Macedonia, Kosovo, Montenegro, Serbia.

174 **UNHCR**, Serbia as a Country of Asylum. Observations on the Situation of Asylum-Seekers and Beneficiaries of International Protection in Serbia, August 2012, http://www.refworld.org/docid/50471f7e2.html. (6.12.2015).

175 Article 36(1) of the Asylum Procedures Directive.

176 Article 37(1) of the Asylum Procedures Directive.

177 **COM (2015)** 452, Safe Countries of Origin Proposed Common EU List, Briefing Paper. Albania, Bosnia and Herzegovina, the former Yugoslav Republic of Macedonia, Kosovo, Montenegro, and Serbia have been proposed as a safe country of origin.

of asylum seekers between member states, there is a need for a common list on the basis of the safe country of origin concept.

However, there is a serious concern about this concept, in that it conflicts with the fundamental principles of international refugee law and human rights law. The first main weakness is that it has been interpreted and applied by some countries to abstain from their responsibilities contrary to the spirit of the 1951 Refugee Convention. For instance, application of the safe third country of origin concept either automatically excludes nationals of countries designated as safe countries of origin from obtaining refugee status in member states or raises a presumption of non-refugee status against asylum seekers' claims, which they must rebut.[178] This situation creates de facto a new geographical limitation on Article 1(A)(2) of the 1951 Refugee Convention, which is not compatible with Article 42, which prohibits any reservation on Article 1(A)(2). Furthermore, the safe country of origin concept is in conflict with Article 3 of the 1951 Refugee Convention, which explicitly forbids discrimination on the basis of country of origin since safe country of origin practice is used as a "toll of en bloc exclusion of nationally defined groups".[179] and can "facilitate discrimination on the basis of nationality and country of origin".[180] To sum up, it constitutes a barrier to defining the nationality of asylum seekers to grant protection.[181]

A second worrying feature of this concept is that asylum seekers are subjected to an accelerated procedure, which reduces the allocated time frame for each asylum applicant.[182] Therefore, it undermines the quality of the refugee status determination process. For instance, some member states have a reduced accelerated asylum determination procedure of up to 48 hours.[183] At the same time, the safe country of origin concept puts the burden on asylum seekers to rebut the presumption of a safe country of origin and an asylum seeker has to show valid reasons why a country is not safe in her/his

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178 **UNHCR**, Background Note on the Safe Country Concept and Refugee Status, EC/SCP/68, 26 July 1991, para. 11.

179 **Hathaway**, 2005, p. 296.

180 **Hunt**, Matthew, The Safe Country of Origin Concept in European Asylum Law: Past, Present, and Future, *International Journal of Refugee Law*, 26(4), 2014, p. 503.

181 **Byrne**, Rosemary & **Shacknove**, Andrew, The Safe Country Notion in European Asylum Law, Harvard Human Rights Journal, 9, 1999, p. 227.

182 Article 31(8)(b) of the Asylum Procedures Directive.

183 **ECRE**, Mind the Gap: An NGO Perspective on Challenges to Accessing Protection in the Common European Asylum System-Second AIDA Annual Report, November 2014, pp. 50-53.

particular case.[184] Along with the reduced time frame, the safe country of origin concept makes it impossible for an asylum seeker to rebut this presumption in practice.[185] In that situation, an asylum seeker may be subjected to a readmission agreement as an irregular migrant and sent back to her/his country of origin without examining her/his asylum application in substance.

The safe country of origin concept has also become a very important issue for the EU-Turkey Readmission Agreement. After this agreement, the European Commission proposed Turkey along with six other countries as a safe country of origin in 2015.[186] If the proposal is adopted, Turkish nationals will not be able to apply for asylum in EU member states. Once approved, the new package will allow member states to dismiss the asylum applications of any Turkish national as unfounded. Turkish nationals who would like to apply for asylum in Europe will have to rebut the presumption of the safety of Turkey with qualified material evidence. Turkish citizens who are apprehended in border regions or caught on an irregular basis will become the subject of readmission without any further procedures. So far, the EU has not yet approved the proposed common safe countries of origin list and Turkey is currently defined as a safe country of origin only by Bulgaria.[187]

3.1.2. Accelerated Border Practices

The EU Member States have developed special asylum procedures for people apprehended in border regions or international zones to determine quickly whether they are in need of international protection or not, in accordance with the 1951 Refugee Convention. Apprehended people are held in border regions, and if their asylum claims are evaluated as unfounded, they are returned promptly to their country of origin or to a transit country with the help of readmission agreements.[188] These special procedures involve an accelerated border procedure, which is an exception to the safeguards provided

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184 Article 36(1)(b) of the Asylum Procedures Directive.

185 **Hunt**, 2014, p. 503; **ECRE**, Mind the Gap, November 2014, pp. 50-53.

186 Proposed Common EU List, EU Legislation in Progress, Safe Countries of Origin, 8 October 2015. http://www.europarl.europa.eu/EPRS/EPRS-Briefing-569008-Safe-countries-of-origin-FINAL.pdf.

187 **European Parliament**, Briefing EU Legislation in Progress, Safe Countries of Origin: Proposed Common EU List, February 2017, p. 3. http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/569008/EPRS_BRI(2015)569008_EN.pdf.

188 **UNHCR**, Global Consultations on International Protection, Asylum Processes (Fair and Efficient Asylum Procedures), 2nd Meeting EC/GC/01/12, 31 May 2001, p. 5.

in the Return Directive[189] and the non-suspensive effect of appeal procedures.

In accordance with the Asylum Procedures Directive, member states can accelerate an asylum examination procedure if an asylum application is made at the border or in a transit zone.[190] Also, the Return Directive gives permission to member states not to apply the special safeguards provided in the Return Directive to

> [T] hird country nationals who are subject to refusal of entry in accordance with Article 13 of the Schengen Borders Code, or who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external borders of a Member States.[191]

In this situation, member states are allowed to apply their return procedures,[192] which provide fewer safeguards when compared to those provided in the Return Directive. During this process, asylum seekers and other irregular migrants are detained in the border region and interviewed by border authorities. Nevertheless, access to fair and efficient asylum procedures at the border zones is very problematic given the deficiencies in border and transit zones. For instance, a lack of educated border guards, a legal advisor or an interpreter may lead to the expulsion of asylum seekers without a substantive examination of their asylum claim. Problems also arise in the appeals procedure, since the Asylum Procedures Directive only permits applicants to remain in an asylum state until a judgment of the first instance court. Without an effective remedy, an accelerated border procedure carries a real risk of *non-refoulement*.

In contrast to these deficiencies in procedural safeguards in frontier regions and international zones, the UNHCR's advice states that asylum seekers should enjoy the same procedural safeguards and rights, regardless of whether the examination is prioritized, accelerated or conducted in a regular procedure. All applicants should be given the opportunity of a personal interview.[193] At land borders, if there is an asylum application, it should be referred to the central authority responsible for asylum so that it

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189 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals, OJ L 348/98-107, 24.12.2008.

190 Article 31(8) of the Asylum Procedures Directive

191 Article 2(2)(a) of the Return Directive.

192 Article 4(a)(b) of the Return Directive.

193 **UNHCR**, Improving Asylum Procedures Comparative Analysis and Recommendations for Law and Practice, March 2010, p. 54.

can interview the applicant and make a decision on the claim. Access to a legal advisor, interpreter, the UNHCR or a non-governmental organization (NGO) is also critical, both at the border and in an airport transit zones.[194]

Readmission agreements with accelerated border procedures also facilitate a return process for asylum seekers without accessing asylum procedures. Readmission agreements provide that both third country nationals and citizens of the contracting states will be readmitted if apprehended while illegally crossing the border of the requesting state. If their unlawful presence is detected when they have already entered the territory of the requesting state, readmission may be executed in an accelerated procedure, and it will take place even in the absence of a formal reply to the readmission request. For instance, the EU-Turkey Readmission Agreement provides an accelerated procedure if a person has been apprehended in the "border region" of the requesting state's territory, extending inwards up to 20 kilometres. Under the accelerated procedure, readmission applications have to be submitted within three working days. In the case of an accelerated procedure being applied, member states will not make any effort to return a third country national or stateless person to the country of origin.[195]

Furthermore, other implemented readmission agreements indicate that member states may use accelerated border procedures with readmission agreements to expel asylum seekers without examining their asylum applications. For instance, Ukraine has long-standing readmission agreements with Hungary, Poland and Slovakia. If these countries apprehend irregular migrants or asylum seekers at their borders, they will be interviewed within 48 hours and readmitted to Ukraine in accordance with a readmission agreement. There is no genuine effort to identify whether individuals are actually in need of international protection. A Hungarian official interviewed by Human Rights Watch stated, "We just count them," before returning them to their country.[196] On another occasion, according to a Human Rights Watch Report, a group of nine Chinese migrants had crossed from Ukraine to Slovakia and travelled on foot to Poland. They were apprehended in Poland and detained for 25 days. During this period, they asked for

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194 **UNHCR**, Global Consultations, 2001, pp. 5-6.

195 Article 7(4) of the Agreement between the Republic of Turkey and the European Union on the Readmission of Persons Residing Without Authorization.

196 **Human Rights Watch,** Ukraine on the Margins, 2005, pp. 15-16.

asylum, but they were not given an opportunity to apply for it. Despite their protests, they were deported to Ukraine and subjected to prolonged detention and sexual harassment.[197]

4. Transferring Refugee Responsibility to Third Countries: Is There a Guarantee of "Effective Protection"?

Today, the debate over refugee protection is more concerned with how refugee protection responsibility of western countries can be transferred to third countries instead of discussing what protection duties countries owe to refugees who are on their territory.[198] Although there is no clear legal basis for conditions for a safe return to third countries in the 1951 Refugee Convention, the UNHCR Executive Committee's conclusions, several commentators, national courts and the jurisprudence of the ECtHR have attempted to identify requirements for the transfer of asylum seekers to third countries without a substantive examination of their asylum claims.

The EXCOM Conclusion has attempted to define the term "*effective protection*" on different occasions to provide guidance in cases of deportation of asylum seekers without consideration of the substance of their protection claims.[199] A Lisbon Expert Roundtable report provides a comprehensive definition of effective protection and fundamental parts of it. It states that protection is only effective in a third country if an asylum seeker has no well-founded fear of persecution in that country; there is no risk that an asylum seeker will be sent by the third country to another country in which s/he would not receive effective protection; and where s/he had no access to means of substance that are sufficient to maintain an adequate standard of living. In addition, the third country must provide an asylum seeker with access to fair and efficient procedures for the determination of their refugee status, taking into account the vulnerabilities of asylum

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197 ibid, pp. 18-19.

198 **Phuong**, Catherine, The Concept of "Effective Protection" in the Context of Irregular Secondary Movements and Protection in the Regions of Origin, Global Migration Perspectives, No. 26, April 2005, p. 14.

199 UNHCR explicitly states that no-asylum seeker should be sent to a third country for determination of the claim without sufficient guarantees in each individual case that: "… i) the person will be admitted to that country; ii) will enjoy there effective protection, in particular against *non-refoulement*; iii) will have the possibility to seek and enjoy asylum, and iv) will be treated in accordance with accepted international standards". **UNHCR**, UNHCR's Three-Pronged Proposal, Working Paper, 26 June 2003, p. 3.

seekers and comply with international refugee protection and basic human rights instruments in practice.[200]

Similarly, the European Commission Communication has identified effective protection criteria for returning an asylum seeker to a third country:

> Physical security, a guarantee against *refoulement*, access to UNHCR asylum procedures or national procedures with sufficient safeguards, where this is required to access effective protection or durable solutions, and social-economic well-being, including, as a minimum, access to primary healthcare and primary education, as well as access to the labour market, or access to means of subsistence sufficient to maintain an adequate standard of living.[201]

As seen in the two definitions above, besides physical security, the assurance of providing durable solutions and basic living standards have become the main concern of both the UNHCR and the European Commission. If refugees live below a certain subsistence level in the potential country of first asylum, then it cannot be concluded that they have obtained effective protection in the country concerned.[202] This constitutes a comprehensive definition of effective protection, which puts emphasis not only on immediate physical safety but also on access to durable solutions, family unity and takes into account the specific vulnerabilities of refugees. The UNHCR's definition can be used as a benchmark in decisions to return refugees to a safe third country. The UNHCR's definition identifies legal constraints, which are binding upon states wishing to return refugees and asylum seekers who have travelled in an irregular manner from safe third countries.[203]

In the joined cases of *Adan, Subaskaran, and Aitseguer*, the UK Court of Appeal also adopted a broad understanding of the principle of *non-refoulement* and expanded the states' responsibilities beyond the physical safety of an asylum seeker against persecution. These cases related to transfers of asylum seekers from the UK to Germany

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200 **Lisbon Expert Roundtable**, Organized by the UNHCR and the Migration Policy Institute, Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers, Lisbon Expert Roundtable, 9-10 December 2002, Article 15 b) e) f) g) h)

201 **COM (2003) 315** Final, Communication from the Commission to the Council and the European Parliament, Towards More Accessible, Equitable and Managed Asylum Systems, p. 6.

202 **Kjaerum**, 1992, p. 519.

203 **Phuong**, 2005, p. 14.

on the basis of the safe third country concept under the Dublin Convention. The issue concerned whether Germany and France qualified as safe third countries. The applicant claimed that a certain form of living standards under German law was below those in the 1951 Refugee Convention. The Court stated that,

> In our judgment, the Secretary of State…is only concerned with the questions whether there exists a real risk that the third countries will refoule the putative refugee in breach of the (1951 Refugee) Convention. The Secretary of State is not concerned to see the claimant will or may enjoy the social rights to which we have referred if he is permitted to stay in the third country. We would not, however, exclude the possibility that such a claimant might in the third country be faced with so destitute an existence, if he were wholly excluded both from the right to work and from access to social provision, and possessed no other resources upon which he might call, that he would be driven to return to the country of feared persecution even though he had successfully claimed such rights of residence in the third country as are offered.[204]

The fundamental basis of the UK Court of Appeal decision is that a lack of basic subsistence in a third country may force a refugee to return to a country of persecution, and therefore it amounts to de facto *refoulement* by the destination country.[205]

The ECtHR's jurisprudence is also very important to illustrate the real meaning of effective protection. As mentioned previously, the landmark decision of the ECtHR in the *M.S.S. v. Belgium and Greece* case is a good example to understand the basis of effective protection in the view of Article 3 of the ECHR. This case is very important because it was the first time the Court determined whether extreme material poverty in the third country could be an issue under Article 3 of the ECHR. The case originated in an application against the Belgium and Greece by an Afghan national, Mr M.S.S. He first entered the EU via Greece but he continued on his journey and applied for asylum in Belgium. Under the Dublin Regulations, Belgium deported the applicant to Greece as a safe third country. He alleged that his expulsion by the Belgian authorities under the Dublin Regulations had violated Article 3 of the ECHR.

The Court ruled that there had been a violation of Article 3 of the ECHR because the Belgian authorities "knowingly exposed him to conditions of detention and living

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204 R. v. Secretary for the Home Department, ex parte Adan; ex parte Subaskaran; ex parte Aitseguer, 1999, 4 All ER 774, p. 27, cited by **Coleman**, 2009, pp. 246-247.

205 **Coleman**, 2009, p. 247.

conditions that amounted to degrading treatment".[206] His living conditions were corroborated by the reports of international organizations and bodies to the ECtHR. These reports stated that asylum seekers were deprived of material support, and many of them lived in public spaces or abandoned houses with no support from the state.[207] Also, at no time was the applicant given any information about the possibilities of accommodation. The Greek authorities gave a pink card to asylum seekers to obtain assistance and a temporary work permit but having a pink card did not seem to be of any benefit in actual practice because there were major bureaucratic obstacles to obtaining a temporary work permit. For example, to get a tax number the applicant had to prove that he had a permanent place of residence, which effectively excluded the homeless from the employment market.[208]

The ECtHR underlined that,

> Article 3 cannot be interpreted as obliging the High Contracting Parties to provide everyone within their jurisdiction with a home. Nor does Article 3 entail any general obligation to give refugees financial assistance to enable them to maintain a certain standard of living.[209]

However, the obligation to provide accommodation and decent material conditions to impoverished asylum seekers has now entered into law, with legislation from the European Union, namely the Reception Directive, providing that asylum seekers must have basic subsistence living standards. This provision binds the Greek authorities.[210] In this respect, the Court stated that

> The Greek authorities have not had due regard to the applicant's vulnerability as an asylum-seeker and must be held responsible, because of their inaction, for the situation in which he has found himself for several months, living on the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs.[211]

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206 **M.S.S. v. Belgium and Greece**, Application no. 30696/09, 21 January 2011, paras. 367-368.

207 ibid, paras. 244-245.

208 ibid, paras. 167-172.

209 ibid, para. 249.

210 ibid, paras. 249-250.

211 ibid, para. 263.

The ECtHR took a similar approach in the *Trakhel v. Switzerland* case to that which it adopted in its judgment in the *M.S.S. v. Belgium and Greece*. The applicants, a married couple and their six children, were Afghan nationals who lived in Switzerland. They entered the EU from Italy and were subjected to the EURODAC identification procedure. The applicants subsequently travelled to Austria and later to Switzerland, where they applied for asylum. However, their application was refused on the ground that, according to the Dublin Regulations, it should have been dealt with by the Italian authorities. The Swiss authorities ordered the applicants' removal to Italy. The applicants lodged an appeal against their deportation order and contended that their deportation from Switzerland would be in breach of their rights under Article 3 of the ECHR[212] because living conditions in that country's reception centre were unacceptable, particularly due to the lack of privacy and the climate of violence among the occupants.[213] The ECtHR, taking into account the feasibility of the applicants' allegations, put a responsibility on the Swiss authorities to obtain guarantees from their Italian counterparts that, on their arrival in Italy, the applicants would receive accommodation so that the family could stay together. However, in their written and oral observations, the Italian authorities had not provided any further details about the special circumstances of the issue. Therefore, the Court concluded that if the applicants were to be returned to Italy without having obtained such guarantees, there would be a violation of Article 3 of the ECHR.[214]

As seen in these two rulings of the ECtHR, effective protection should not only be equated with the absence of persecution and a threat of *refoulement*. Protection should also encompass the socio-economic conditions of asylum seekers in a third country. These need not be the same as high standard of living conditions, but refugees must be entitled to the same rights as aliens living in that country in accordance with Article 7 of the 1951 Refugee Convention. States cannot knowingly return asylum seekers to third countries, which violate rights recognized in the 1951 Refugee Convention. It is important to consider whether a third country is able to provide basic living standards, which asylum seekers are entitled to get as soon as they enter the state territory to apply for asylum.[215]

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212 **Tarakhel v. Switzerland**, Application no. 29217/12, 4 November 2014, paras. 8-22.

213 ibid, paras. 66-68.

214 ibid, paras. 115, 122.

215 **Legomsky**, Stephen H., Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection**,** UNHCR, Department of International Protection,

States should take into account third countries' capacity to provide basic living standards, reception conditions and longer-term integration facilities, including their absorption capacity.[216] Also, formal effectiveness is not enough to regard a country as a safe. State's actual practice should be the main indicator before returning asylum seekers to a third country.[217]

Beyond the principle of *non-refoulement*, refugees are entitled to some fundamental rights according to their duration of stay in the asylum country and their legal status in accordance with the 1951 Refugee Convention. These basic fundamental human rights are evaluated as a bar for transferring the responsibility for asylum seekers to third countries as well. At the lowest level of attachment, an asylum seeker gains basic fundamental rights as soon as s/he comes within the jurisdiction of the country of asylum without being formally recognized as a refugee. This is categorized as "simple presence". More rights are granted when the refugee's attachment is strengthened according to being "physically present", "lawfully present", "lawfully staying" and "durable residence" within a state's territory.[218]

In this regard, based on Hathaway's system of incremental entitlement, Battjes analyzes the provisions of the 1951 Refugee Convention to determine what rights apply to an asylum seeker who has not been granted refugee status formally but has "simply presence" in the territory of a state. He finds that Articles 31 and 33 apply to unrecognized refugees, i.e. asylum seekers. Articles 1(C), 5, 28, 32, 34 and 5 apply to recognized refugees. The other remaining provisions of the Convention do not define clearly whether they are appropriate for recognized refugees, asylum seekers or both. Battjes argues that reading these articles in conjunction with Article 1(A)(2), as well as the object or purpose of the 1951 Refugee Convention, implies that they are applicable to asylum seekers

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Legal and Protection Policy Research Series, February 2003, 1, p. 66; **Guild** & **Moreno-Lax**, 2013, p. 26.

216 **UNHCR**, Considerations on the "Safe Third Country" Concept, Vienna, 8-11 July 1996**,** pp. 3-4; **Goodwin-Gill** & **McAdam**, p. 393; **Kneebone**, Susan, The Pacific Plan: The Provision of "Effective Protection"? International Journal of Refugee Law, September 29, 2006, p. 696; **ECRE**, The Way Forward Europe's Role in the Global Refugee Protection System, Guarding Refugee Protection Standards in Regions of Origin, European Council on Refugees and Exiles, December 2005, p. 6; **Legomsky**, Secondary Refugee Movements, UNHCR, 2003, p. 66.

217 **Feller**, Erika, UNHCR, UN. Doc.A/AC.96/SR.585, para.28, 2004, cited by **Goodwin-Gill** & **McAdam**, p. 394. See also Legomsky's seven elements of effective protection in **Legomsky**, Secondary Refugee Movements, pp. 630- 664.

218 **Hathaway**, The Rights of Refugees, 2005, p. 156.

regardless of their recognition as refugees.[219] To sum up, states are held responsible for their transfers to third countries, if asylum seekers and refugees are in lack of fundamental Conventional rights as described above in the third country.

5. Conclusion

The principle of *non-refoulement* constitutes the cornerstone of the international refugee protection regime and has been extended beyond the 1951 Refugee Convention by the jurisprudence of the ECtHR and other human rights instruments. Against these extended responsibilities of state authorities towards asylum seekers and refugees, sovereign states have changed their protection approach and developed restrictive policies to contain refugees and asylum seekers in their regions of origin in order to abstain from their responsibilities under international refugee protection regimes and human rights instruments. Readmission agreements along with other deflective policies, such as the safe third country concept and accelerated border procedures, have all been developed to shift member states' responsibilities towards third countries, that are located near conflict zones. Given this situation, this chapter set out to determine the compatibility of readmission agreements with the principle of *non-refoulement*.

It has identified three main problems regarding the implementation of readmission agreements. First, readmission agreements do not provide any safeguards against *non-refoulement* or any monitoring systems during the implementation by contracting parties, showing their effects on asylum seekers and refugees. The gaps in the readmission agreements pose a threat to the principle of *non-refoulement*. States may reject asylum seekers and send them back to third countries without examining their asylum applications on the basis of the "safe third country concept" and without indicating that they are asylum seekers. Second, it is not difficult to predict that this increased burden on third transit countries may lead to a downgrading of the refugee protection standards because of third countries' financial, economic and institutional deficiencies. Effective protection must encompass both protection from *refoulement* and access to basic living standards but deficiencies in third countries' refugee protection systems might leave refugees in a precarious situation without access to basic living standards and durable solutions. Third, the refugee policies introduced by European member states are creating

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219 **Battjes**, 2006, pp. 468-469.

ripple effects that risk undermining the international refugee protection regime, which depends on fair burden sharing principles. European member states, however, continue their burden shifting policies. In this situation, it is hard to ask transit countries to continue to host refugees on a large scale. Recent practices of less developed countries towards refugees shows that they are reluctant to host a large number of refugees anymore and wish to follow the EU's strict attitudes and practices towards refugees.[220]

There is, therefore, a definite need for a burden sharing agreement between the EU and transit third countries. Third countries cannot provide effective protection without reaching a consensus on a burden-sharing agreement with the EU. Without becoming a threat to the *non-refoulement* principle, there is an urgent need for member states and third countries to share this burden, according to their economic status, population and capacity, rather than laying the whole burden on the transit countries. The EU's external dimension of migration policy should drop the conditionality driven part and attention must be directed towards improving the economic and political conditions of source countries. There is an urgent need for a reconceptualization of the migration issue based on human rights. Readmission agreements are only one instrument in the crisis of irregular migration; they alone will never solve the problem.[221]

After analysing readmission agreements and their compatibility with the principle of *non-refoulement*, the right to seek asylum and fundamental principles of effective refugee protection from the perspective of international human rights and refugee law, now it is time to turn to the EU-Turkey Agreement on Refugees. The next chapter examines its contradictory legal basis and its human rights considerations.

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220 **Hargrave**, Karen & **Pontuliano**, Sara & **Idris**, Ahmed, Closing Borders, The Ripple Effects of Australian and European Refugee Policy: Case Studies from Indonesia, Kenya and Jordan, Humanitarian Policy Group, Working Paper, September 2016.

221 Return and Readmission to Albania, The Experience of Selected EU Member States, International Organization for Migration: Tirana, August 2006, p. 122.

CHAPTER IV: The EU-Turkey Readmission Agreement: A Challenge to Human Rights?

> The downfall of nations begins with the undermining of lawfulness, whether the laws are abused by the government in power, or the authority of their source becomes doubtful and questionable. In both instances, laws are no longer held valid. The result is that the nation, together with its "belief" in its own laws, loses its capacity for responsible political action; the people cease to be citizens in the full sense of the word.[1]

1. Introduction

This chapter focuses on the EU-Turkey Agreement on the refugee issue and its legal and political backgrounds. It is divided into two sections, the first explains why Turkey signed the RA with the EU and which incentives were used by the EU to convince Turkey to readmit irregular migrants and refugees. This section also considers why the EU and Turkey needed a new 'refugee deal' even though they had signed RA and what its legal status is. The second section explores what risks the EU-Turkey Statement carries in relation to the rights of refugees and asylum seekers.

In this chapter, it is argued that the EU-Turkey Statement opens a way of readmitting refugees to Turkey on the ground of "safe third country" and "first country of asylum" concepts. Although Greece has adopted a law to assign Turkey as a "safe third country" or "first country of asylum", Turkey does not meet the criteria of either concept *vis-à-vis* the Asylum Procedures Directive. The refugee deal has led to entrapment of asylum seekers and refugees in Greece and Turkey in inhuman conditions and increased the risk of *refoulement* without access to asylum procedures. Given the lack of safeguards, the readmission process has left refugees and asylum seekers in legal limbo. Arendt describes this as "holes of oblivion".[2] It means that they do not know their fate but stay as refugees

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1 **Arendt**, Hannah, Essays in Understanding: 1930–1954, cited by **Cassarino**, Jean-Pierre, Unbalanced Reciprocities: Cooperation on Readmission in the Euro-Mediterranean Area, The Middle East Institute, Special Edition, Viewpoints, Washington D.C., 2010, p. 29. Available at SSRN: https://ssrn.com/abstract=1730633 or http://dx.doi.org/10.2139/ssrn.1730633.

2 **Mackereth**, Kerry, "Nothing is More Dangerous for Human Beings than to be forgotten": Seyla Benhabib on Donald Trump, Hannah Arendt, and the Refugee Crisis, 10 March 2017, http://inthelongrun.org/articles/article/nothing-is-more-dangerous-for-human-beings-than-to-be-forgotten-seyla-benha.

for their whole life without access to any foreseeable solution. There are many clear indications that the EU intended to create this kind of space both in Turkey and in Greece while detaining victims in inhuman conditions and obstructing their access to safe havens.

To substantiate my arguments, human rights reports of NGOs, leading jurisprudence of the ECtHR and the reports of the European institutions will be analysed.

2. The EU-Turkey Readmission Agreement and Its Controversial Link to the EU-Turkey Statement

In world politics today, there is a tug of war between national security and human rights. Migration has been increasingly framed as a danger to public safety, cultural identity, and labour markets. As the Special Rapporteur, François Crépeau, has underlined in his report the EU has seen irregular migration largely as a "security concern". This approach fundamentally conflicts with a human rights approach that sees migrants as individuals and equal holders of human rights.[3] Today, as a consequence of the securitization of the migration issue, the more measures are taken for security reasons; the less importance is given to human rights concerns.[4]

The EU has adopted two distinct strategies to control migration flow into its territory. The first is the preventive strategy, which has sought to eliminate the factors encouraging migrants to travel to the EU. It addresses the root causes of migration through development assistance, trade, foreign investment, and supporting refugee protection in the source countries. The second strategy is the externalization of migration control, which seems "one of the most striking innovations" of the EU.[5] In this context, the EU has started to transfer the management of border controls to third countries by signing bilateral agreements with source and transit countries. If third countries fail to prevent irregular entry of migrants into the EU, they will have to take back migrants and asylum seekers on the basis of RAs. By doing so third countries have become the border guards

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3 **Crépeau**, François, United Nations General Assembly Report on the Human Rights of Migrants, Human Rights Council Twenty-third Session, 24 April 2013, A/HRC/23/46, para. 31.

4 **Huymans**, Jef, The European Union and the Securitization of Migration, *Journal of Common Market Studies*, 38(5), 2000, pp. 751-752; **Oltean**, Priscilla & **Iov**, Claudia Anamaria, EU-Turkey Negotiations in the Context of Securitizing Migration After the 2015 Refugee Crisis: Joint Action Plan and the Readmission Agreement, *Research and Science Today*, September No. 1, 2017, pp. 101-103.

5 **Gammeltoft-Hansen**, Thomas Graae, Outsourcing Migration Management, EU, Power, and the External Dimension of Asylum and Immigration Policy, DIIS Working Paper no. 2006/1, p. 13.

of the EU's external borders but this fails to offer a real solution to the increasing refugee crisis.[6] As Emiliani describes it, the EU sees neighbouring states as service suppliers rather than real partners and uses "conditionality" to uphold its political realism instead of upholding the universal rights of refugees and asylum seekers.[7]

The EU forces Turkey to develop integrated borders management, visa restrictions against refugee producing countries and a comprehensive asylum policy to take over the responsibility of refugees and asylum seekers on its territory.[8] However, although the EU has forced Turkey to take responsibility for refugees and asylum seekers, its asylum law is not designed to host an increasing number of asylum seekers and refugees. Turkey's asylum law only permits asylum seekers and refugees to stay temporarily rather than permanently. For national security reasons and to curb a mass influx into the region,[9] Turkey made a declaration in accordance with Article 1(B)(1) of the 1951 Refugee Convention that the words "events occurring before 1 January 1951" in Article 1(A) were to be understood as "events occurring in Europe.[10] For that reason, the geographical limitation led to Turkey maintaining a "two-tiered asylum policy" where the first tier applies to asylum seekers coming from Europe, called "*Convention Refugees*", and the

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6 **Billet**, Carole, EC Readmission Agreements: A Prime Instrument of the External Dimension of the EU's Fight against Irregular Immigration. An Assessment After Ten Years of Practice, *European Journal of Migration and Law*, 12(1), 2010, p. 74; **Trauner**, Florian & **Kruse**, Imke, EC Visa Facilitation and Readmission Agreements: Implementing a New EU Security Approach in the Neighborhood, CEPS Working Document No. 290/April 2008, p. 40; **Dimitriadi**, Angeliki, Deals Without Borders: Europe's Foreign Policy on Migration, Policy Brief, European Council on Foreign Relations, April 2016, p. 1.

7 **Emiliani**, Tommaso, 'Refugee Crisis'–'EU Crisis'? The Response to the Inflows of Asylum Seekers as a Battle for the European Soul, College of Europe Policy Brief, March 2016, pp. 2-4.

8 **Tokuzlu**, Lami Bertan, Burden-Sharing Games for Asylum Seekers between Turkey and the European Union, European University Institute, Florence Robert Schuman Centre for Advanced Studies, EUI Working Paper RSCAS, May 2010, p. 1.

9 **Kirişçi**, Kemal, UNHCR and Turkey: Cooperating for Improved Implementation of the 1951 Convention Relating to the Status of Refugees, *International Journal of Refugee Law*, Vol. 13, No. 1/2, 2001, p. 71; **Kirisci**, Kemal, The Question of Asylum and Illegal Migration in European Union-Turkish Relations, *Journal of Turkish Studies*, 4(1) 2003, p. 92; **Frelick**, Bill, Barriers to Protection: Turkey's Asylum Regulations", *International Journal of Refugee Law*, Vol. 9(1), 1997, p. 14; **Ay**, Kadir, Bugünkü Yasal Düzenlemeler Çerçevesinde Yürütülen Uygulamalar ve Karşılaşılan Güçlükler (Conducted Practices and Encountering Problems within the Framework of Today's Legislative Arrangements), Türk Mülteci Hukuku ve Uygulamadaki Gelişmeler (Turkish Migration Law and Developments in the Practice), İstanbul Barosu Yayınları (Publication of Istanbul Bar Association), İstanbul 2004, p. 71; **Kaya**, İbrahim, Reform in Turkish Asylum Law: Adopting the EU Acquis? European University Institute, Robert Schuman Centre for Advanced Studies, CARIM-RR 2009/16, p. 5, 15.

10 Turkey defines Europe as all members of the Council of Europe, including Russia and ex-Soviet states west of the Urals (including the Caucasus). UNHCR in Turkey: Facts & Figures, January 2011, issue 3, p. 18.

second tier applies to asylum seekers coming from outside of Europe, called "*Non-Convention Refugees.*"[11] This two-tiered system has been protected under the LFIP and refugee status is only given to *European refugees*.

The limitation that restricts Turkey's obligations under international law, unfortunately, places non-European asylum seekers in a vulnerable position. On this legal ground, Turkey only grants "conditional refugee" status to refugees originating from non-European countries on a temporary basis. Therefore, this situation means non-European refugees have to move forward irregularly to find a durable solution.[12] Even though the EU used Europanisation as a conditionality to encourage Turkey to lift geographical limitation, Turkey declared that the geographical limitation would only be lifted on condition that it would not encourage large-scale refugee flows to Turkey from the East, upon the completion of Turkey's membership to the EU and setting up burden sharing mechanism between EU member states and Turkey.[13]

Although Turkey refused to lift geographical limitation, the EU did not give up any chance of cooperation with Turkey and invited Turkey to begin the RA negotiations in 2003, but it did not formally acknowledge this until March 2004. In 2007, the Commission offered to negotiate visa facilitation, on condition that Turkey signed the RA but Turkey did not respond to this offer due to the limited scope of the proposal. Moreover, the introduction to procedures different from Balkan Countries raised concern about unequal treatment to Turkey. The EU's visa facilitation offer caused Turkish policymakers to wonder about Turkey' status because visa facilitation was being used as an incentive for third country nationals, but not for a future member state which Turkey aspired to. Therefore, Turkish policymakers feared that the EU wanted to use Turkey as a buffer zone or dumping ground for irregular migrants but not for future membership.[14]

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11 **Kirişçi**, Kemal, Reconciling Refugee Protection with Combating Irregular Migration: Turkey and the EU, *Perceptions: Journal of International Affairs*, Vol. 9, Summer 2004, pp. 7-8; **Kirişçi**, UNHCR and Turkey, pp. 74-78; **Kirişçi**, Kemal, Disaggregating, Turkish Citizenship and Immigration Practices, *Middle Eastern Studies*, 36(3), 2000, p. 11; **Kirisci**, Kemal, The Legal Status of Asylum Seekers in Turkey: Problems and Prospects, *International Journal of Refugee Law*, 3(3), 1991, p. 513; **Kirişçi**, Kemal, The Question of Asylum, 2003, pp. 83-85.

12 **Kirişçi**, The Question of Asylum, 2003, p. 83.

13 **Kirişçi**, Kemal, Border Management and EU-Turkish Relations: Convergence or Deadlock, Cooperation Project on the Social Integration of Immigrants, migration and the Movement of Persons, Robert Schuman Centre, No. 3, 2007, p. 15.

14 **Bürgin**, Alexander, European Commission's Agency Meets Ankara's Agenda: Why Turkey is Ready for a Readmission Agreement, *Journal of European Public Policy*, 19(6), August 2012, pp. 883-884.

Turkish politicians partly refused to accept visa facilitation as an incentive for signing a RA and offered visa liberalization for concluding the RA.

Turkey's hesitation towards RA with the EU can be explained therefore in two ways. First, RA without foreseeable EU membership would result in major problems and adaptation costs. For instance, the EU required Turkey to be more active in controlling migration and to provide international protection to non-European asylum seekers and refugees. Providing international protection for refugees and establishing reception conditions and a structure for combatting irregular migration required a long-term political, institutional and financial commitment. The capacity of Turkey to shoulder such long-term commitments was very limited. These were the priorities for the EU, but not for Turkey.[15] Turkish politicians also pointed out that the economic gap between Europe and the countries neighbouring Turkey was the main reason for irregular migration and could not be reduced through Turkish policy measures alone.[16] The second reason behind the hesitation of Turkey in signing the RA can be found by analyzing the EU's existing acquis in asylum policies and the position of Turkey as a transit country. Turkish politicians anticipate that if Turkey signed the RA and lifted geographical limitation; it would be functioning as a safe third country in the terms of the Asylum Procedures Directive. In this regard, the EU could easily shift the responsibility for all refugees without taking into account the burden-sharing principle.[17] In that situation, Turkey would start to function as a buffer zone or dumping ground for irregular migrants. The mistrust among Turkish officials towards European policies adversely affected the relationship between Turkey and the EU.[18]

The negotiations with Turkey could not be concluded until the EU Council empowered the Commission to initiate a process allowing Turkish citizens to travel to the EU member states without a visa. For Turkey, visa liberalization was more achievable than EU

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15 **Tolay**, Juliette, Turkey's "Critical Europeanization": Evidence from Turkey's Immigration Policies", Edited by Paçacı Elitok, Seçil & Straubhaar, Thomas, Turkey, Migration and the EU: Potentials, Challenges and Opportunities, Hamburg: Hamburg University Press, 2012, p. 52.

16 **Imke**, Kruse, The EU's Policy on Readmission of Illegal Migrants, PhD. Candidate, Max Planck Institute for the Study of Societies, Cologne/Germany, p. 35. http://socsci2.ucsd.edu/~aronatas/scrretreat/Kruse.Imke.pdf.

17 **Bürgin**, Alexander & **Aşıkoğlu**, Derya, Turkey's New Asylum Law: A Case of EU Influence, Journal of Balkan and Near Eastern Studies, 13 November 2015, pp. 4-5; **Tokuzlu**, 2010, p. 15.

18 **Kirişçi**, Kemal, Managing Irregular Migration in Turkey: A political-Bureaucratic Perspective, CARIM Analytic and Synthetic Notes, Irregular Migration Series: Socio-Political Module, 61, 2008, p. 1.

membership, and so the government accepted the risks associated with the RA, believing that the benefits of visa liberalization would outweigh the costs.[19] Therefore, Turkey signed the RA with the EU on 16 December 2013 only after the Commission got permission to initiate negotiations of visa liberalization in parallel with the RA.[20] The RA was ratified by the Turkish Parliament and came into force in June 2014.[21] It would become applicable to third-country nationals[22] and stateless persons after three years in 2017. However, due to the Syrian refugee crisis, the EU and Turkey agreed to start implementation for third-country nationals and stateless persons in June 2016.[23]

Currently, even though the planned date has passed, the RA has not come into force for third country nationals due to political tension between Turkey and the EU. It is only applicable to Turkey's own nationals, stateless persons, and third-country nationals coming from those third countries with which Turkey has concluded RAs.[24] Therefore, the EU member states, which have not concluded RAs with Turkey cannot return irregular migrants and rejected asylum seekers into Turkey until the problems between Turkey and the EU are solved.[25] Now the EU-Turkey RA has been implemented for over one and half years with the help of the Turkey and Greece Readmission Protocol concluded in 2012 between both parts.

The EU-Turkey RA foresees lifting visa requirements for Turkish nationals that are travelling in the Schengen zone for a short period. For the visa liberalization to come into effect, Turkey is expected to fulfil 72 requirements including the establishment of migration and asylum systems in line with international standards, effective management

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19 **Bürgin**, 2012, pp. 888-889.

20 Agreement between the European Union and the Republic of Turkey on the Readmission of Persons Residing without Authorisation. OJ L 134/3-27, 07.05.2014.

21 **European Commission Statement**, Statement by Cecilia Malmström on the Ratification of the EU-Turkey Readmission Agreement by the Turkish Parliament, 26 June 2014, http://europa.eu/rapid/press-release_STATEMENT-14-210_en.htm.

22 Third country national clause in the EU-Turkey RA requires Turkey to accept returns not only of its own nationals but also of nationals that have transited through its territory to the European territory. This is a point of concern that this may impose a significant burden on Turkey.

23 Council Decision (EU) 2016/551 of 23 March 2016 on Readmission of Persons Residing Without Authorisation from 1 June 2016, OJ EU, L 95/9, 9.4.2016, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016D0551. The Republic of Turkey, Ministry of EU Affairs, EU-Turkey Visa Liberalisation Dialogue, December 2015, p. 5. http://www.ab.gov.tr/files/stib/TR-ABVizeSerbestisi.pdf

24 Article 24(3) of the Readmission Agreement.

25 Republic of Turkey, Ministry for EU Affairs, EU-Turkey Visa Liberalisation Dialogue, December 2015, p. 5. http://www.ab.gov.tr/files/stib/TR-ABVizeSerbestisi.pdf

of borders, securing travel documents, establishing visa requirement against refugee producing countries and respecting the fundamental rights of migrants and refugees. On 13 June 2017, the European Commission published the sixth report on the progress made by Turkey in fulfilling the requirements of its visa liberalization roadmap.[26] Turkey fulfilled 65 of 72 requirements.[27] Considering these 7 requirements of the EU from Turkey, there are indications from both contracting parts that definition of terrorism will become a major obstacle in front the coming into force of visa liberalization for Turkish nationals.[28]

Why did Turkey sign the RA after such a long negotiations process and their stated fear that the EU would shift the responsibility of the refugee burden onto Turkey? The main reasons can perhaps be explained using Europeanization theories. According to external policy conditionality in Europeanization theory, the EU exerts influence on domestic policy in third countries by using conditionality in two ways: accession conditionality and policy conditionality. Accession conditionality applies to the candidate countries during their accession negotiations and it is the strongest and most effective form of conditionality. Policy conditionality applies to all third countries with the attachment of specific rewards in related policy areas. It may lead to increase in the level of compliance and transformation in domestic level in the shorter term and valuable for government actors with electoral concerns.[29]

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26 **European Commission Report** to the European Parliament, the European Council and The Council, Com (2017) 470 final, Seventh Report on the Progress Made in the Implementation of the EU-Turkey Statement, 6th of September 2017, pp. 10-11.

27 Seven requirements are not fulfilled by Turkey: biometric travel document, implementing the national strategy on the fight against corruption, provide effective cooperation in criminal matters, law enforcement cooperation with EUROPOL, adoption of personal data protection legislation, the definition of terrorism and effective implementation of existing readmission obligations with the member states.

28 **European Commission**, Staff Working Document Accompanying the Document on Progress by Turkey in Fulfilling the Requirement of Its Visa Liberalisation Roadmap, SWD 2016, 161 Final, 4.5.2016, p. 38. See Article 65 "Revise-in line with the ECHR and with the European Court of Human Rights (ECtHR) case law, the EU acquis and EU Member States practices- the legal framework as regards organised crime and terrorism, as well as its interpretation by the courts…so as to ensure the right to liberty and security, the right to a fair trial and freedom of expression, of assembly and association in practice".

29 **Schimmelfennig**, Frank & **Sedelmeir**, Ulrich, Governance by Conditionality: EU Rule Transfer to the Candidate Countries of Central and Eastern Europe, *Journal of European Public Policy*, 11(4), 2004, pp. 661-662; **Börzel**, Tanja & **Risse**, Thomas, When Europe Hits Home: Europeanization and Domestic Change, *European Integration Online Paper*, 4(15), 2000, pp. 1-2.

However, in the case of Turkey, regarding the EU's decreasing effect on Turkey as a candidate country, the EU had used visa liberalization as a policy conditionality to convince Turkey to sign the RA. According to policy conditionality, the adaptation of rule and values is only possible if it suits national interests. This is particularly visible in the RA negotiations between Turkey and the EU because the EU used visa liberalization as leverage to obtain the Turkish Government's cooperation on readmission of irregular migrants and refugees.[30] Even though the Turkish government has been waiting to get visa liberalization for Turkish nationals in a parallel with the coming into force of the EU-Turkey RA, the visa liberalisation for Turkish nationals has not come into force. Thus, this unbalanced nature of the deal has shadowed the implementation of the EU-Turkey RA entirely and led to the deterioration in relations between the EU and Turkey.[31]

2.1. The EU-Turkey Statement and the Implementation of the Turkey-EU Readmission Agreement

The Syrian refugee crisis began in 2011 when millions of Syrians left their country to seek protection outside Syria. This refugee crisis has put an enormous responsibility on Turkey's refugee protection system and Turkey has become the first country in the world to host that number of refugees. As of 2017, Turkey has been hosting over 3 million refugees and its absorption capacity has stretched to its limits. As the crisis intensifies, with no possible short-term solution on the horizon, large numbers of refugees are trying to get to Europe. During 2015, nearly 856.000 people crossed from Turkey to the Greek islands and the overwhelming majorities were from Syria, Afghanistan and Iraq.[32] Only after hundreds of thousands of refugees had entered the EU territory, did the refugee problem attract the attention of the media and State governments. Increasing refugee flows into the EU through Greece, the closure of its border by the former Yugoslav Republic of Macedonia and member states' failure to fulfil their commitments to relocate refugees from Greece has led to considerable tension between member states and

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30 **Tolay**, Juliette, Turkey's "Critical Europeanization": Evidence from Turkey's Immigration Policies, Edited by Paçacı Elitok, Seçil & Straubhaar, Thomas, Turkey, Migration and the EU: Potentials, Challenges and Opportunities, Hamburg University Press: Hamburg, 2012, pp. 49-50.

31 **Şenyuva**, Özgehan & **Üstün**, Çiğdem, A Deal to End "the" Deal: Why the Refugee Agreement is a Threat to Turkey-EU Relations, The German Marshall Fund of the United States, no. 132, July 2016, pp. 3-4. http://www.gmfus.org/publications/deal-end-"the"-deal-why-refugee-agreement-threat-turkey-eu-relations.

32 **UNHCR**, Refugees/Migrants Emergency Response-Mediterranean, http://data.unhcr.org/mediterranean/country.php?id=83.

institutions of the EU. Moreover, it has seen the Dublin Regulation come to a dead end due to the unfair distribution of refugees between member states. As stated by MPs of the European Parliament, the "inability" or "lack of political will" of the member states to take responsibility for the refugee crisis has forced the EU to "outsource" its refugee problems to Turkey.[33] The EU has seen the cooperation with Turkey as an alternative way to respond to the refugee crisis.[34] It offered Turkey a re-energized accession process, financial support on the welfare of Syrian refugees and accelerated visa liberalization for Turkish nationals to gain Turkey's cooperation on the refugee issue.

On 15 October 2015, the EU and Turkey concluded a Joint Action Plan[35] to tackle the increasing flow of Syrian refugees into EU territory, bring order to migratory flows and stem the influx of irregular migration. The EU agreed to provide Turkey with €3 bn of financial support to cope with Syrian refugees needing temporary protection. The Joint Action Plan mainly focuses on two issues:

> i) Turkey will offer temporary protection to Syrian refugees. In return, the EU will mobilize funds "in the most flexible and rapid way possible";
>
> ii) Turkey will strengthen border controls and prevent irregular migrants from crossing into the EU. In exchange, the EU will accelerate visa liberalization dialogue to facilitate visa requirements for Turkish nationals.

The main weakness of the Joint Action Plan is that the first part of the Plan describes Syrians as seeking refuge, so they have to be supported in Turkey. The second part of the Plan characterizes the same people as irregular migrants, and therefore their irregular departure to the EU has to be prevented. This clearly shows "how the EU manipulates the migration crisis for political purposes".[36] As explained earlier, the EU uses visa liberalization as policy conditionality for guaranteeing Turkey's cooperation on the

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33 **European Parliament News**, No Blank Cheque for Turkey, say MEPs in Debate on EU-Turkey Deal, 28.04.2016, http://www.europarl.europa.eu/news/en/news-room/20160426IPR24798/No-blank-cheque-for-Turkey-say-MEPs-in-debate-on-EU-Turkey-deal.

34 **Peers**, Steve, The Orbanisation of EU Asylum Law: The Latest EU Asylum Proposals, Statewatch, 6 May 2016, pp. 1-2.

35 **The EU-Turkey Joint Action Plan**, 15 October 2015, http://europa.eu/rapid/press-release_MEMO-15-5860_en.htm.

36 **Atak**, İdil, A Look at the EU-Turkey Action Plan, 17 October 2015, François Crépeau Chaire Oppenheimer en Droit International Public, http://francoiscrepeau.com/fr/a-look-at-the-eu-turkey-action-plan/.

refugee issue but at the same time, the EU is outsourcing its international responsibilities of taking care of refugees to another third country.

The Joint Action Plan was activated on 18 March 2016 under the EU-Turkey Statement[37] with new key elements.[38] According to the EU-Turkey Statement, the EU will provide Turkey the extra € 3 bn of financial support until the end of 2018 to cope with Syrian refugees and accelerate Turkey's accession negotiations. In turn, Turkey will continue to provide Syrian refugees temporary protection and strengthen its borders to prevent Syrian refugees from crossing into the EU. The EU has also established a very controversial resettlement scheme: "for every Syrian being returned to Turkey from Greek islands, another Syrian will be resettled from Turkey to the EU". The exact scale of the resettlement will depend on how many Syrian refugees continue to reach the Greek islands. The swapping of irregular migrants and asylum seekers for resettlement of Syrian refugees is found "deeply 'inimical' to established European traditions"[39] and "morally dubious".[40] Amnesty International also criticises the EU-Turkey Statement for its legal flaws. It states the EU-Turkey Statement

> …make(s) every resettlement place offered to a Syrian in the EU contingent upon another Syrian risking their life by embarking on the deadly sea route to Greece.

Also, Head of Amnesty International's Institutions Office, Iverna McGowan, argues that

> The idea of bartering refugees for refugees is not only dangerously dehumanising but also offers no sustainable long-term solution to the ongoing humanitarian crisis.[41]

The EU-Turkey RA coupled with the EU-Turkey Statement has raised considerable concern related to protection of fundamental human rights and refugee protection. NGOs and scholars have heavily criticized the deal for infringement of the EU and international

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37 The EU-Turkey Statement, European Council of European Union, Press Release, 18 March 2016, http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/.

38 This Statement was preceded by six principles set out in the Statement of EU Heads of State or Government on 7 March 2016, http://www.consilium.europa.eu/en/press/press-releases/2016/03/07-eu-turkey-meeting-statement/.

39 **Carrera**, Sergio & **Guild**, Elspeth, EU-Turkey Plan for Handling Refugees is Fraught with Legal and Procedural Challenges, 10 March 2016, https://www.ceps.eu/publications/eu-turkey-plan-handling-refugees-fraught-legal-and-procedural-challenges.

40 **Peers**, Steve, The Final EU/Turkey Refugee Deal: A Legal Assessment, 18 March 2016, http://eulawanalysis.blogspot.co.uk/2016/03/the-final-euturkey-refugee-deal-legal.html?m=1.

41 **Amnesty International**, EU Turkey Summit: EU and Turkey Leaders Deal Death Blow to the Rights to Seek Asylum, 8 March 2016, https://www.amnesty.org/en/latest/news/2016/03/eu-turkey-summit-reaction/

refugee law.[42] The EU's deal with Turkey aims to deflect the burden of refugee protection and migration control mechanism on to Turkey by linking migration policy with a wide range of policy instruments, including financial aid, accession conditionality, trade and visa liberalization, In doing so, the EU is willing to utilize both its hard and soft powers to structure Turkey's migration agenda.[43] Nevertheless, the EU does not give enough attention to the real impact of such agreements, neither on the partner countries nor asylum seekers and refugees.[44] European member states have framed refugees as a security problem and prioritized its national interests over individuals who are in need of international protection.[45] In a similar way, the negotiations reveal that while Turkey has given the commitment to contain Syrian refugees and prevent them from crossing into the EU's territory, it actually has ignored the possible effects of the deal on refugees. Turkey also follows its own national interests rather than taking account of the vulnerabilities of refugees.

Regarding the urgency of the refugee issue, it is clear that Turkey's bargaining power has increased greatly due to the refugee crisis. As Turkish Prime Minister Davutoğlu said on 18 April 2016,

> I maintain my belief that, god willing, we will have the visa exemption in June. In the absence of that, then, of course, no one can expect Turkey to adhere to its commitments.[46]

Again, in a press conference on 6 May 2016, Turkish President Erdoğan insisted that he would not change the definition of terrorism in Turkish law, which is one of the 72 key

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42 **Statewatch**, 300 Organizations and 11.000 individuals denounce the EU-Turkey Agreement, 04.05.2016, http://www.statewatch.org/news/2016/may/cear-eu-turkey-complaints.htm; **Peers**, Steve, The Final EU/Turkey Refugee Deal: A Legal Assessment, 18 March 2016, http://eulawanalysis.blogspot.co.uk/2016/03/the-final-euturkey-refugee-deal-legal.html?m=1; **Carrera** & **Guild**, EU-Turkey Plan for Handling Refugees, 2016; **Hafelach**, Lisa & **Kurban**, Dilek, Lessons Learnt from the EU-Turkey Refugee Agreement in Guiding EU Migration Partnership with Origins and Transit Countries, *Global Policy*, 8(4), June 2017, p. 85.

43 **Gammeltoft-Hansen**, 2006, p. 7.

44 **Billet**, 2010, p. 79; **Collinson**, Sarah, Visa Requirements, Carrier Sanctions, 'Safe Third Countries' and 'Readmission': the Development of an Asylum 'Buffer Zone' in Europe, Transactions of the Institute of British Geographers, 21(1), 1996, p. 85.

45 **Hafelach** & **Kurban**, 2017, p. 85.

46 **Nielsen**, Nikolaj, EU Observer, Turkish PM ıssues EU Visa Ultimatum, 19 April 2016, https://euobserver.com/migration/133113.

requirements[47] for visa liberalization. He gave a signal of the threat to cancel the EU-Turkey Statement, saying, "We will go our way, you go yours".[48] Also, he claimed that current anti-terror laws are necessary tools in order to counter the threat of PKK and ISIS terrorism at home and abroad.[49] At this stage, the Turkish government has not cancelled the refugee deal but the implementation of the EU-Turkey RA is still on a knife-edge.

As Gammeltoft-Hansen[50] pointed out there is a risk that the EU's power relations with third countries on the refugee issue may take "hostage" of the EU itself. In order to ensure RAs and the establishment of control mechanisms by third countries, the EU has drastically changed its foreign priorities towards a range of strategic transit countries, including Turkey. As seen in the EU-Turkey cooperation arrangement, combating irregular migration and reducing secondary movements of refugees has only succeeded with the cooperation of Turkey and implementation of the EU-Turkey RA. In this regards, it can be said that Turkey is using its increasing bargaining power and threatening the EU to cancel the deal on the refugee issue.[51] As the International Crisis Group report indicates that even though Turkey did not create the refugee crisis, Turkey has used refugees in its relations with the EU. While the deal has produced mutual benefits for both parties, "the promise to curb the flow to Europe…increased Ankara's leverage and arguably rendered EU counterparts less vocal about human rights and rule of law issues".[52]

Greenhill in her theory of "coercive engineered migration" argues that cross-border movements can be deliberately created, manipulated or used by states or non-state actors in order to gain political advantages from target countries. It can be used by three kinds of challengers: "generators, agent provocauteurs and opportunitists."[53] In the case of the

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47 **European Commission**, Staff Working Document Accompanying the Document on Progress by Turkey in Fulfilling the Requirement of Its Visa Liberalisation Roadmap, SWD 2016, 161 Final, 4.5.2016, p. 40.

48 **The Guardian**, EU-Turkey Visa Deal on Brink as Erdoğan Refuses to Change Terror Laws, 6 May 2016, http://www.theguardian.com/world/2016/may/06/erdogan-turkey-not-alter-anti-terror-laws-visa-free-travel-eu.

49 ibid.

50 **Gammeltoft-Hansen**, 2006, pp. 13-14.

51 **Oltean**, Priscilla & **Iov**, Claudia Anamaria, EU-Turkey Negotiations in the Context of Securitizing Migration After the 2015 Refugee Crisis: Joint Action Plan and the Readmission Agreement, *Research and Science Today*, September No. 1, 2017, p. 109.

52 **The International Crisis Group**, Turkey's Refugee Crisis: The Politics of Permanence, Europe Report no: 241, 30 November 2016, p. 1.

53 **Greenhill**, Kelly, Open Arms Behind Barred Doors: Fear, Hypocrisy and Policy Schizophrenia in the European Migration Crisis, *European Law Journal*, 22(3), May 2016, pp. 319-320.

EU-Turkey refugee deal, Turkey has no direct role in the creation of the crisis but as an opportunist player, it can "exploit the existence of outflows" generated by other players. Also, Turkey could threaten to close its borders and create a humanitarian crisis "unless targets take desired action and/ or side-payments".[54] Her theory of "coercive engineered migration" provides a comprehensive explanation of how migration can be used by third countries to gain relative strenght *vis-à-vis* their powerful counterparts and advantages in its relations with them. However, it is difficult to blame Turkey for using its opportunist position since as Greenhill underlines, the liberal states' unethical behaviours have caused this situation and entrapped them.[55] The Syrian refugee crisis acts as a catalyst in defining the EU's member states position in this global refugee crisis. They have to choose to take refugees and bear the responsibility of taking on the real cost of refugees or face the hypocrisy consequences of not taking them. They have chosen not to take refugees whatever the cost and given priority to domestic political interests rather than ethical and moral values. Thus as Wizek points out they have left themselves open to the "blackmail" of Turkey.[56]

The important question is how the EU-Turkey Statement affects the implementation of the EU-Turkey RA. The EU-Turkey RA is intended to expel irregular migrants who do not fulfil the entry and residence conditions of the country concerned.[57] Its scope covers both nationals and non-nationals who transited through the territory of one of the contracting parties *en route* to the EU.[58] In accordance with the EU-Turkey RA, Turkey will readmit, "upon application by a Member State", all third-country nationals or stateless persons in an irregular situation in the territory of that member state. However, there is no mention of asylum seekers and refugees in the RA. The EU-Turkey Statement raises the question of whether asylum seekers and refugees may be readmitted to Turkey based on the implicit assumption that Turkey is a safe third country or first country of

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54 ibid, pp. 320-321.

55 ibid, pp. 328-330.

56 **Wilzek**, Maria, When the EU is No Longer Able to Bribe Turkey, the Blackmail will Begin, 4 March 2016, The Spectator, 4 March 2016, https://blogs.spectator.co.uk/2016/03/when-the-eu-is-no-longer-able-to-bribe-turkey-the-blackmail-will-begin/#.

57 **European Commission**, Green Paper on a Community Return Policy on Illegal Residents, Brussels, COM (2002), 175, Final, p. 26.

58 **Cassarino**, Jean-Pierre, Readmission Policy in the European Union, European Parliament, Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, 2010, p. 12; **Roig**, Annabella & **Huddleston**, Thomas, EC Readmission Agreements: A Re-evaluation of the Political Impasse, *European Journal of Migration and Law*, 9(3), 2007, p. 363.

asylum in accordance with the Asylum Procedures Directive. The answer to this question constitutes the fundamental basis of the EU-Turkey Statement and defines the legality of the return of asylum seekers and refugees to Turkey. This question will be addressed below with the help of scholars', the UNHCR's and NGOs' views.

2.1.1. Is Turkey a Safe Third Country?

The EU-Turkey Statement states that

> Migrants not applying for asylum or whose application has been found unfounded or inadmissible in accordance with the (Asylum Procedures)…will be returned to Turkey.[59]

This means that if an asylum application is deemed unfounded, it has been rejected after examining its merits. However, if an asylum application is inadmissible, then it means that it is rejected without examining its merits on the grounds that Turkey is either a "first country of asylum" or a "safe third country" and subjected to accelerated procedures. Therefore, this provision of the Statement implicitly opens a way to readmission of refugees and asylum seekers to Turkey. However, there has been a major debate between scholars, European institutions, UNHCR and NGOs as to whether Turkey can be considered to be a "safe third country" or "first country of asylum" in accordance with Asylum Procedures Directive and international law.

There is no clearly stipulated general declaration about third country's safety neither by member states nor by the EU. The safe third country designation is left to every member states' discretion. Accordingly, if member states desire to accept Turkey as a safe third country in accordance with Article 38(1) of Asylum Procedures Directive, member states should check stated principles before doing so,

> a) Life and liberty are not threatened on grounds 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 art. 33 of the 1951 Geneva Convention is respected;
>
> d) There is a prohibition of removal, in violation of the right to freedom from torture

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59 The EU-Turkey Statement, European Council of European Union, Press Release, 18 March 2016, http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/.

> 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.

In this crucial debate, the UNHCR referring to Article 38(1)(e) states, if Turkey is designated as a "safe third country" by member states,

> Turkey must allow, in accordance with rules laid down in national law, non-European nationals or stateless persons who had their place of habitual residence outside Europe to request refugee status and to have access to all rights conferred by the 1951 Convention.[60]

It means that Turkey should provide non-European asylum seekers a refugee status and all rights conferred by the 1951 Refugee Convention to be accepted as a safe third country.

However, the Commission interprets the "safe third country" concept contrary to the UNHCR's interpretation. It says,

> Asylum Procedures Directive requires that the possibility exists to receive protection in accordance with the Geneva Convention, but does not require that the safe third country has ratified that Convention without geographical reservation.[61]

The President of the European Commission, Jean-Claude Juncker, reaffirmed this interpretation saying, "sending refugees back to Turkey was legal and in line with the Geneva Convention." Citing specific paragraphs of the Asylum Procedure Directive, he said

> Countries could refuse to consider refugee claims if there was a safe place to send them back to. As Greece had decided Turkey was a safe country, the returns policy was legal.[62]

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60 **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.

61 **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, 10.2.2016, p. 18.

62 **Guardian**, EU-Turkey Deal Could See Syrian Refugees Back in War Zones says UN, 8 March 2016, http://www.theguardian.com/world/2016/mar/08/un-refugee-agency-criticises-quick-fix-eu-turkey-deal.

The EU Commission report on progress by Turkey fulfilling the requirement of its visa liberalisation roadmap states that,

> Conditional refugees are granted a status that does not differ in practice from the one given to refugees covered under the "geographical limitation", offering both groups work permits, social assistance and opportunities to integrate, in line with the approach in the EU Qualification Directive.[63]

Accordingly, the Commission claims that Turkey provides equivalent rights to conditional refugees same as conventional refugees and Turkey's geographical limitation does not constitute a barrier to be a safe third country.

Like the Commission, Hailbronner and Thym argue that Turkey's geographical limitation cannot be considered a barrier to being a safe third country. In accordance with Article 38 of the Asylum Procedures Directive, Turkey will fulfil the requirement of the Asylum Procedures Directive if it provides the material obligations of the Convention including *non-refoulement* and providing equivalent protection to refugees.[64] The European Stability Initiative also claims that Turkey effectively observes the prohibition of *non-refoulement* in accordance with Article 4 of the LFIP and therefore "it sees no obstacle in treating Turkey as a "safe third country".[65]

On the other hand, the counter argument claims that Turkey should not be designated as a safe third country for refugees since Turkey's geographical limitation and the country's deficient asylum system has led to precarious situations for refugees. Peers states in his legal assessment of the EU-Turkey refugee deal that the safe third country concept requires Turkey to apply the 1951 Refugee Convention without geographical limitation. Although the European Commission and the Council claim that Turkey applies equivalent standards in practice, Peers does not support this claim. He argues that

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63 **European Commission,** Report on Progress by Turkey in Fulfilling the Requirements of Its Visa Liberalization Roadmap, COM (2014) 646, 20.10.2014, p. 17.

64 **Hailbronner**, Kay, Legal Requirements for the EU-Turkey Refugee Agreement: A Reply to J. Hathaway, 11 June 2016, VerfBlog, http://verfassungsblog.de/legal-requirements-for-the-eu-turkey-refugee-agreement-a-reply-to-j-hathaway/; **Thym**, Daniel, Why the EU-Turkey Deal Can be Legal and a Step in the Right Direction, EU Immigration and Asylum Law and Policy, 11 March 2016, http://eumigrationlawblog.eu/why-the-eu-turkey-deal-can-be-legal-and-a-step-in-the-right-direction/.

65 **European Stability Initiative,** Background Document, Turkey As Safe A "Safe Third Country" for Greece, 17 October 2015, p. 2.

> Even if this latter interpretation is correct, whether Turkey does apply equivalent standards in practice might itself be open to question.[66]

In the same manner, Marx and Roman & Baird & Radcliffe argue that asylum seekers and refugees face uncertainty regarding their legal situation in Turkey due to the country's geographical limitation. According to Article 62 of the LFIP, non-European refugees are granted only a "conditional refugee status." They are provided fewer rights than 1951 Refugee Convention recommends in particular family reunification and Turkish citizenship.[67] For instance, when Syrians arrived *en masse* they were at first received as "guest" and subjected to a temporary protection regime but they had no right to apply for refugee status and no access to refugee protection status in its full sense, as enshrined in the 1951 Refugee Convention. They have limited rights in the country compared to asylum seekers in the parallel procedure. Thus the rules and protection standards are different for Syrians or other third country nationals. Therefore, this has led to inequalities in access to protection and content of protection. As such, Syrians have a right to reside in the country but are denied the prospect of long-term legal integration. It is for this reasons that safe third country clause cannot be applied to Turkey.[68]

Hathaway also defines three legal requirements for lawful removal of refugees and asylum seekers into Turkey. He argues that removals of asylum seekers will only be lawful under the 1951 Refugee Convention if these three criteria are met:[69]

> First, the destination state must be a state party to the Refugee Convention. Second, it must ensure that refugees are in fact recognized. And third, the destination state must, in fact, honour refugee rights (Arts. 2-34 of the Refugee Convention).

It is hard to say that Turkey complies with the requirement of the first requirement. Under the geographical limitation to the 1951 Refugee Convention, Turkey has no obligations towards non-European refugees. In this case, refugee protection responsibility cannot be shared with a country, which has no responsibility towards relevant refugee populations.

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66 **Peers**, Steve, The Final EU/Turkey Refugee Deal: A Legal Assessment, 18 March 2016, http://eulawanalysis.blogspot.co.uk/2016/03/the-final-euturkey-refugee-deal-legal.html?m=1

67 **Marx**, Reinhard, Legal Opinion on the Admissibility under Union Law of the European Council's Plan to Treat Turkey like a "Safe Third Country" Commissioned by Pro Asyl, 14 March 2016, pp. 9-10.

68 **Roman**, Emanuela & **Baird**, Theodore & **Radcliffe**, Talia, Statewatch Analysis, Why Turkey is not a "Safe Country", February 2016, pp. 18-19.

69 **Hathaway**, Three Legal Requirements, 2016.

Second and third requirements are only being assessed while looking at the actual practice of the country. However, recent human rights reports about the real condition of refugees in Turkey indicate that Turkey cannot fulfil the requirements of being a safe third country for transferring responsibility of refugees.[70]

Chetail also argues that the interpretation of the Commission on "safe third country" concept in relation to Turkey is not convincing on several points. The first is that even though Turkey is hosting a substantial number of refugees in its territory, there is a high risk that it may remove asylum seekers to a country where there is a danger of persecution, torture, inhuman or degrading treatment. Second is whether Turkey really provides equivalent protection in practice.[71] Unfortunately, the experiences of refugees in the field have shown that Turkey cannot provide equivalent protection to refugees in many areas due to its institutional deficiencies and the lack of legal protection.

This is evident in the case of access to work permits. Although Turkey adopted the legislation[72] to open the way for temporary protection beneficiaries to work legally after six months, so far only one per cent of the Syrian refugees in Turkey have been given permission to work legally despite the legislation.[73] As a result, most of them work without work permits, which subjects them to a different kind of abuse and exploitation.[74] Similarly, the LFIP provides that all refugees, including temporary protection and conditional refugee status holders have access to elementary and secondary education in public schools for free. However, only one third of the children have enrolled in schools due to the language barrier and economic problems of their families.[75] In the same way,

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70 Ibid; **Hathaway**, C. James, Taking Refugee Rights Seriously: A Reply to Professor Hailbronner, 12 June 2016, VerfBlog, http://verfassungsblog.de/taking-refugee-rights-seriously-a-reply-to-professor-hailbronner/.

71 **Chatail**, Vincent, Will the EU-Turkey Migrant Deal Work in Practice?, 29 March 2016, The Graduate Institute Geneva, http://graduateinstitute.ch/home/relations-publiques/news-at-the-institute/news-archives.html/_/news/research/2016/will-the-eu-turkey-migrant-deal.

72 Regulation No. 2016/8375. OGT, 15.01.2016 No: 29594.

73 **Yayboke**, Erol, Syrian Refugees in Turkey: Beyond Burden, Centre for Strategic & International Studies, August 31, 2017, https://www.csis.org/analysis/syrian-refugees-turkey-beyond-burden; **The Guardian**, Fewer than 0.1 of Syrians in Turkey in Line for Work Permits, 11 April 2016, http://www.theguardian.com/world/2016/apr/11/fewer-than-01-of-syrians-in-turkey-in-line-for-work-permits.

74 **Asylum Information Database**, Country Report: Turkey, Edited by ECRE, December 2015, pp. 84-85.

75 **Achilli**, Luigi & **Yassin**, Nasser & **Erdoğan**, Murat, Neighbouring Host-Countries' Policies for Syrian Refugees: The Cases of Jordan, Lebanon, and Turkey, *European Institute of Mediterranean*, January 2017, p. 40; **UNICEF**, New Note, Over the 40 percent of Syrian refugee children in Turkey

legal assistance is possible under the LFIP, but in practice, it is nearly impossible to access. The visit of a Parliamentary delegation to removal centres, which receive all people returned from Greece since the EU-Turkey deal, revealed that only three cases were filed out of the 416 people, who were subjected to deportation orders. The lack of capacity of the provincial bar associations actually makes legal assistance impossible for refugees and asylum seekers in removal centres.[76] It seems that the EU Commission's understanding of the safe third country concept is questionable in many areas of actual practice. Therefore, before Greece decides to send refugees to Turkey on the ground that it is a safe third country, the EU should establish a monitoring mechanism to observe the implementation of Turkish asylum law in actual practice.

2.1.2. Turkey as a "First Country of Asylum"

The most debated question on the EU-Turkey deal is whether asylum seekers who, have already been granted temporary protection or conditional refugee status in Turkey, can still avail themselves of this protection if they are returned from Greece to Turkey. In accordance with Article 35 of Asylum Procedures Directive, member states may consider an application for international protection as inadmissible if a country can be considered as a first country of asylum for the applicant.

Article 35 establishes two options to be considered as a first country of asylum. First option a) establishes that a third country can be considered a first country of asylum on condition that an asylum seeker "has been recognized in that country as a refugee and he or she can still avail himself/herself of that protection". This requirement is also used to establish whether a country is a safe third country. As discussed above, there is no common agreement among scholars on the designation of Turkey as a safe third country. It is argued that Turkey cannot provide the required conditions in accordance with option a) of Article 35 of Asylum Procedures Directive due to its geographical limitation.

On the other hand, option b) may apply to a third country if an asylum seeker "enjoys sufficient protection in that country, including benefiting from the principle of *non-refoulement*". In the case of Turkey, "non-European asylum seekers can, at least access

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missing out on education, despite massive increase in enrolment rates, 19 January 2017, https://www.unicef.org/media/media_94417.html.

[76] Report from GUE/NGL Delegation to Turkey, What Merkel, Tusk and Timmermans Should See During Their Visit to Turkey, May 2-4 2016, http://www.statewatch.org/news/2016/may/ep-GUENGL-report-refugees-Turkey-deal.pdf.

an alternative form of protection under "conditional refugee status" or "subsidiary protection". Moreover, asylum seekers originating from Syria have access to a different form of "temporary protection". The main point is whether these forms of protection, which Turkey has provided to Syrian refugees and other nationalities on a temporary basis, could be considered as "*sufficient protection*".[77] Unfortunately, there is no agreement between scholars, NGOs, and the UNHCR on this issue either.

The issue of Turkey's acceptance as the first country of asylum is still in dispute but the Greek Parliament urgently adopted a new law to designate Turkey as a "first country of asylum" for asylum seekers and refugees using Article 35 option b).[78] On this legal ground, Greece can return asylum seekers and refugees to Turkey on the ground of the "first country of asylum" concept. This means that if Syrian refugees apply for asylum in Greece, their asylum application will be found inadmissible and subjected to readmission procedure.

In this debate, the UNHCR takes a cautious position rather than refusing immediately. It asks for some safeguards from the EU before designating Turkey as a first country of asylum for recognized temporary protection beneficiaries and conditional refugees. In accordance with UNHCR's interpretation, sufficient protection covers both the concept of *non-refoulement* and also treatment in accordance with "basic human rights standards" until a durable solution is found for asylum seekers. Fundamental human rights standards include the social and economic elements of protection for the survival of refugees, such as access to shelter, employment, healthcare and primary education as citizens of the host state, and relief until work is found.[79] In the case of Syrian asylum seekers in Greece being returned to Turkey on the ground of the first country of asylum concept, UNHCR states that sufficient protection requires that protection in the first country of asylum is effective and available in law and practice. Therefore, the UNHCR underlines that there is a need for clarification on

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77 **Peers**, Steve & **Roman**, Emanuela, The EU, Turkey and the Refugee Crisis: What Could Possibly Go Wrong? 5 February 2016, EU Law Analysis, Expert Insight into EU Law Developments.

78 Law 4375/2016 on the Transposition of the Recast Asylum Procedures Directive, OG, A'51/03.04.2016.

79 **UNHCR** EXCOM Conclusions, No. 58 (XL), Problem of Refugees and Asylum Seekers Who Move in an Irregular Manner from a Country in Which They Had Already Found Protection, 13 October 1989, para. f.

> How Syrians can apply for or re-avail themselves of temporary protection under the Temporary Protection Regulation in Turkey. However, Syrians cannot be recognized and granted refugee status within Turkey in accordance with the 1951 Convention. Furthermore, Article 35(b) of the Asylum Procedures Directive implies that the individual concerned must have enjoyed protection and not merely be available to him or her.[80]

To allay these doubts, Turkey amended its Temporary Protection Regulation to provide assurance that Syrian nationals returning under the EU-Turkey Statement may request and be granted temporary protection, covering both previously registered and non-registered Syrians in Turkey.[81] In addition to these legislative changes, Turkey has provided assurances by letter to the EU that all returned Syrians will be granted temporary protection upon return. Also, the Turkish government gave assurances that returning non-Syrian refugees in need of international protection who are returned from Greece to Turkey will be able to apply for asylum, have their applications processed promptly, receive protection and be protected from *refoulement.*[82] These assurances by the Turkish government attempt to address the legal concerns raised by the NGOs that Turkey does not respect the principle of *non-refoulement* and deports readmitted refugees and asylum seekers illegally.

Although Turkey gives these assurances that Syrian and non-Syrian refugees will not to sent back to their country of origin and will be provided temporary protection, there is still doubt amongst scholars, European Parliamentary, and NGOs. Statewatch criticizes heavily the Turkish government's assurances in an unpublished letter saying,

> If this 'letter' addresses the legal concern about the EU-Turkey 'dodgy deal' why has it not been published? Does it commit Turkey to fully signing up the Geneva Convention? If not it is worthless. First, we had the EU-Turkey deal in a 'Statement'...and now an unpublished 'letter' neither of which are legally binding. In their desperate haste to shut the borders the EU is neglecting the basic tenets of lawful decision-making.[83]

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80 **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. 3-5.

81 Temporary Protection Regulation no. 2014/6883 and the Regulation no. 2016/8722 Amending the Temporary Protection Regulation.

82 European Commission Press Release, Implementing the EU-Turkey Agreement- Questions and Answers.

83 **Statewatch**, Refugee Crisis: EU-Turkey "dodgy deal": Legal Concerns Met? 28 April 2016.

The Parliamentary Assembly report states that the sending country should obtain confirmation from a third country that it would provide international protection, minimum economic, social, and cultural rights to readmitted irregular migrants and asylum seekers. If a third country could not fulfil these conditions, the sending country should refrain from requesting readmission. The rapporteur, Strik, is of the opinion that it is contrary to human dignity of asylum seekers and refugees to have them removed to a country which is not their country of origin and in which they are likely to be denied their access to basic rights such as housing, healthcare, primary education, work and social welfare.[84] In the recent groundbreaking judgment of Supreme Court of Hungary on the application of the safe third country concept states,

> The fact that asylum system of a third country is overburdened may render this country incapable to respect the rights of asylum seekers. Such a third country shall not be regarded as safe for asylum seekers.[85]

According to Carrera and Guild, the Turkey and EU deal poses a fundamental challenge to the human rights of migrants. Although Turkey is a signatory of the ECHR, the ECtHR has filed many judgments against Turkey for its violation of the prohibition on torture, inhuman and degrading treatment of refugees. Also, the ECtHR in the case *M.S.S. v. Belgium and Greece* held that returning a person to a state where s/he lives in destitution constitutes inhuman and degrading treatment under Article 3 of the ECHR. They argue that the situation of refugees in Turkey is unsatisfactory for receiving social benefits, education, and health and permission to work. Therefore, readmission of refugees and asylum seekers to Turkey is likely to constitute a violation of Article 3 of the ECHR.[86]

Considering these arguments, Turkey's designation as a first country of asylum for refugees is consistent with EU law on the basis of Article 35 option b). However, there is some question as to whether Turkey provides sufficient protection for refugees or not. Regarding the lack of institutional capacity and refugee protection practices of Turkey, the designation of Turkey as a first country of asylum and returning refugees to Turkey

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http://www.statewatch.org/news/2016/apr/eu-med-crisis-news-dodgy-deal.htm.

84 **Strik**, Tineke, Readmission Agreements: A Mechanism for Return Irregular Migrants, Council of Europe Parliamentary Assembly, Doc. 12168, 17 March 2010, p. 15.

85 Opinion of the Supreme Court of Hungary (KÚRIA) on Certain Questions Related to the Application of the Safe Third Country Concept, Opinion No. 2/2012 (XII.10) KMK. 10 December 2012, http://www.helsinki.hu/wp-content/uploads/HU-Supreme-Court-on-S3C-Dec-2012.pdf.

86 **Carrera** & **Guild**, EU-Turkey Plan for Handling Refugees, 2016.

is itself either *refoulement* or degrading treatment under international human right and refugee law.[87] Moreover, the Asylum Procedures Directive allows an asylum seeker to challenge the application of the first country of asylum concept to her/his particular circumstances,[88] but there is no suspensive effect that applies in the case of any appeal against such a decision based on the first country of asylum. Asylum seekers can only ask a court to permit them to remain pending the outcome. However, they can be sent back to the first country of asylum before the court decision is given.[89] Therefore, this avenue is not sufficient to protect the rights of asylum seekers against *refoulement*. Moreover, it is absolutely against the right of an effective remedy according to Article 13 of the ECHR regarding the vulnerability of refugees and asylum seekers. To prevent *refoulement* of refugees, Greece has to conduct a case-by-case assessment, taking into account special situations of every individual applicant whether s/he enjoys sufficient protection in Turkey and gives each applicant a right to challenge the decision of the administrative authority before the court with suspensive effect.

2.2. What is the Legal Status of the EU-Turkey Statement and How Can It Be Challenged before the Courts?

The legal nature of the EU-Turkey Statement is crucial because as Strik underlines in her report, the EU-Turkey Agreement "exceeds the limits of what is permissible under European and international law and even on paper, it raises many serious questions of compatibility with basic norms on refugees' and migrants' rights".[90] If the Statement is a treaty and of binding nature, it can be challenged before both the national and international courts but there is again no consensus amongst scholars on its status.

Peers argues that the EU-Turkey Statement is not defined as a treaty in the meaning of Article 218 TFEU, but a politically binding joint declaration and therefore, cannot be legally challenged in the courts.[91] Babickâ appears to share that view with Peers and

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87 ibid; **Leiserson**, Elizabeth, Securing the Borders Against Syrian Refugees: When Non-Admission Means Return, *Yale Journal of International Law*, 42, pp. 209-210.

88 Article 33(2)(b) of the Asylum Procedures Directive.

89 Article 46(6)(b) of the Asylum Procedures Directive.

90 **Strik**, Tineke, The Situation of Refugees and Migrants under the EU-Turkey Agreement of 18 March 2016, Parliamentary Assembly, Doc, 14028, 19 April 2016, p. 12.

91 **Peers**, Steve, The Draft EU/Turkey deal on migration and refugees: Is It Legal? EU Law Analysis, 16 March 2016, http://eulawanalysis.blogspot.co.uk/2016/03/the-draft-euturkey-deal-on-migration.html.

argues that the Statement is only a joint declaration and cannot be challenged directly in the courts. She suggests that if its implementation conflicts with the rights of refugees in practice, then it can be challenged in national courts.[92]

The counter argument of Den Heijer and Spijkerboer is that the EU-Turkey Statement is legally binding on both parties and a treaty in the meaning of the Vienna Convention on the Law of Treaties. The question of whether a text is a treaty does not depend on form but on whether the parties intended to bind themselves and that is clearly the case with the EU-Turkey Statement.[93] There is the commitment on the part of Turkey to accept returned migrants and asylum seekers and a commitment on the part of the EU to accept the resettlement of one Syrian for everyone Syrian returned to Turkey. Also, the Greek Parliament has passed a law allowing asylum seekers arriving in the country to be returned to Turkey from Greece. All these point that "both parties intended to bind themselves and therefore, it is a treaty".[94]Accordingly, it can be challenged in courts.

Gatti also agrees that the EU-Turkey Statement contains legally binding commitments, for example, a one to one deal and financial assistance to Turkey. There is also widespread agreement that the Statement was intentionally formulated in such an ambiguous way because the European Council wished to mask the agreement as a non-binding instrument to avoid the procedures for the negotiation of international agreements. It is also possible that European member states intended to hide the binding nature of the statement to avoid consulting the European Parliament and national parliaments. Considering certain elements of the Statement it constitutes a unique international agreement.[95]

The ruling of the General Court of the Court of Justice of the European Union (CJEU) on 28 February 2017 has not ended the controversy. Surprisingly, the CJEU decided that it had no competence to look into the question of the legality of the deal under Article 262 TFEU because neither the EU Council nor any institutions of the EU had decided to

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92 **Babickâ**, Karolina**,** EU-Turkey Deal Seems to be Schizophrenic, 22 March 2016, http://www.migrationonline.cz/en/eu-turkey-deal-seems-to-be-schizophrenic.

93 **De Heijer**, Maarten & **Spijkerboer**, Thomas**,** Is the EU-Turkey Refugee and Migration Deal a Treaty?, EU Law Analysis, 7 April 2016, http://eulawanalysis.blogspot.co.uk/2016/04/is-eu-turkey-refugee-and-migration-deal.html?m=1.

94 ibid.

95 **Gatti**, Mauro, The EU-Turkey Statement: A Treaty that Violates Democracy (Part 1 of 2), Blog of the European Journal of International Law, 18 April 2016, https://www.ejiltalk.org/the-eu-turkey-statement-a-treaty-that-violates-democracy-part-1-of-2/.

conclude an agreement with the Turkish Government. This refugee deal was only negotiated and signed by the Head of State and Government of the Member States and the Turkish government.[96] After this judgment, three asylum seekers have lodged an appeal to the CJEU on 21 April 2017. The case is still pending.[97]

The "hyper-formalistic reading of the Court" leaves migrants and refugees "at the mercy of whatever consequences the deal leads to". No regard was given to the principle of *non-refoulement*, the right to asylum and the prohibition of collective expulsion as envisioned in the international and EU law. It feeds legal uncertainty, increases the risk of violations and leads to "dilution of legal obligations by bypassing of democratic checks and balances.[98] It is very interesting that although the EU Institutions have publicly claimed the ownership of the Statement and actively contributed to its implementation, the same institutions rejected ownership of the Statement before the Court. By denying ownership of the Statement in the Court, the EU institutions circumvented the democratic and judicial checks and balances as laid down in the EU treaties. This attitude of the EU has more far-reaching implications for its future because it undermines the legitimacy of the EU's responses to the refugee crisis, reduces its credibility as a reliable partner on the international stage and jeopardises its treaty-based framework that aims to ensure the rule of law.[99]

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96 **Court of Justice of the European Union** (First Chamber, Extended Composition), Judgment in Case T-192/16, NF v European Council, 28 February 2017, paras. 26-32; **Court of Justice of the European Union** (First Chamber, Extended Composition), Judgment in Case T-193/16, NG v European Council 28 February 2017, paras. 70-75; **Court of Justice of the European Union** (First Chamber, Extended Composition), Judgment in Case T-257/16, NM v European Council 28 February 2017, paras. 68-73.

97 **Court of Justice of the European Union,** C-208/17 P, Appeal Brought on 21 April 2017 by NF against the Order of the General Court (First Chamber, Extended Composition) delivered on 28 February 2017 in Case T-192/16: NF v European Council; **Court of Justice of the European Union,** C-209/17 P, Appeal Brought on 21 April 2017 by NG against the Order of the General Court (First Chamber, Extended Composition) delivered on 28 February 2017 in Case T-193/16: NG v European Council; **Court of Justice of the European Union,** C-210/17 P, Appeal Brought on 21 April 2017 by NM against the Order of the General Court (First Chamber, Extended Composition) delivered on 28 February 2017 in Case T-257/16: NM v European Council.

98 **Gammeltoft-Hansen**, Thomas & **Guild**, Elspeth & Moreno-Lax, Violeta & **Panizzon**, Marion and **Roele**, Isobel, What is a Compact? Migrants' Rights and State Responsibilities Regarding the Design of the UN Global Compact for Safe, Orderly and Regular Migration, Raoul Wallenberg Institute, 2017, pp. 31-32.

99 **Carrera**, Sergio & **de Hertog**, Leonhard & **Stefan**, Marco, It Wasn't Me! The Luxembourg Court Orders on the EU-Turkey Refugee Deal, CEPS Policy Insights, 5 April 2017, pp. 1-2; **Zoeteweij**, Helena Margarite & **Turhan**, Ozan, Above the Law-Beneath Contempt: The End of the EU-Turkey Deal?, *Swiss Review of International and European Law*, 27(2), 2017, p. 164; **Spijkerboer**, Thomas, Bifurcation of Mobility, Bifurcation of Law. Externalization of Migration Policy Before the EU Court of Justice, *Journal of Refugee Studies* forthcoming, 2017, pp. 16-17.

3. An Analysis of the EU-Turkey Readmission Agreement and the EU-Turkey Statement Concerning Human Rights

The implementation of the EU-Turkey Statement indicates that the European member states have used every opportunity to stop refugees from reaching its territory and to avoid responsibility. To achieve this, the EU adopted three main strategies; "criminalising migrants", "militarising border control" and "outsourcing the problem to non-EU states". This allows them to pretend that there is not refugee protection problem[100] in spite of the universal human right to protection. As Dembour emphasises even though migrants and refugees are entitled to human rights, they are vulnerable to being subjected to violations of human rights such as detention, inhuman treatment and unlawful deportations. This view indicates that human rights are inherently defective in ensuring the protection of refugees and asylum seekers.[101]

Considering the negotiation and implementation process, it is not surprising that neither the EU nor the Turkish part of the agreement mention refugee protection or the Turkish government's capacity to provide protection for readmitted refugees and asylum seekers.[102] The negotiating partners only looked after their own interests and migrants and refugees were not be properly considered.[103] Human rights activists, Roland-Goselin and Fotiadis, describe the EU as masquerading its "cynicism" as realism offering the refugee deal as an the only solution to the high numbers of asylum seekers and migrants arriving in Greece.[104]

This section of the chapter focuses on the risk of the EU-Turkey Statement carries for the fundamental human rights of refugees and asylum seekers considering the problems in

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100 **Malik**, Kenan, The Dark Side of the EU-Turkey Refugee Deal: If the Refugees are a Cause of Crisis, How Does the EU Imagine that Offloading Them to Turkey is Any Less of a Crisis?, Aljazeera, 9 March 2016, http://www.aljazeera.com/indepth/opinion/2016/03/dark-side-eu-turkey-refugee-deal-160309080433064.html.

101 **Dembour**, Marie-Bénédicte & **Tobias**, Kelly Are Human Rights for Migrants? Critical Reflections on the Status of Irregular Migrants in Europe and the United States, Routledge Taylor & Francis: New York, 2011, pp. 5-6.

102 **Carrera**, Sergio & **Cassarino**, Jean-Pierre & **El Qadim**, Nora & **Lahlou,** Mehdi & **Den Hertog**, Leonhard, EU-Morocco Cooperation on Readmission, Borders and Protection: A Model to Follow? CEPS Paper in Liberty and Security in Europe, No, 87, January 2016, p. 2.

103 **Sciurba**, Alessandra & **Furri**, Filippo, Human Rights Beyond Humanitarianism: The Radical Challenge to the Right to Asylum in the Mediterranean Zone, *Antipode*, 2017, p. 4.

104 **Roland-Gosselin**, Louise & **Fotiadis**, Apostolis, Cynicism Masquerading as Realism: A Response to Gerald Knaus, Refugees Deeply, 27 July 2017, https://www.newsdeeply.com/refugees/community/2017/07/27/cynicism-masquerading-as-realism-a-response-to-gerald-knaus.

accessing refugee status determination, lack of effective remedies and monitoring systems and stranded refugees without foreseeable solutions.

3.1. Problems in Access to Refugee Status Determination and Lack of Effective Remedy Against Removal to Turkey

The main weakness of the EU-Turkey RA is that it contains a high risk of deportation of asylum seekers and refugees without access to refugee status determination or an effective remedy against removal. The Statement makes clear that all irregular migrants crossing from Turkey to the Greek islands will be returned to Turkey. In accordance with the Asylum Procedures Directive, if an irregular migrant does not apply for asylum, s/he will be subjected to return procedure in accordance with the Return Directive. However, if an irregular migrant applies for asylum in Greece, s/he is initially channelled into admissibility tests and the fast-track asylum procedure. This combination of inadmissibility tests and fast-track procedure greatly reduce the chance of asylum seekers having their asylum claims considered on their merits before being returned to Turkey.[105]

The reports on the situation of refugees in Greece by NGOs and the European Commission reaffirm this situation stating that the increasing refugee burden on Greek authorities has made it difficult to deal with the individual assessment of applications and has led to deficiencies in practice. According to the observation of the Italian lawyers' group, ASGI, in the camps,

> The possibility of submitting request for international protection is undoubtedly prevented. Migrants arriving from Syria, Iraq and from other states…are not given the chance to ask for international protection and hence remain at risk of repatriation.[106]

The European Commission recognised the same deficiencies in its report on 10 February 2016. It stated,

> Further efforts still need to be made by Greece to ensure that its asylum system is functioning in full alignment with the requirements of law, "reception capacity for

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105 **Ulusoy**, Orçun & **Battjes**, Hemme, Situation of Readmitted Migrants and Refugees from Greece to Turkey under the EU-Turkey Statement, Vrije University Migration Law Series, No. 15, 2017, p. 14; **Amnesty International**, A Blue Print for Despair, Human Rights Impact of the EU-Turkey Deal, 2017, pp. 12-13.

106 **ASGI Report**, Legal Analysis, Migrants in Greece are denied the rights to international protection and family unity. The visit to the camps in Idomeni and government-run camps, and a legal analysis of the situation we observed. No. 293, Observation was made on 26 and 27 March 2016. p. 7. http://www.asgi.it/asilo-e-protezione-internazionale/idomeni-analisi-giuridica-grecia/.

> asylum seekers in Greece took place but it is not yet sufficient", and "many asylum seekers are currently not provided with the necessary free legal aid to enable them to pursue an appeal against a first instance asylum decision.[107]

It is not surprising that the EU-Turkey deal can lead to deportation of asylum seekers without examining their asylum claims and conflicts with the principle of *non-refoulement*, the ban on collective expulsion in Article 19(1) of the EU Charter of Fundamental Rights and Article 4 of Protocol no. 4 of the ECHR and Article 13 of the ECHR.[108] These anticipations were confirmed in the first implementation of the EU-Turkey deal when asylum seekers were deported without access to refugee status determination. The director of UNHCR's Europe Bureau, Cochetel, confirmed that 13 Afghan and Congolese asylum seekers who reached the Greek island after 20 March 2016 were deported back to Turkey without being allowed to apply for asylum formally due to administrative chaos on the island.[109] It was reported that following their readmission to Turkey, the 13 asylum seekers were placed in detention and waiting for their deportation in Pehlivanköy. The Turkish Government refused to allow the UNHCR Commissioner to visit them.[110]

In addition to insufficient Greek asylum practice, Greece has recently adopted a new law[111] to set up very short time limits for asylum applications and appeals against administrative removal decision. This new Law makes it extremely difficult for asylum

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107 Commission Recommendation of addressed to the Hellenic Republic on the Urgent Measures to be Taken by Greece in view of the Resumption of Transfers under Regulation (EU), No. 604/2013, C (2016) 871 final, 10 February 2016.

108 **ASGI Report**, 2016. pp. 6-7. http://www.statewatch.org/analyses/no-293-asgi-greece.pdf.; **Guild**, Elspeth & **Costello**, Cathryn & **Moreno-Lax**, Violeta, Implementation of the 2015 Council Decisions Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and of Greece, European Parliament Directorate-General for Internal Policies, Policy Department Cıtizens' Rights and Constitutional Affairs, March 2017, pp. 50-51; **Labayle**, Henri & **de Bruyker**, Philippe, The EU-Turkey Agreement on Migration and Asylum: False Pretences or a Fool's Bargain? 1 April 2016, EU Immigration and Asylum Law and Policy, http://eumigrationlawblog.eu/the-eu-turkey-agreement-on-migration-and-asylum-false-pretences-or-a-fools-bargain/.

109 **Guardian**, Greece May Have Deported Asylum Seekers by Mistake, Says UN, 5 April 2016, http://www.theguardian.com/world/2016/apr/05/greece-deport-migrants-turkey-united-nations-european-union.

110 **Guardian**, Refuges in Greece Warn of Suicides Over EU-Turkey Deal, 7 April 2016, http://www.theguardian.com/world/2016/apr/07/refugees-in-greece-warn-of-suicides-over-eu-turkey-deal.

111 Law 4375/2016 on the Transposition of the Recast Asylum Procedures Directive, OG. A'51/03.04.2016.

seekers to access asylum determination.[112] Article 60(4) of the new law gives asylum seekers only one day for the preparation of their interview.[113] Accelerated border procedures have also reduced appeal procedures against removal decisions. According to the new Law, there are only three days for a decision on appeal. Furthermore, there is no automatic suspension of removal decision, which means that the applicants must apply to a judge in order to remain in Greece during their appeal.[114] The new law is not compatible with Article 46 of the Asylum Procedures Directive, which requires an automatic suspensive effect on appeals against inadmissibility decisions based on the "safe third country" concept. This means that if Greece decides to remove refugees and asylum seekers to Turkey, it should give them the right to seek remedy with automatic suspensive effect in accordance with Article 46 of the Asylum Procedures Directive.

Furthermore, the Greek government has widened Assisted Voluntary Return and Reintegration (AVRR) programmes to include asylum seekers whose asylum applications were found inadmissible or rejected on their merits. Although financial assistance was given to migrants who no longer wish to stay in Greece, under this new AVRR programme, financial assistance is now being given to rejected asylum seekers if they do not go to court for appeal. As 1,000 euro financial assistance is now available, the new AVRR programme may put pressure on rejected asylum seekers not to exercise their right to appeal and they may choose to take the money. Fifteen NGOs signed a joint declaration against this new policy for jeopardizing the right to an effective remedy. The declaration underlined that the new AVRR programme aims to limit the steps in the appeal process and facilitate fast removal of asylum seekers without using their right to an effective remedy. It contradicts the fundamental rights of asylum seekers that they can exercise their rights to an appeal without foregoing the opportunity to seek AVRR at any point and after the asylum process".[115]

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112 **Strik**, Tineke, The Situation of Refugees and Migrants under the EU-Turkey Agreement of 18 March 2016, Parliamentary Assembly, Doc, 14028, 19 April 2016, p. 8.

113 **Asylum Information Database** (AIDA), Greece: Asylum Reform in the Wake of the EU-Turkey Deal, 4 April 2016, http://www.asylumineurope.org/news/04-04-2016/greece-asylum-reform-wake-eu-turkey-deal.

114 **Guild** & **Costello** & **Moreno-Lax**, 2017, p. 49; **ECRE**, Greece Urgently Adopts Controversial Law to Implement EU-Turkey Deal, 8 April 2016, http://www.ecre.org/component/content/article/70-weekly-bulletin-articles/1439-greece-urgently-adopts-controversial-law-to-implement-eu-turkey-deal-.html.

115 Greece: NGOs Decry New Policy Limiting Asylum Seekers in Exercising Their Right to Appeal, 9 March 2017, https://www.hrw.org/news/2017/05/09/greece-ngos-decry-policy-limiting-asylum-

In addition to these new measures that the Greek government has adopted since the EU-Turkey Statement, further interception operations in the Aegean Sea are resulting in deportation without access to asylum determination procedure. With the help of NATO and Frontex, asylum seekers and refugees are being intercepted in the international sea or Turkish waters without any access to asylum determination procedure. So far, Turkey has blocked the exit of irregular migrants and asylum seekers since 18 March 2016 and these interception operations have resulted in a huge drop of daily crossings from 2,500 to just 43, notwithstanding human rights concerns.[116] If people are intercepted in Greek waters or apprehended at the borders of Greece, the Asylum Procedures Directive applies. However, the Directive does not refer to international or Turkish waters so there is no clear statement on what will happen to asylum seekers if they are intercepted by Frontex or NATO in these waters. The critical question is whether they have been given a chance to apply for asylum consistent with the ECtHR's jurisprudence.[117]

Moreno-Lax argues that although these interception operations have been presented as rescue, they apparently first rescue the people from death at sea but after rescuing them, return survivors to third countries or home countries without giving a chance to apply for asylum.[118] The NATO Secretary General, Jens Stoltenberg, affirmed this in his talk in the European Parliament:

> When we rescue those people, what we agreed with Turkey at a ministerial level…that if those people came from Turkey then we could return them to Turkey.[119]

The statement indicates that states have tried to circumvent its refugee protection responsibility through border controls or rescue operations. This constitutes misuse of states' sovereign power and bad faith in the implementation of its international protection obligations.[120]

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appeal-rights; **Nielsen**, Nikolaj, Greece Paying Asylum Seekers to Reject Appeals, EU Observer, 3 May 2017, https://euobserver.com/migration/137762.

116 **Moreno-Lax**, Violeta, The Interdiction of Asylum Seekers at Sea: Law and (mal) practice in Europe and Australia, Kaldor Centre for International Refugee Law, Policy Brief 4, May 2017, p. 3.

117 **Peers**, Steve, The Final EU/Turkey Refugee Deal: A Legal Assessment, 18 March 2016, http://eulawanalysis.blogspot.co.uk/2016/03/the-final-euturkey-refugee-deal-legal.html?m=1.

118 **Moreno-Lax**, 2017, p. 3.

119 **Rettman**, Andrew, NATO to Take Migrants Back to Turkey, If Rescued, 23 February 2016, EUObserver, https://euobserver.com/foreign/132418.

120 **Moreno-Lax**, 2017, p. 9; **Spijkerboer**, Thomas, The NATO Pushbacks in the Aegean and International Law, February 2016,http://thomasspijkerboer.eu/thomas-blogs/the-nato-pushbacks-in-the-aegean-and-international-law/.

These increasing interception operations at sea contradict the principle of *non-refoulement.* Even though NATO ships intercept asylum seekers and refugees on the high seas, member states are bound by the principle of *non-refoulement*. It means that if asylum seekers and refugees are intercepted by member states on the high seas, they must be given an opportunity to apply for asylum before sending them back to Turkey. Also, those who have applied for asylum should be given an effective remedy before a court to challenge a negative decision of administrative authority, including access to a legal advisor, translation and stay until the court decides.[121] However, the practice shows that the NATO action has not given asylum seekers an opportunity to ask for asylum and has returned migrants to Turkey. This violates the principle of *non-refoulement* and the right to seek asylum even though it happens in the form of search and rescue. Therefore, the NATO actions are in violation of international law binding on NATO states.[122]

Interception operations with strict border controls also have brought a crucial question as to whether refugee deals with interception operations and strict border controls conflict with the right to leave. Article 2 of Protocol No. 4 to the ECHR declares that "everyone shall be free to leave any country, including his own". Hathaway argues that an individual is entitled to decide for himself where to seek protection as a refugee and thus,

> Undifferentiated efforts to deter groups known to include refugees — for example, NATO action "against smugglers", to the extent it precludes refugees from reaching a state party — are in breach of the Refugee Convention.[123]

However, contrary to Hathaway, Hailbronner suggests that there is no freedom of choice where to seek protection. The 1951 Refugee Convention does not provide a right of admission to those who have not yet reached a border where entry may be requested for the purpose of international protection. Even the jurisprudence of the ECtHR on the *Hirsi case* cannot be interpreted as a right to admission to the EU for the purpose of filing an asylum claim. For this reason, the EU cooperation with Turkey, which aims to reduce refugee crossings via border controls and interception operations, does not breach the 1951 Refugee Convention and the right to leave.[124]

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121 **Moreno-Lax**, 2017, p. 12.

122 **Spijkerboer**, The NATO Pushbacks, 2016.

123 **Hathaway**, Three Legal Requirements, 2016.

124 ibid.

From my point of view, it is hard to share the view of Hailbronner because these interception operations have taken away the only chance of asylum seekers to access international protection and have undermined the essence of the 1951 Refugee Convention. However, it is very difficult to prove these interception operations and challenge them before the Courts.

As seen in the case of Turkey, the Turkish government has conducted these interception operations along its border and intercepted asylum seekers before leaving the country's territory. The EU is financially supporting Turkey to set up its border security mechanism and interception operations alongside its border. In this regards, Turkey has introduced penalties for irregular exit from its territory and established patrols to prevent exit. While the EU has been supporting Turkey's interception operations with donations of assets and financial support, it actually stays away itself from responsibility for intercepted refugees as illustrated before in *Hirsi Jamaa* case by the ECtHR. As Peers points out these interception operations by Turkey using assets donated by member states does not bring member states' responsibility within the scope of the ECHR.[125] These practices of member states have shown us once again that international human rights remain inadequate to protect an individual against the sovereign power of states.

3.2. The Monitoring Mechanism and Suspension Clause Against the Risk of *Refoulement*

Some NGOs, the UNHCR, and the European Parliamentary Assembly have sought a greater emphasis on human rights in RAs because they carry a risk of violating the right to seek asylum, the principle of *non-refoulement* and other fundamental human rights. People subjected to forced return procedures are especially vulnerable and are not always informed properly in their own language about their rights. Lack of monitoring also causes concerns, especially given the cost and negative implications of RAs with transit countries. This can lead to further deportations without considering human rights reports of requested countries,[126] arbitrary detention and treatment against human dignity.

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125 **Peers**, Steve, The Future of the Schengen System, Swedish Institute for European Studies, report no. 6, November 2013, p. 106.

126 **Trauner**, Florian & **Kruse**, Imke & **Zeilinger**, Bernhard, Values Versus Security in the External Dimension of EU Migration Policy: A Case Study on the EC Readmission Agreement with Russia, Edited by Noutcheva, Gergana & Pomorska, Karolina & Bosse, Giselle, The EU and Its Neighbours: values vs. Security in European Foreign Policy, Manchester: Manchester University Press, 2012, p. 23.

Considering the human rights consequences for individuals, the EU Commission recommended a monitoring system and suspension clause in every RA to prevent serious human rights violations.[127] Monitoring is seen as necessary to oversee the entire removal procedure from start to finish. Independent monitoring systems with the participation of NGOs and Parliamentary delegations should be established to monitor the human rights' impact of RAs on readmitted refugees and asylum seekers. Scholars[128] and NGOs[129] have always supported independent, neutral, transparent and effective monitoring systems and suspension clauses for the implementation of RAs without infringing the rights of refugees and asylum seekers. However, member states always take into account the effectiveness of return rather than considering the rights of returnees and they do not provide any mechanism for monitoring its effect on readmitted persons.

If we turn to the EU-Turkey RA, it puts responsibility on Turkey to readmit both irregular migrants and refugees but it does not set up any monitoring system to consider its effects on refugees and asylum seekers.[130] Although it establishes a Joint Committee for monitoring its technical implementation, it has no power for monitoring its human rights implications.[131] Even if one of the contracting parties violates the international refugee protection regime, there is no suspension clause in the agreement. The only conditionality used by the EU in the implementation process against Turkey is visa liberalization.[132]

There is evidence to support human rights concern that lack of post-return monitoring mechanism in the RA process has triggered violations of the fundamental rights of refugees and asylum seekers. Human rights reports published by many NGOs allege that Turkish border authorities have deported or turned away Syrian refugees at the border with the direct use of force and detention. Amnesty International published a report called

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127 Communication from the Commission to the European Parliament and the Council, Evaluation of Readmission Agreements, COM (2011) 76 final, 23.02.2011, p. 13.

128 **Virolainen**, Anne-Mari, Monitoring the Return of Irregular Migrants and Failed Asylum Seekers by Land, Sea and Air, Parliamentary Assembly, Council of Europe, Doc. 13351, 07 November 2013, p. 3; **Strik**, Tineke, Readmission Agreements: A Mechanism for Return Irregular Migrants, Council of Europe Parliamentary Assembly, Doc. 12168, 17 March 2010, p. 17.

129 **Human Rights Watch**, European Union Managing Migration Means Potential EU Complicity in Neighbouring States' Abuse of Migrants and Refugees, Number: 2, October 2006, pp. 20-21; **Amnesty International**, The Human Cost of Fortress Europe, Human Rights Violations Against Migrants and Refugees at Europe's Borders, 2014, p. 29.

130 **Barbulescu**, Roxana, Still a Beacon of Human Rights? Considerations on the EU Response to the Refugee Crisis in the Mediterranean, *Mediterranean Politic*s, 22(2), 2017, p. 307.

131 **Trauner** & **Kruse** & **Zeilinger**, 2012, p. 23.

132 ibid, p. 19.

"Europe's Gatekeeper: Unlawful detention and deportation of refugees from Turkey". [133] The report was based on face-to-face and telephone interviews with more than 50 refugees and asylum seekers who had been detained or deported from Turkey. The report examines the unlawful detention and deportation of refugees and asylum seekers in Turkey who had attempted to cross irregularly to the EU during and after the signing of the EU-Turkey Joint Action Plan. It alleged that the former favourable and humanitarian approach of the Turkish authorities towards refugees and asylum seekers in the country had dramatically changed due to EU's pressure on the country to stop refugees and irregular migration crossing to the EU.[134]

A recent report of Amnesty International repeated the same allegations that the EU-Turkey deal had "disastrous knock-on effects on Turkey's own policies" towards Syrian refugees and that Turkey has forced a large number of refugees to return to Syria after the EU-Turkey Joint Action Plan in 2015. Many of the returned refugees appear to be unregistered. Also, the increasingly restrictive border policies are a radical change from the more generous and "open-gate policy" of the Turkish authorities during the first five years of the Syrian crisis. Previously, Syrian residents with passports had been able to enter at regular border gates but after the EU-Turkey statement,

> Turkey has introduced visa requirement for Syrians arriving by air, sealed its land border with Syria for all but those in need of emergency medical care, and shot at some of those attempting to cross it irregularly.[135]

In line with Amnesty International, the Human Rights Watch reports in 2015 states that Turkish authorities arrested Syrian asylum seekers after they crossed the border and detained them in military facilities overnight and then returned them to Syria. Turkish authorities closed its two official border crossings to almost all Syrians after the EU-Turkey Joint Action Plan and only allowed some people with urgent medical needs to cross. Syrians still continued to reach Turkey through smuggling routes but Turkey has stepped up enforcement forces at the border crossing points. About 25.000 people had

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133 **Amnesty International**, Europe's Gatekeeper, Unlawful Detention and Deportation of Refugee from Turkey, 2015.

134 **Amnesty International**, Europe's Gatekeeper, Unlawful Detention and Deportation of Refugee from Turkey, 2015, pp. 13-14.

135 **Amnesty International**, Turkey: Illegal Mass Return of Syrian Refuges Expose Fatal Flaws in the EU-Turkey Deal, 1 April 2016.

wanted to cross Turkish borders but they were being stopped by Turkish border authorities "firing warning shots and using water cannon".[136]

Marx claims that Turkey does not respect the principle of *non-refoulement*, which prohibits both returning refugees to their country of origin and turning them away at the border gates. Although Turkey guarantees the principle of *non-refoulement* in Article 4 of the LFIP,[137] it does not contain any prohibition of turning refugees away at the border.[138] Therefore, Turkey does not respect the principle of *non-refoulement* in accordance with international law.[139] There is common agreement among scholars that rejection at the frontier of a country without access to refugee status determination also constitutes a breach of the principle of *non-refoulement*.[140] As regards rejection or non-admittance at the frontier, the 1951 Refugee Convention does not provide a right to asylum but this does not mean that states are free to reject people at the frontier without any restriction, including those with a well-founded fear of persecution. It means that states must find another option if they are not prepared to grant asylum to persons who have a well-founded fear of persecution without infringing the principle of *non-refoulement*. These include sending them to a safe third country or providing temporary protection.[141]

Therefore, the principle of *non-refoulement* applies the moment an asylum seeker presents herself/himself for entry, either within a State or at its border.[142] The UNHCR

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136 **Human Rights Watch**, Turkey: Syrians Pushed Back at the Border, 23 November 2015.

137 Article 4 of the LFIP, "No one within the scope of this Law shall be returned to a place where he or she may be subjected to torture, inhuman or degrading punishment or treatment or, where her/his life or freedom would be threatened on account of her/his race, religion, nationality, membership of a particular social group or political opinion".

138 **Marx**, Reinhard, Legal Opinion on the Admissibility under Union Law of the European Council's Plan to Treat Turkey like a "Safe Third State" Commissioned by Pro Asyl, 14 March 2016, p. 10. https://www.proasyl.de/en/material/legal-opinion-on-the-admissibility-under-union-law-of-the-european-councils-plan-to-treat-turkey-like-a-safe-third-state/.

139 ibid, p. 10.

140 **Lauterpacht**, Sir Elihu & **Bethlehem**, Daniel, The Scope and Content of the Principle of *Non-refoulement*: Opinion. Edited by Feller, Erika & Türk, Volker & Nicholson, Frances, Refugee Protection in International Law, Cambridge: Cambridge University Press, 2003, pp. 113-114; **Hyndman**, 1982, Asylum, p. 50.

141 **Lauterpacht** & **Bethlehem**, 2003, p. 113.

142 Regina v. Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and Others (Appellants), On Thursday 8 December 2004, Opinions of the Lords of Appeal for Judgment in the Cause, House of Lords, Session 2004-5, 2004. UKHL 55, para. 26, cited by **Goodwin-Gill**, Guy S., & **McAdam**, Jane, The Refugee in International Law, Third Edition, Oxford: Oxford University Press, 2007, p. 208.

supports this view, reaffirming that "(c) the fundamental importance of the observance of the principle of *non-refoulement* – both at the border and within the territory of a State…".[143] Therefore, lack of legislation guaranteeing access to asylum at the border points and a monitoring system may lead to deportation of refugees or other serious human rights infringements. Turkey has provided a proper asylum law and basic safeguards for persons seeking international protection but

> There is an ongoing gap in regards to any significant level of monitoring presence along Turkey's long land borders in the south and east. Practices of border security authorities take place largely outside the critical gaze of independent monitoring actors such as NGOs and UNHCR.[144]

In such a context, it is difficult to monitor Turkey's conformity with the principle of *non-refoulement* and international law.

3.3. Stranded Refugees in Greece and Turkey and Article 3 of the ECHR

Refugees and asylum seekers have been stranded both in Greece and Turkey. If we look at the Greek side, the EU-Turkey Agreement has changed the rules for everyone arriving irregularly on the Greek islands after midnight on 19 March 2016. In accordance with the new Law in Greece (Law 4375/2016), all new irregular arrivals are detained in Greece and subjected to a two-step process; first step is that the individual concerned must pass an admissibility assessment on the ground of safe third country or first country of asylum concepts; second step is that the asylum application will be considered on its merits. However, this double examination procedure puts an enormous and disproportionate bureaucratic burden on Greek authorities. Nearly 60,000 people have been stranded in Greece in dire circumstances while waiting the outcome of their asylum application. They are often waiting as long as 12 months in reception centres without accessing dignified living conditions or asylum procedures.[145] The implementation of the EU-Turkey deal shows that Greece is functioning as an inner buffer states or gatekeeper within the

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143 **UNHCR**, EXCOM Conclusions, No. 6 (XXVIII), *Non-Refoulement*, 1977.

144 **Asylum Information Database**, Country Report: Turkey, Edited by ECRE, December 2015, p. 32.

145 **Amnesty International**, A Blueprint for Despair, 2017; **Lovertt**, Asleigh & **Whelan**, Claire & **Rendón**, Renata, The Reality of the EU-Turkey Statement**:** How Greece has Become a Testing Ground for Policies that Erode Protection for Refugees, Publishers: International Rescue Committee & Norwegian Refugee Council and Oxfam Joint Agency, Briefing Note, 17 March 2017, p. 2; **Guild** & **Costello** & **Moreno-Lax**, 2017, p. 50: **Powell**, Sara. R, EU-Turkey Refugee Agreement Benefits EU, Not Stranded Refugees, *Washington Report on Middle East Affairs*, June/July 2016, pp. 32-33.

European territory.[146] Contrary to the claim of the European Commission; the refugee deal "has not been a success story, but a horror story, with terrible consequences for people's lives and health".[147] Individuals who are under constant threat of being readmitted to Turkey are suffering from rising levels of trauma and depression.[148]

On the other hand, the legal uncertainty about the EU-Turkey Statement put many refugees and asylum seekers in legal limbo. According to the new law in Greece, all international protection applications are deemed admissible or inadmissible after their interviews. If the Greek Asylum Service deems an applicant as inadmissible, s/he will be given the right to appeal. In this regard, if the Greek Appeal Committee approves the decision of the Greek Asylum Service, the individual will be deported to Turkey. However, the Greek Appeal Committee overturned 390 out of 393 decisions of the Greek Asylum Service on admissibility arguing that Turkey does not qualify as a safe third country.[149] In these cases, the Committee acknowledged that protection from *refoulement* is established in Article 4 of the LFIP but there is still a serious risk of non-fulfilment of this criterion in practice. So the Committee distinguished between law in the book and law in action recalling the incidents of violent rejection at the borders and deportations to Syria.[150] Furthermore, the Committee finds that Turkey cannot provide equivalent protection to Syrians provided by the 1951 Refugee Convention. The Committee notes that the temporary protection guarantees legal stay to Syrians in Turkey but the possibility of long-term integration is excluded. The facilitation to naturalization of refugees as envisaged in Article 34 of the 1951 Refugee Convention is not satisfied in the LFIP. Thus, the Greek Appeal Committees did not find Turkey as a safe third country and blocked the

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146 **Christopoulo**s, Dimitris, Refugees are the Bogeyman: the Real Threat is the Far Right, Open Democracy, 9 November 2016, https://www.opendemocracy.net/dimitris-christopoulos/refugees-are-bogeyman-real-threat-is-far-right; **Ekathimerini**, In Greece, Europe's New Rules Strip Refugee of Their Right to Seek Protection, http://linkis.com/www.ekathimerini.com/A8Pmp.

147 **Squires**, Nick, A Year on from EU-Turkey Deal, Refugees and Migrants in Limbo Commit Suicide and Suffer From Trauma, The Telegraph, 14 March 2017. http://www.telegraph.co.uk/news/2017/03/14/year-eu-turkey-deal-refugees-migrants-limbo-commit-suicide-suffer/.

148 **Refugee Support Aegean**, Serious Gaps in the Care of Refugees in Greek Hotspots; Vulnerability Assessment System in Breaking Down, 17 July 2017, http://rsaegean.org/serious-gaps-in-the-care-of-refugees-in-greek-hotspots-vulnerability-assessment-system-is-breaking-down/.; **Squires**, A Year on from EU-Turkey Deal, 2017; **Gogou**, Kondylia, The EU-Turkey Deal: Europe's Year of Shame, Amnesty International, 20 March 2017, https://www.amnesty.org/en/latest/news/2017/03/the-eu-turkey-deal-europes-year-of-shame/.

149 **Amnesty International**, A Blue Print for Despair, 2017, p. 14.

150 **Gkliati**, Mariana, The Application of the EU-Turkey Agreement: A Critical Analysis of the Decisions of the Greek Appeals Committees, *European Journal of Legal Studies*, 10, 2017, pp. 99-100.

return of rejected asylum seekers on the ground of inadmissibility criteria.[151]

However, the European Commission did not welcome the decisions of the Greek Appeal Committee, which stopped the return of rejected asylum seekers to Turkey and put pressure on Greece to change the structure of the Appeal Committees. One month after the first decision of the Appeal Committees, following allegations of lack of objectivity of their members, the Greek Parliament amended the composition of the Appeal Committees on June 2016 in a fast-track legislative procedure.[152] Now the Committee's approach has fundamentally changed and the recognition rate of international protection on inadmissibility decisions has decreased dramatically. The recent figures indicate that the Committee has approved nearly all decisions of the Greek Asylum Service on inadmissibility decisions and this has quickened the removal process of individuals to Turkey.[153]

Furthermore, the Greek Council of State made a groundbreaking decision on 22 September 2017 about the forcible return of two Syrians to Turkey on grounds of safe third country concept. The Court decision is very important because it could set a dangerous precedent for the future return of asylum seekers who are stranded on the Greek islands. In this case, the Greek Council of State rejected two Syrians' appeals declaring that the decisions of the Greek Appeal Committee that Turkey is a safe third country for the two applicants is reasonable. The Council of State also decided not to refer the cases to the European Court of Justice to determine whether Turkey can be considered a "safe third country".[154] This decision of the Greek Council of State puts the lives of asylum seekers and refugees at risk by approving the inadmissibility decision of the Greek Asylum Service and the Greek Appeal Committees.

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151 ibid, pp. 100-103.

152 ibid, pp. 83-84.

153 **ECRE**, AIDA Update: Greece 2016, 28 March 2017, http://reliefweb.int/report/turkey/eugreece-hearing-deal-turkey.

154 **Amnesty International**, Greece: Court Decisions Pave Way for First Forcible Returns of Asylum Seekers under EU-Turkey Deal, 22 September 2017, https://www.amnesty.org/en/latest/news/2017/09/greece-court-decisions-pave-way-for-first-forcible-returns-of-asylum-seekers-under-eu-turkey-deal/; **Refugee Law Clinics Abroad**, Greek Council of State Approves Forced Returns to Turkey-RLCA Fears Massive Removals to Turkey, 25 September 2017, https://refugeelawclinicsabroad.org/2017/09/25/rlca-fears-massive-removals-to-turkey/; **Asylum Information Database**, Greece: The Ruling of the Council of State on the Asylum Procedure Post EU-Turkey Deal, 4 October 2017, http://www.asylumineurope.org/news/04-10-2017/greece-ruling-council-state-asylum-procedure-post-eu-turkey-deal.

If we turn to Turkey, the EU-Turkey RA has serious consequences for Turkey as a hosting country. It is a fact the EU explicitly assumes that every country can sign a RA with other neighbouring migrant sending and transit countries to send back third-country nationals. Nevertheless, there is no "universal system of readmission agreements".[155] Every contracting state has to persuade other third countries to send back their nationals and other third-country nationals. Therefore, the transfer of third-country nationals to their country of origin depends on Turkey's ability to sign readmission agreements with countries of origin.[156] In this regard, Turkey has signed RAs with various source and transit countries over the last 10 years including Greece,[157] Syria,[158] Ukraine,[159] Kyrgyzstan,[160] Romania,[161] Russia,[162] Belarus,[163] Moldova[164] and Pakistan.[165] However, migrant sending countries' unstable situations make it difficult for Turkey to return readmitted third-country nationals to their countries of origin, resulting in these migrants either staying in Turkey under limited and severe conditions or reattempting to enter the EU. In addition, Turkey cannot persuade Middle East, Asian and African countries to sign readmission agreements.[166] Turkey lacks political leverage to persuade the countries of origin in its region. Unlike the EU, Turkey does not have incentives and political power over these countries of origin to persuade them to readmit non-nationals or their own nationals.

As a result, it is difficult for Turkey to achieve a more effective return policy than that of the EU.[167] This situation is corroborated by the fact that of the readmitted migrants under

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155 Return and Readmission to Albania, The Experience of Selected EU Member States, International Organization for Migration: Tirana, August 2006, p. 13.

156 **Crépeau**, François, United Nations General Assembly Human Rights Council Report, Twenty–third Session, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, Report of the Special Rapporteur on the Human Rights of Migrants, Agenda Item 3, Mission to Turkey, 22-29 June 2012, p. 10.

157 OGT, 24.04.2002, No: 24735.

158 OGT, 12.04.2007, No: 26491.

159 OGT, 26.09.2008, No: 27009.

160 OGT, 18.10.2009, No: 27380.

161 OGT, 24.11.2009, No: 27416.

162 OGT, 15.03.2011, No: 27875.

163 OGT, 15.03.2014, No: 28942.

164 OGT, 25.04.2014, No: 28982.

165 OGT, 20.04.2016, No: 29690.

166 **Ekşi**, Nuray, Türkiye Avrupa Birliği Geri Kabul Anlaşması, (Turkey and EU Readmission Agreement) Beta: İstanbul, 2016, pp. 103-107.

167 **Roig & Huddleston**, p. 380.

the Turkey-Greece Readmission Protocol, only 10% of irregular migrants could be sent back to their country of origin.[168] Without effective assistance in returning third-country nationals to their countries of origin and integration concerns, the increasing numbers of readmitted persons from member states into Turkey might create a "readmission trap" in the long term.[169] Consequently, the EU-Turkey RA may lead to third country nationals facing the risk of being stranded in Turkey.[170] During the visit of the United Nations General Assembly Human Rights Council's rapporteur, François Crépeau, to Turkey, it was found that there were a large number of apprehended migrants in detention centres, called removal centres in the new LFIP, including families and children. It is a widespread practice that irregular migrants can be detained for lengthy periods because some nationals cannot be returned to their own country due to a lack of diplomatic relations. This is especially the case with many Afghan and Iranian nationals.[171] As pointed out in the report of Amnesty International "many persons cannot be deported because no readmission agreement exists with their country of origin or because the required resources for the deportation are not available".[172]

4. Conclusion

In summary, Turkey does not fulfil the requirements either of a "safe third country" or a "first country of asylum" concepts in accordance with the Asylum Procedures Directive. The EU- Turkey Statement implicitly opens a way to readmit refugees and asylum seekers to Turkey on the basis of "safe third country" or "first country of asylum", however, the implementation of the Turkey-Greece Readmission Protocol demonstrates that the EU-Turkey RA raises many human rights violation issues, particularly the principle of *non-refoulement*. Although the EU Commission argues that Turkey provides sufficient protection to non-European refugees as well as European refugees, Turkey still continues to apply "geographical limitation" to the 1951 Refugee Convention and only provides temporary protection for non-European refugees, raising long-term integration concerns. On the other hand, even though Turkey has adopted new regulations to provide sufficient

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168 United Nations General Assembly Human Rights Council Report, p. 15.

169 Return and Readmission to Albania, The Experience of Selected EU Member States, International Organization for Migration: Tirana, August 2006, p. 30.

170 **Strik**, Tineke, Readmission Agreements: A Mechanism for Return Irregular Migrants, Council of Europe Parliamentary Assembly, Doc. 12168, 17 March 2010, p. 15.

171 **Crépeau**, 2012, p. 20.

172 **Amnesty International**, Stranded Refugees in Turkey Denied Protection, April 2009, p. 27.

protection to non-European refugees, it has no effect in practice due to the increasing refugee burden on the country's institutions and economy.

There is no doubt that the EU-Turkey RA contains a high risk of deportation for asylum seekers and refugees without accessing refugee status determination. The human rights reports have shown that Greek authorities have deported asylum seekers and refugees to Turkey without given the chance to ask for asylum. After readmission of refugees, Turkey has been deporting non-Syrian refugees to their country of origin based on the assumption that all readmitted peoples had an opportunity to ask for asylum in Greece. Furthermore, Turkey has changed its generous and "open-gate" policy towards Syrian refugees and closed its borders to them after the EU-Turkey Statement. There is a lack of a monitoring system and suspension clause in the EU-Turkey RA, which increases unlawful deportations and leads to infringement of the principle of *non-refoulement*.

Moreover, the EU-Turkey RA does not offer any sustainable solution to the ongoing refugee crisis. The swapping of asylum seekers for Syrian refugees is not enough to provide asylum seekers a humanitarian way to access asylum. Also, the EU's financial support to Turkey is conditioned on reduction in the number of arrivals on Greek territory. Both of these certainly conflict with the EU's unconditional duty to open the humanitarian pathways and burden sharing principles of international refugee law. Both the EU and Turkey should put aside their interests and take into account the vulnerabilities of refugees. It is crucial to provide them with basic conditions for a dignified life without getting into destitution. To this end, the EU should ensure that Turkey's institutions provide the large number of refugees with a dignified life, proper reception conditions, access to economic, social and cultural rights in practice before commencing readmission of refugees to Turkey.

After analyzing the political and legal background of the EU-Turkey RA and Statement and the risks they create for refugees and asylum seekers in practice, the next chapter will explain Turkish asylum law and investigate critically how the EU-Turkey Agreement on the refugee affects Turkey's delivery of its human rights obligations.

CHAPTER V: The Effects of the Implementation of the EU-Turkey Statement on Turkey's Delivery of Human Rights Obligations

> It is said that no one truly knows a nation until one has been inside its jails. A nation should not be judged by how it treats its highest citizens, but its lowest ones.
>
> Nelson Mandela

1. Introduction

The EU-Turkey Statement poses new challenges for Turkey's delivery of human rights obligations and refugee protection responsibility. This chapter evaluates what awaits asylum seekers and refugees in Turkey after their readmission. As discussed in chapter IV, the Greek Council of State ruled that Turkey is a safe third country in accordance with the Asylum Procedures Directive.[1] This decision of the Council of State sets a dangerous precedent for future returning asylum seekers who are stranded on the Greek islands under the EU-Turkey Statement.[2] By September 2017, only 1,896 migrants had been readmitted to Turkey since 4 April 2016[3] but this low readmission figure is mainly related to the unclear legal status of the EU-Turkey Statement and its incompatibility with international human rights and the EU law. Since coming into force, the EU-Turkey Statement has been challenged before the CJEU, Greek Appeal Committees and the Greek Council of State by rejected asylum seekers, whose claims have been found inadmissible on ground of safe third country concept and these cases have blocked their readmission to Turkey. However, the recent decisions of the Greek Appeal Committees and the Council of State may now quicken readmission of asylum seekers and refugees to Turkey.

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1 **Asylum Information Database**, Greece: The Ruling of the Council of State on the Asylum Procedure Post EU-Turkey Deal, 4 October 2017, http://www.asylumineurope.org/news/04-10-2017/greece-ruling-council-state-asylum-procedure-post-eu-turkey-deal.

2 **Amnesty International**, Greece: Court Decisions Pave Way for First Forcible Returns of Asylum Seekers under EU-Turkey Deal, 22 September 2017, https://www.amnesty.org/en/latest/news/2017/09/greece-court-decisions-pave-way-for-first-forcible-returns-of-asylum-seekers-under-eu-turkey-deal/. : **Refugee Law Clinics Abroad**, Greek Council of State Approves Forced Returns to Turkey-RLCA Fears Massive Removals to Turkey, 25 September 2017, https://refugeelawclinicsabroad.org/2017/09/25/rlca-fears-massive-removals-to-turkey/.

3 European Commission Seventh Report on the Progress Made in the Implementation of the EU-Turkey Statement, COM (2017) 470, 6.9.2017, p. 5.

This chapter provides a comprehensive assessment of Turkey's asylum law and is divided into three sections. First, it evaluates whether readmitted Syrian and non-Syrian refugees and asylum seekers have the opportunity to access fair and efficient asylum procedures. Second, it examines whether readmitted asylum seekers and refugees are subjected to detention and whether they can apply for asylum from detention centres. The third section elaborates whether asylum seekers and refugees are returned to their country of origin after their readmission to Turkey and if so on what grounds.

In conclusion of the chapter, the researcher argues that even though Turkey is considered as a safe third country for refugees, it is still struggling to provide efficient and fair asylum procedures to asylum seekers. Furthermore, the implementation of the EU-Turkey Statement triggers prolonged detention of asylum seekers in inhuman conditions. Finally, there is a risk that asylum seekers and refugees will be deported on the basis of "public order, public security or public health" grounds. To substantiate the arguments put forward in the chapter, human rights reports of the European institutions, NGOs, leading jurisprudence of the ECtHR and Turkish jurisprudence will be used.

2. Readmitted Non-European Asylum Seekers

This section provides an overview of the legal status of non-European asylum seekers in Turkish asylum law and critically evaluates their opportunity to access international refugee protection.

2.1. The Legal Status of non-European Asylum Seekers

Turkish asylum law has changed with the adoption of the LFIP on 11 April 2013. The purpose of the LFIP was to regulate the entry, stay and exit of foreigners from Turkey and to determine the scope and implementation for the international protection that will be provided to foreigners who seek protection from Turkey.[4] It is based on the principles of the international human rights, refugee law and the EU's common asylum law but unfortunately it also incorporates many controversial elements of the EU asylum law,[5] which have harmful effects on the rights of refugees and asylum seekers, such as accelerated asylum procedures, detention of asylum seekers during their pending asylum

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4 Article 1 of the LFIP.

5 **Tokuzlu**, Lami Bertan, Burden-Sharing Games for Asylum Seekers between Turkey and the European Union, European University Institute, Florence Robert Schuman Centre for Advanced Studies, EUI Working Paper RSCAS, May 2010, p. 1.

applications and fast-track deportations of irregular migrants. These controversial policies have increased the risk of *refoulement* in the new member states of the EU and neighbour countries. In fact, the same adverse effects of the EU's strict policies have been experiencing in Turkey.[6]

The LFIP recognises two distinct categories of protection: international protection status, which is available upon an individual assessment of asylum seekers and temporary protection status, which can be provided to a group in mass-arrival situations. Regarding the first category of protection, the LFIP provides three different statuses for international protection seekers, namely "refugee", "conditional refugee" and "subsidiary protection". A refugee is defined in Article 61 of the LFIP in conformity with the 1951 Refugee Convention, and it is only available to the person, who comes from European countries. Conditional refugee status is defined in Article 62 of the LFIP in the same way as refugees but it is only given to non-European refugees. The difference between a refugee and conditional refugee status comes from Turkey's geographical limitation under the 1951 Refugee Convention. Conditional refugee status is a temporary and lesser type of protection that is provided pending their expected resettlement by the UNHCR in other countries. Like "asylum seeker" status under Article 62 of the LFIP, conditional refugees are only allowed to reside temporarily in Turkey until they are resettled to a third country. However, due to the refugee crisis, the chance of resettlement to another third country has become almost impossible for conditional refugees and they have to wait many years to be resettled in another third country.[7] This long period of waiting makes non-European refugees vulnerable to human traffickers,[8] and they have attempted to reach the EU territory even risking their own and their families' lives.

The LFIP has extended international protection to those who are neither refugee nor conditional refugee, but they are unable to return to their country where they would be faced with the death penalty, or torture or inhuman or degrading treatment or punishment,

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6 **Baklavacıoğlu**, Nurcan Ozgur, Building Fortress Turkey: Europeanization of Asylum Policy in Turkey, *The Romanian Journal of European Studies*, No. 7-8, Special issue, 2009, p. 114; **Kibar**, Esra Dardağan, An Overview and Discussion of the New Turkish Law on Foreigners and International Protection, *Perceptions*, Autumn, 18(3), 2013, p. 125.

7 **Soykan**, Cavidan, The New Draft Law on Foreigners and International Protection in Turkey, *Oxford Monitor of Forced Migration*, 2(2), 2012, p. 39; **European Commission** Communication from the Commission to the European Parliament, the European Council and the Council, Third Report on Relocation and Resettlement, 18.05.2016, 360 (final), pp. 8-9.

8 **Soykan**, 2012, pp. 44-45.

or a serious threat due to violence in international or nationwide-armed conflicts. It is a major step concerning the protection provided to large groups of asylum-seekers against *refoulement*.[9] This is also compatible with the ECtHR ruling and Article 3 of the ECHR, which imposes an obligation on States not to deport a person to another country, where substantial grounds have been shown for believing that s/he would face a real risk of being subjected to torture or inhuman or degrading treatment or punishment.[10] However, the LFIP does not define the procedure for how and who investigates the situation of an applicant making a decision on subsidiary protection. The ECtHR in the *Abdolkhani and Karimnia v. Turkey* case ruled that an independent body should scrupulously examine the threat of torture or inhuman treatment against each applicant.[11] Nevertheless, the LFIP did not establish an independent body for assessing the situation of an applicant in her/his own country.

The second category of protection, temporary protection, is defined in Article 91 of the LFIP and provides "temporary protection" status for foreigners who are forced to leave their country of origin *en masse* to find protection. The Syrians in Turkey first became part of the country's temporary protection system as guests on an *ad hoc* basis after their first arrival in 2011 because at that time Turkey had not any legislation regulating this area. With the coming into force of the LFIP on April 2014 and adoption of the Temporary Protection Regulation (TPR) on October 2014,[12] the legal basis for hosting large numbers of Syrian refugees was established after three years. However, there is no limitation on how long temporary protection will last. The Turkish Council of Ministers has full discretion on extension or termination of the temporary protection of Syrians.[13] It was

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9 **Erkem**, Nalan, Abdolkhani ve Karimnia/Türkiye Kararının Uygulanması İzlenme Raporu (Monitoring Report of Turkey and the Implementation of Abdolkhani and Karimnia v. Turkey Case), İnsan Hakları Ortak Platformu & Almanya Federal Cumhuriyeti, (Human Rights Joint Platform & German Federal Republic), Mart 2013, p. 11. http://www.aihmiz.org.tr/files/03_Abdolkhani_Karimnia_Rapor_TR.pdf.

10 **Plender**, Richard & **Mole**, Nuala, "Beyond the Geneva Convention: Constructing a *de facto* Right of Asylum from International Human Rights Instruments", Edited by Nicholson, Frances & Twomey, Patrick M., Refugee Rights and Realities: Evolving International Concepts and Regimes, Cambridge University Press: Cambridge, 1999, p. 86.

11 **Erkem**, 2013, p. 11.

12 OGT, 22.10.2014, No: 29153.

13 Article 91 of the LFIP states, "Temporary protection may be provided for foreigners…". The Article does not put an obligation on Turkish authorities to provide temporary protection but gives large discretion to them. However, this large discretion on whether temporary protection will be provided or not should be compatible with the responsibility of Turkey under international, refugee and human rights law. See **Kaya**, İbrahim & **Eren**, Esra Yılmaz, Türkiye'de Suriyelilerin Hukuki Durumu Arada Kalanların Hakları ve Yükümlülükleri (The Legal Situation of Syrians in Turkey: The Rights and

decided at the early stage that the arrivals would not be considered on an individual basis for international protection. Thus Syrians are barred from applying for international protection under Turkish asylum law. Accordingly, they cannot gain conditional refugee status and they do not have a right to apply for resettlement into another safe third country by the UNHCR. So far, the EU has only offered Turkey 72.000 places for resettlement of Syrian refugees under the "one to one" deal with the EU-Turkey Statement as mentioned in chapter IV to control the increasing irregular entry of the Syrian refugees into the EU territory. Considering there are nearly 3 million Syrian temporary protection holders in Turkey, this very limited chance of resettlement into an EU country and temporary status of Syrians without a chance of gaining even conditional refugee status puts them in a desperate position and real legal limbo.

The LFIP does not provide permanent residence permit to refugees while foreigners who have continuously resided in Turkey for at least eight years are eligible. For conditional refugee status and temporary protection holders, it means that one of these categories cannot apply for Turkish citizenship even though they fulfil the eight-year residency requirement for Turkish citizenship available to foreigners. This element of Turkish asylum law conflicts with the Article 34 of the 1951 Refugee Convention, which requires States to facilitate the assimilation and naturalisation of refugees. The extreme uncertainty puts asylum seekers and refugees in a precarious situation, and it is a major push-factor which is contributing to many of them taking the dangerous journeys to Europe.[14]

Also, contrary to the argument of the EU Commission[15] that Turkey offers equivalent rights to conditional refugees as to European refugees, the LFIP offers a lesser set of rights and entitlements to conditional refugees than to refugee status holders. The differences between refugee and conditional refugee can be explained in three ways. First, although family unification has been permitted for refugee status holders, conditional refugees are not entitled to apply for family unification.[16] Second, conditional refugees

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Responsibilities of Stranded Refugees), SETA Report, 55, 2015, pp. 47-48.

14 **Skribeland**, Özlem Gürakar, A Critical Review of Turkey's Asylum Laws and Practices, Seeking Asylum in Turkey, Norwegian Organization for Asylum Seekers, 2016, p. 21. http://www.asylumineurope.org/sites/default/files/resources/noas-rapport-tyrkia-april-2016_0.pdf.

15 **European Commission,** Report on Progress by Turkey in Fulfilling the Requirements of Its Visa Liberalization Roadmap, COM (2014) 646, 20.10.2014, p. 17.

16 Article 34 of the LFIP.

are required to reside in a particular province and report to authorities in weekly periods due to public security and public order concerns[17] while refugees are not required to reside in any defined area.[18] Baklavacioglu suggests that these restrictions on free movement and residence are very problematic in the long term since it is obvious that this obstructs self reliance of the refugees economically and leaves them to the "the mercy of the local society.[19] The United Nations Human Rights Report states that this "satellite-city" system makes it difficult for asylum-seekers to find a job to sustain their life. This often leads to asylum-seekers leaving the "satellite city" for other places even risking losing their refugee status or to attempt to cross the border irregularly into Europe.[20] Lastly, with respect to access to the labour market, conditional refugees may apply for a work permit after six months following the registration of an international protection claim although refugees can access the labour market without waiting six months. They have an automatic right to work along with obtaining refugee status.[21]

For these reasons, Turkey is struggling to provide equal protection to temporary protection status holders as envisaged in the 1951 Refugee Convention. It is clear that temporary protection status constitutes a barrier to the integration of refugees into the Turkish community which involves family unification, a long-term residence permit and the facilitation of Turkish citizenship.[22] It also requires personal autonomy without any restriction on the freedom of movement within national borders and the right to work without any restriction to achieve self-reliance.[23] The evidence suggests that the integration of a large number of refugees cannot be achieved in Turkey in the near future, particularly without EU member states sharing the burden. So refugees and asylum seekers continue to look for a solution in the EU territory in spite of the dangers.

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17 Article 71 of the LFIP provides that "Administrative obligations may be imposed on applicants, such as to reside in designated reception and accommodation centres, a specific location or province, as well as to report to the authorities in the form and at intervals as requested". This practice is called as a "satellite-city" system.

18 Article 82 of the LFIP.

19 **Baklavacıoğlu**, 2009, p. 114.

20 **Crépeau**, François, United Nations General Assembly Human Rights Council Report, Twenty–third Session, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, Report of the Special Rapporteur On the Human Rights of Migrants, Agenda Item 3, Mission to Turkey, 22-29 June 2012, p. 15.

21 Article 89(4)(a-b) of the LFIP.

22 As stated in Article 34 of the Refugee Convention states should "facilitate the assimilation and naturalization of refugees".

23 Article 17 of the 1951 Refugee Convention.

2.2. Access to the Asylum Procedure After Readmission of Refugees

Syrian nationals and non-Syrian nationals are subjected to slightly different readmission procedure. As of August 2017, 214 Syrian nationals have been readmitted to Turkey according to the DGMM statistics.[24] Syrians are returned from the Greek islands by plane and are placed in Düziçi Temporary Accommodation Camp until their temporary protection status is reinstated. After this procedure is completed, they are released from the camp and settled in a province of Turkey or, if they prefer, they stay in the camp.[25] On the other hand, once non-Syrian nationals are returned from the Greek islands to Turkey by boat, they are subjected to administrative detention in the Pehlivanköy Removal Centre until their removal process is completed. As of August 2017, 1,092 non-Syrian nationals were readmitted to Turkey of whom 580 were Pakistan nationals.[26] So far 57 returned non-Syrians have applied for asylum but only two have been granted refugee status, nine were rejected, 831 who did not apply for refugee status have been returned to their country of origin and 39 applications were pending.[27] This low level of asylum applications from non-Syrian nationals raises the question whether Turkey provides a fair and effective legal framework for asylum seekers asking for asylum, information and legal assistance as defined in the LFIP. The significant differences in the readmission procedure between Syrian nationals and non-Syrian nationals also invite investigation.

2.2.1. Syrian Refugees and Asylum Seekers

With the coming into force of the EU-Turkey Statement, the EU Commission put pressure on Turkey to provide an assurance that all readmitted Syrians will be granted temporary protection after their return to Turkey. According to Article 12 of the previous Temporary Protection Regulation (TPR), temporary protection status holders who left Turkey for a third country in either an irregular or regular manner lost their temporary protection status. They would have also been banned from re-entry into Turkey. During negotiations

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24 Republic of Ministry of Interior Directorate General of Migration Management, Return Statistics Since 4 April 2016, http://www.goc.gov.tr/icerik6/return-statistics_915_1024_10104_icerik.

25 European Commission Fifth Report on the Progress Made in the Implementation of the EU-Turkey Statement, COM (2017) 204, 2.3.2017, pp. 5-6.

26 Republic of Ministry of Interior Directorate General of Migration Management, Return Statistics 2016.

27 European Commission Seventh Report on the Progress Made in the Implementation of the EU-Turkey Statement, COM (2017) 470 final, 6.9. 2017, pp. 5-6.

prior to the agreed EU-Turkey Statement, the EU used visa liberalisation as a conditionality[28] and put pressure on Turkey to change the provision of the TPR. Turkey had to amend Article 12 of the previous TPR and clarified that Syrian nationals might request and be granted protection upon their return to Turkey and this covered both previously registered and non-registered Syrians.[29] The pressure by the EU on Turkey to amend the TPR can be explained in two ways. First, the EU wanted to shift the responsibility for Syrian refugees on to Turkey. Second, if the EU did not obtain assurances from Turkey to accept Syrian refugees and asylum seekers, the implementation of the EU-Turkey RA may infringe the principle of *non-refoulement* and thus the EU would be responsible for *refoulement* cases of Syrians as a first sending country in accordance with international law and the EU law. Against many criticisms from NGOs, the EU has established that Turkey is a safe country for refugees respecting the principle of *non-refoulement* when hosting readmitted Syrian refugees in its territory.

Nevertheless, this amendment has not convinced NGOs[30] and some scholars,[31] who have found this assurance of the Turkish government meaningless without lifting geographical limitation to the 1951 Refugee Convention. It is alleged by two NGOs, Mülteci-Der and Pro Asyl, that the amendment to the TPR does not guarantee any automatic re-access to temporary protection for Syrians. Turkish authorities still have discretion not to accept them as temporary protection seekers. Also, these assurances do not prevent the informal deportation of Syrians. Syrian asylum seekers may be forced to live in the reception camps or removal centres against their wishes, and this situation would make them feel obliged to ask for a voluntary return to Syria.[32] A recent report of Amnesty International shares the same view stating that the EU-Turkey deal has "disastrous knock-on effects on

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28 EU Commission First Report on the Progress Made in the Implementation of the EU-Turkey Statement, COM (2016) 231 final, Brussels, 20.04.2016, p. 4.

29 Temporary Protection Regulation no 2014/6883 and the Regulation no 2016/8722 Amending the Temporary Protection Regulation.

30 **Statewatch**, Refugee Crisis: EU-Turkey "dodgy deal": Legal Concerns Met? 28 April 2016. http://www.statewatch.org/news/2016/apr/eu-med-crisis-news-dodgy-deal.htm.; Report from GUE/NGL Delegation to Turkey, What Merkel, Tusk and Timmermans Should Seen During Their Visit to Turkey, May 2-4 2016, http://www.statewatch.org/news/2016/may/ep-GUENGL-report-refugees-Turkey-deal.pdf.

31 **Marx**, Reinhard, Legal Opinion on the Admissibility under Union Law of the European Council's Plan to Treat Turkey like a "Safe Third State" Commissioned by Pro Asyl, 14 March 2016, pp. 18-19; **Roman**, Emanuela & **Baird**, Theodore & **Radcliffe**, Talia, Statewatch Analysis, Why Turkey is not a "Safe Country", February 2016, pp. 18-19.

32 **Mülteci-Der** and **Pro-Asyl**, Observation on the Situation of Refugees in Turkey, 22 April 2016, p. 6.

Turkey's own policies" towards Syrian refugees and Turkey has forced large numbers to return to Syria informally since the EU-Turkey Joint Action Plan in 2015. Many of those returned refugees appear to be unregistered. In addition, Turkey has adopted increasingly restrictive border policies and changed its previous generous and "open-gate policy" since the deal.[33] Human Rights Watch reported in 2015 that Turkish authorities arrested Syrian asylum seekers after they crossed the border and detained them in military facilities overnight and then returned them to Syria.[34]

The previous Greek Appeal Committee on readmission of Syrian refugees to Turkey shared the same doubtful perspective affirming that Turkey still did not meet international protection standards and could not be considered as a safe third country. It decided that readmitting Syrian refugees from Greek islands to Turkey was unlawful in accordance with international refugee law and the EU law because "the temporary protection offered by Turkey to the applicant, as a Syrian citizen, did not offer him rights equivalent to those required by the Geneva Convention" or comply with the principle of *non-refoulement*".[35] This decision of the Greek Appeal Committee put the EU-Turkey refugee deal further into uncertainty. The consequence of the Greek Appeal Committee's decision was that the EU Council put pressure on the Greek government to "review the composition and role of the Appeal Committees".[36] The Greek authorities agreed to amend its legislation[37] and changed the composition of the Appeal Committee, which is responsible for examining asylum claims and appeals of asylum seekers. Since then, the Greek Appeal Committee's approach has changed and they have started to approve inadmissibility decision of the Greek Asylum Service ruling that Turkey is a safe third country for Syrian nationals and provides sufficient protection as envisioned in the 1951 Refugee

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33 **Amnesty International**, Turkey: Illegal Mass Return of Syrian Refuges Expose Fatal Flaws in the EU-Turkey Deal, 1 April 2016.

34 **Human Rights Watch**, Turkey: Syrians Pushed Back at the Border, 23 November 2015.

35 **The Guardian**, Syrian Refugee Wins Appeal Against Forced Return to Turkey, 20 May 2016, https://www.theguardian.com/world/2016/may/20/syrian-refugee-wins-appeal-against-forced-return-to-turkey.

36 **New Europe**, EU Council: Why Greece Should Consider Turkey Safe for Syrian Refugees, 16 June 2016, https://www.neweurope.eu/article/eu-council-greece-consider-turkey-safe-syrian-refugees/.

37 **European Commission** Communication from the Commission to the European Parliament, the European Council and the Council, Second Report on the Progress Made in the Implementation of the EU-Turkey Statement, 349, 15.06.2016, p. 4.

Convention.[38] This attitude of the EU demonstrates that it will put into force the EU-Turkey Statement whatever the cost to the human rights of refugees.

2.2.2. Non-Syrian Refugees and Asylum Seekers

The risk of *refoulement* for non-Syrian refugees and asylum seekers who have been or will be readmitted to Turkey may be even greater than for Syrian refugees. According to the LFIP, if foreigners "breach the terms and conditions for legal entry into or exit from Turkey", they will be subjected to a removal decision and deported immediately.[39] Even if they are registered asylum seekers or granted refugee statuses from the UNHCR, their asylum claims are considered as withdrawn, and they will be subjected to a deportation decision.[40] Considering the legal status of readmitted refugees and asylum seekers in Turkey, the EU Commission have requested assurances from Turkey not to send back non-Syrian refugees and asylum seekers to their country of origin. Turkey has made a written declaration to the EU Commission that all returned non-Syrians refugees and asylum seekers will enjoy protection from *refoulement* in line with international standards.[41] Turkey has also allowed the EU to monitor the situation of readmitted Syrian and non-Syrian refugees and asylum seekers regularly. Recently Turkey and the UNHCR concluded an agreement to monitor the implementation of international protection procedures and standards; particularly in removal centres and reception centres.[42] However, this has not happened so far.[43]

Although Turkish government gave assurance to the EU to respect the principle of *non-refoulement* for non-Syrians asylum seekers and refugees in a written declaration, it is very important to clarify that it does not have a binding effect in Turkish national law. Only international treaties have a binding effect in Turkish national law after approval of the Turkish Parliament. Therefore, as discussed in chapter IV with the legal status of the EU-Turkey Statement, the declaration of the Turkish government is seen merely as a

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38 Greece Overhauls Appeals to Speed Up Returns to Turkey, 20 June 2016, https://newsthatmoves.org/en/greece-overhauls-appeals-to-speed-up-returns-to-turkey/.

39 Article 54(1)(h) of the LFIP.

40 Article 54(i) of the LFIP

41 **EU Commission Second Report** on the Progress Made in the Implementation of the EU-Turkey Statement, COM (2016) 349, Brussels, 15.06.2016, p. 5.

42 ibid.

43 **Letter from the UNHCR**, Response to Query Related to UNHCR's Observation of Syrians Readmitted to Turkey, 23 December 2016, https://statewatch.org/news/2017/jan/unhcr-letter-access-syrians-returned-turkey-to-greece-23-12-16.pdf.

statement, and it cannot be legally challenged before the courts. Also, recent statements of the Turkish authorities have conflicted with this assurance. On April 4, 2016, when the first group of 220 people was readmitted to Turkey, Mustafa Toprak, the governor of İzmir explicitly stated that re-admitted non-Syrians would be immediately transferred to Kırıkkale Removal Centre. After then,

> In accordance with international law, they would be either re-admitted if Turkish government has a readmission agreement with their countries of origin or if there is no such agreement, then they would be returned to their countries with travel documents.[44]

Furthermore, the report based on the visit of three members of the EU Parliament to removal centres received testimonies of refugees highlighting that people deported from Greece have had no opportunity to ask for asylum in Turkey. All those interviewed claimed that they were not given an opportunity to ask for asylum, neither in Greece nor Turkey. It is a worrying issue that Turkish authorities told the delegation that "all people being returned to Turkey had the opportunity to request asylum in Greece. They are not in need of international protection". The representative of the DGMM also told the delegation that the aim was to "ensure deportation of all those being returned from Greece, 100 per cent if possible. This is the spirit of the readmission agreement".[45]

Considering this increased risk of refoulement after readmission procedure, three Pakistani nationals, staying in Greece but subject to readmission between Greece and Turkey, applied to the ECtHR for annulment of the EU-Turkey Statement. They argued, inter alia, that

> This act rendered them at risk of *refoulement* to Turkey or 'chain *refoulement*' to Pakistan or Afghanistan.[46]

In support of their request, the applicants put forward a number of pleas against the EU-Turkey Statement. The most important one was based on "invalidity on the grounds of

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44 Statement to the Press by İzmir Governor Mustafa Toprak, Dikili, April 4, 2016, published on the official web page of İzmir Governorship on 6 April 2016, http://www.izmir.gov.tr/0096.

45 Report from GUE/NGL Delegation to Turkey, What Merkel, Tusk and Timmermans Should Seen During Their Visit to Turkey, May 2-4 2016, http://www.statewatch.org/news/2016/may/ep-GUENGL-report-refugees-Turkey-deal.pdf.

46 Council of the European Union Information Note, 7 June 2016, Brussels, 9897/16, http://www.statewatch.org/news/2016/jun/eu-council-turkey-agreement-challenges-9897-16.pdf. See Cases T-192/16 NF v European Council, T-193/16 NF v European Council and T-257/16 NF v European Council.

being based on the unlawful conclusive assumption that Turkey is a safe country".[47] The applicants also applied for interim suspensive measures to stop their deportations from Greece to Turkey. This is a very important case because it is the first time the EU-Turkey Statement has been challenged by asylum seekers before the ECtHR. If the Court finds the application admissible, it will examine the legality of the EU-Turkey Statement, and this could fundamentally affect the implementation of the EU-Turkey RA.

3. "Unwelcome Guests": Detention of Readmitted Asylum Seekers as Irregular Migrants

This section examines the legal basis of administrative detention and its application to readmitted asylum seekers and refugees. It explores whether they can access asylum procedures from removal centres, have dignified living conditions and procedural safeguards against *refoulement* including legal assistance and effective remedies.

3.1. The Legal Basis of Administrative Detention

Today member states have many provisions in their asylum laws, which are leading to de facto deprivation of asylum seekers' liberty in their reception centres. The states use administrative detention to enforce immigration and deter future arrivals of asylum seekers.[48] Irregular arrivals are seen as an "anomaly for Western liberal democracies in the context and development of citizenship discourse, constitutionalism and human rights".[49] Nearly all asylum seekers or irregular arrivals are subjected to administrative detention because they breach state's territorial sovereignty.[50] The Council of Europe's Committee on the Prevention of Torture suggest that conditions in these centres may be worse than those of prison establishments.[51] Many asylum seekers and irregular migrants

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47 ibid.

48 **Wilsher**, Daniel, The Administrative Detention of Non-Nationals Pursuant to Immigration Control: International and Constitutional Law Perspectives, International & Law Quarterly, 53(4), October 2004, pp. 897-900; **Cornelisse**, Galina, Immigration Detention and Human Rights: Rethinking Territorial Sovereignty, Martinus Nijhoff Publishers: Leiden, 2010, pp. 1-4; **Mouzourakis**, Minos, The Reception of Asylum Seekers in Europe: Failing Common Standards, ECRE, 20 April 2016, http://eumigrationlawblog.eu/the-reception-of-asylum-seekers-in-europe-failing-common-standards/.

49 **Cornelisse**, 2010, p. 4.

50 **O'niens**, Helen, No Right to Liberty: The Detention of Asylum Seekers for Administrative Convenience, *European Journal of Migration and Law*, 2008, p. 152.

51 European Committee for the Prevention of Torture, Inhuman or Degrading Treatment or Punishment. Visit reports: Poland CPT/ınf (2006) 11, para. 59; Greece CPT/Inf (2006) 41; Ireland CPT/Inf (2006) para. 40; Germany CPT/Inf (2007) para. 49, cited by **O'niens**, 2008, p. 151.

have found detention conditions as "harsh and punitive" despite seeking asylum and migration cannot be considered as a criminal act.[52] The detention of asylum seekers and irregular migrants has been increasingly encouraged, financed and promoted by the EU in the new EU member states and neighbouring countries, especially Turkey as a means of ensuring that irregular migrants are stopped before entering the EU.[53]

However, this widespread practice of states to systematically detain irregular migrants and asylum seekers on arrival in their national territory without considering less coercive measures conflicts with the international refugee and human rights law.[54] Article 32(2) of the 1951 Refugee Convention only permits states to detain asylum seekers in necessary situations.[55] In this regard, Hathaway, Grahl-Madsen and Goodwin-Gill argue that detention can be applied in order to define the identity of the asylum seeker pending an asylum application but it is limited by the requirement of necessity.[56] Hathaway argues that once the asylum seeker has complied with the procedural requirements of refugee status determination, any further detention would constitute a penalty, which goes against Article 32(2) of the 1951 Refugee Convention.[57] Also, Article 26 of that Convention establishes a freedom of movement that applies to those "lawfully" in the territory. While Article 26 clearly applies to recognized refugees, there is some debate as to whether it applies to asylum seekers too. Hathaway claims that Article 26 should also apply to asylum seekers whose applications have been presented.[58] He argues that presence of individuals become lawful when they apply for asylum. In this view, asylum seekers

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52 **Crépeau**, François, United Nations General Assembly Report on the Human Rights of Migrants, Human Rights Council Twenty-ninth Session, 8 May 2015, A/HRC/29/36, para. 42.

53 ibid, para. 50; **Jesuit Refugee Service**, Administrative Detention of Asylum Seekers and Illegally Staying Third Country Nationals in the 10 New Member States of the EU, October 2007, pp. 130-131. http://www.refworld.org/docid/4ed755c92.html.

54 **Fordham**, Michael, Immigration Detention and the Rule of Law, Safeguarding Principles, Bingham Centre for the Rule of Law, British Institute of International and Comparative Law, 2013, p. 1; **Tuitt**, Patricia, The Law's Construction of the Refugee Law, The Hague: Martinus Nijhoff, 1997, p. xx., cited by **O'niens**, 2008, p. 154; **Balfe**, Lord Richard, Administrative Detention in Council of Europe Member States-Legal Limits and Possible Alternative Measures, Committee on Legal Affairs and Human Rights, AS/Jur, 18, 2016, pp. 8-9.

55 Article 32(2) of the Refugee Convention states, "The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem **necessary**".

56 **Hathaway**, James C., The Rights of Refugees under International Law, Cambridge University Press: Cambridge, 2005, pp. 410-418; **Grahl-Madsen**, Atle, The Status of Refugees in International Law, Sijhoff: Leiden, 171, p. 148, cited by **O'niens**, 2008, p. 152; **Goodwin-Gill** and **McAdam**, The Refugee in International Law, Third Edition, Oxford: Oxford University Press, 2007, p. 463.

57 **Hathaway**, 2005, pp. 410-418.

58 ibid, pp. 173-175.

should enjoy the right to free movement once they formally apply for asylum. The movement of asylum seekers may be only restricted under the same conditions as are applicable to foreigners in the same circumstances.[59]

Furthermore, states' widespread practice of detaining asylum seekers conflicts with the developing human rights approach. Accordingly, Article 5(1)(f) of the ECHR only permits detention of the individual in accordance with a procedure prescribed by law if states aim to prevent *"*an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition". This means that states can apply administrative detention to prevent the unauthorised entry of foreigners or pending deportation of foreigners as part of its sovereign power to control migration flow into its territory.[60] But, this sovereign power of states is not limitless and administrative detention can only be applied when necessary, proportional and consistent with the human rights law.[61] Also, Article 12(3) of the ICCPR underlines the same approach and it only permits detention on condition that meets these criteria, are authorised by law; are reasonable and necessary in all circumstances and finally subject to periodic review and judicial review. Field and Edwards state that consideration of non-custodial alternatives is a pre-requisite of these necessity criteria.[62] Regrettably, states use administrative detention as a deterrent measure to stop asylum seekers from seeking asylum and effectively criminalising migration although both international refugee and human rights law prohibit it.[63]

In the case of Turkey, the legal basis of administrative detention and procedural safeguards against arbitrary detention had always been problematic before the LFIP. The ECtHR found Turkey's systematic violations of Article 5 of the ECHR in many cases[64]

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59 Article 26 of the 1951 Refugee Convention.

60 **Wilsher**, 2004, p. 900.

61 ibid, p. 897; **Landgren**, Karin, Comments on the UNHCR Position on Detention of Refugees and Asylum Seekers, 1998, p. 146.

62 **Field,** Ophelia & **Edwards**, Alice, Alternatives to Detention of Asylum Seekers and Refugees, UNHCR Legal and Protection Policy Research Series, POLAS/2006, 3 April 2006, paras.70.

63 **Tuitt**, Patricia, The Law's Construction of the Refugee Law, The Hague: Martinus Nijhoff, 1997, p. xx., cited by **O'niens**, 2008, p. 154.

64 **Dbouba v. Turkey**, Application no. 15916/09, 13 July 2010, para. 50; **Tehrani and Others v. Turkey**, Applications nos. 32940/08, 41626/08, 43616/08, 13 April 2010, para. 73; **Z.N.S. v. Turkey**, Application no. 21896/08, 19 January 2010, para. 56; **Ranjbar and Others v. Turkey**, Application no. 37040/07, 13 April 2010, para. 41; **Charahili v. Turkey**, Application no. 46605/07, 13 April 2010, para. 66; **Alipour and Hosseinzadgan v. Turkey**, Applications nos. 6909/08, 12792/08, 28960/08, 13 July 2010, para. 57; **Athary v. Turkey**, Applications no. 50372/09, 11 December 2012,

due to lack of a legal framework, prolonged detention and no effective remedies against administrative detention. For the first time, the ECtHR, in the *Abdolkhani and Karimnia v. Turkey* case in 2009, made an important judgment that the Turkish administrative detention system had no legal basis, stating:[65]

> In the absence of clear legal provisions establishing the procedure for ordering and extending detention with a view to deportation and setting time-limits for such detention, the deprivation of liberty to which the applicants were subjected was not circumscribed by adequate safeguards against arbitrariness…The national system failed to protect the applicants from arbitrary detention and, consequently, their detention cannot be considered 'lawful' for the purposes of Article 5 of the Convention.

The Court also ruled that the administrative courts had failed to examine rigorously the reason for the detention decisions. For this reason, it cannot be considered as an effective remedy for securing individuals' liberty and security in accordance with Article 5 of the ECHR. In many cases, although applicants had applied to Administrative Court to uphold their detention decision after taking an interim measure from the ECtHR on their deportation from Turkey, the Administrative Court did not uphold the detention decision due to public security and public order concerns. Without examining whether national security and public order concerns had a serious basis, the Administrative Courts decided to permit the continuation of detention until the ECtHR's final judgments. Thus many asylum seekers and refugees have been held in detention centres for nearly two years on the grounds of national security and public order concerns until the finalization of the judgment of the ECtHR.[66]

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para. 31; **Ghorbanov and Others v. Turkey**, Application no. 28127/09, 03 December 2013, para. 42; **Keshmiri v. Turkey**, Application no. 22426/10, 17 January 2012, para. 33; **D.B. v. Turkey**, Application no. 33526/08, 13 July 2010, para. 50; **Ahmadpour v. Turkey**, Application no. 12717/08, 15 June 2010, paras. 48-49; **Moghaddas v. Turkey**, Application no. 46134/08, 15 February 2011, para. 42; **Asalya v. Turkey**, Application No. 43875/09, 15 April 2014, para. 66; **Yarashonen v. Turkey**, Application no. 72710/11, 24 June 2014, para. 39; **A.S. and Others v. Turkey**, Application no. 22681/09, 22 July 2014, para. 114; **Aliev v. Turkey**, Application no. 30518/11, 21 October 2014, para. 56; **T. and A. v. Turkey**, Application no. 47146/11, 21 October 2014, para. 61; **Musaev v. Turkey**, Application no. 72754/11, 21 October 2014, para. 30.

65 **Abdolkhani and Karimnia v. Turkey**, Application no. 30471/08, 22 September 2009, para. 135; see commentary notes on this case **Erkem**, 2013, pp. 10-20; **Mole**, Nuala & **Meredith**, Catherine, Asylum and the European Convention on Human Rights, Council of Europe Publishing; Strasbourg, no. 9, 2010, p. 143.

66 **Erkem**, 2013, pp. 17-20; Ankara 14. Administrative Court, E. 2009/1060, KT. 27.10.2009; **Ekşi**, İdari Gözetim, pp. 17-26.

With the effects of many judgments of the ECtHR and the Europeanization process, the legal basis of administrative detention has been adopted by the LFIP in a very detailed manner.[67] Accordingly, the LFIP establishes two categories of grounds for administrative detention. The first category is only applied to asylum seekers during their pending application in exceptional situations.[68] The period of administrative detention should not exceed 30 days. The second category can be applied to irregular migrants for pending deportation.[69] The duration of the administrative detention should not exceed six months but in some cases, this period might be extended for a maximum of six months if there is an administrative requirement.

Although the LFIP provides legal grounds for administrative detention in a detailed manner, these grounds leave extensive discretion to the Turkish authorities. Specifically, detention of asylum seekers and migrants on the basis of "public order and public security threat" may lead to arbitrary detention decisions.[70] Also, the LFIP introduces "breached the rules of entry into and exit from Turkey" and "have used false or fabricated documents" as legal grounds for detention of irregular migrants. Regarding Turkey's transit country role, this means that almost every person may be detained under this provision of the LFIP. Under the EU-Turkey RA, readmitted irregular migrants may fall within the scope of this provision except they apply for asylum in Turkey. It should be noted that

> These extensive formulations are prone to misuse in Turkey and can lead to arbitrary detention decisions, particularly prolonged detention of asylum seekers as irregular

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67 **Ekşi**, İdari Gözetim, pp. 50-51.

68 See these exceptional situations at Article 68 of the LFIP; i) for the purpose of determination of the identity or nationality in case there is serious doubt as to the accuracy of the information provided; ii) for the purpose of being withheld from entering into Turkey in breach of terms and conditions of entry at the border gates; iii) when it would not be possible to identify the elements of the grounds for their application unless subjected to administrative detention; iv) when the person poses a serious public order or public security threat.

69 The Second category of administrative detention is only applicable for those who i) bear the risk of absconding or disappearing; ii) breached the rules of entry into and exit from to Turkey; iii) have used false or fabricated documents; iv) have not left Turkey after the expiry of the period granted to them to leave, without an acceptable excuse; or, v) pose a threat to public order, public security or public health in accordance with Article 57(2) of the LFIP.

70 **Helsinki Citizens Assembly**, Refugee and Advocacy and Support Program, Unwelcome Guest: The Detention of Refugees in Turkey's 'Foreigners' Guesthouses, November 2007, p. 1.

> migrants considering that administrative detention under the LFIP is not subject to automatic judicial review.[71]

In fact, Turkey's treatment is not unique. Turkey followed the EU's restrictive approach while adopting its new asylum law. In the same way, the Return Directive allows member states to detain asylum seekers and migrants within the national borders on the ground of "public order" and "national security" or "breaching the rules of entry".[72]

The UN General Assembly Human Rights Council draws attention to these same deficiencies.[73] It alleges that the scope of administrative detention determined under the LFIP is more extensive, and there is a risk that it goes too far and may be applied de facto to all migrants in irregular situations in Turkey. During the visit of the Rapporteur François Crépeau to detention centres, he found that there were a large number of apprehended migrants in the detention centre (called removal centres in the LFIP) including families and children. It is a widespread practice that irregular migrants may be detained for lengthy periods because some nationals cannot be returned to their country of origin due to lack of diplomatic relations. In particular, many Afghan and Iranian nationals cannot be returned to their country of origin, as they do not currently accept the return of their own nationals.[74] Also, in accordance with the LFIP,

> Foreigners to be removed shall cover their own travel costs. In cases where foreigners are unable to cover such costs, the full or remaining cost of travel shall be met from the budget of the Directorate General.[75]

This provision has left many irregular migrants in a desperate position due to lack of financial resources to buy tickets and where the budget of the Ministry of Interior is insufficient to cover migrants' journey costs. This provision conflicts with the 1951 Refugee Convention, ECHR, and ICCPR because the detention of the individual in the

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71 **Skribeland**, 2016, p. 32.

72 **Baklavacıoğlu**, 2009, p. 114; **Kibar**, Esra Dardağan, Yabancılar ve Uluslararası Koruma Kanunu Tasarısında ve Başlıca Avrupa Birliği Düzenlemelerinde Yabancıların Sınır Dışı Edilmelerine İlişkin Kurallar: Bir Karşılaştırma Denemesi (the Comparison Between the Draft Law on Foreigners and International Protection and Other European Countries Regulations on Deportation) *Ankara Avrupa Çalışmaları Dergisi* (*Ankara European Studies Journal*) 11(2), 2012, p. 65.

73 **Crépeau**, Twenty–third Session, 2013, p. 20.

74 ibid.

75 Article 60(3) of the LFIP.

absence of deportation proceedings is against both the rights of refugees and human rights.

The LFIP has provided two different times for maximum duration of detention. In the first case international protection seekers can only be held in removal centres for up to 30 days. In the second case, irregular migrants can only be held in removal centres for up to six months. However, if the removal cannot be completed because of the foreigner's failure to cooperate, this period may be extended for a further six months.[76] Therefore, the maximum duration of administrative detention cannot exceed twelve months. The requirement for administrative detention will be assessed monthly or sooner if necessary on a case-by-case basis by governorates. If administrative detention terminates, these foreigners may be required to comply with certain administrative obligations such as to reside at a given address and report to the authorities in the determined periods.[77] The detainee or her/his legal representative or lawyer will be notified of all aspects of the detention decision together with its reasons. If the detainee does not have a lawyer, then s/he or her/his legal representative will be informed about the consequences of the decision, the appeal procedure and the time limit for appeal.[78]

However, in practice, the administrative authorities do not respect time limitations on administrative detention.[79] For instance, if an asylum seeker applies for international protection after being detained, the transition from one detention regime to another is not made automatically. If the detention decision is taken on the grounds of breaching the rules of entry and exit in accordance with Article 57(2) of the LFIP this allows detention for up to 12 months. But if the applicant applies for asylum then, detention regime should be changed from Article 57(2) to Article 68, which only gives detention for up to 30 days. Unfortunately, governorates fail to change the legal status of a person and assume that Article 57(2) of the LFIP is still valid as the basis of detention. Therefore, governorates fail to observe the very different procedural safeguards required by Article 68 of the LFIP and in most cases, the time limits of 30 days is exceeded. This practice constitutes a deliberate violation of the LFIP.

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76 Article 57(3) of the LFIP.

77 Article 57(4) of the LFIP.

78 Article 57(5) of the LFIP.

79 **Asylum Information Database**, Country Report: Turkey, Edited by ECRE, December 2015, p. 95.

Also, detention decisions are not subject to automatic judicial review but detainees or their legal representatives or lawyers can challenge the decision in the Criminal Court. In this regard, a detainee can appeal to the Criminal Court as long as the administrative detention is continuous[80] but such an appeal will not suspend the decision. A judge in the Criminal Court will finalize the assessment within five days, and the judgment of the Criminal Court will be final.[81] This is potentially problematic because the final character of the judgment conflicts with Article 13 of the ECHR for preventing effective remedy.[82] Furthermore, it is my opinion that the administrative detention of foreigners is not an arrest under the Turkish criminal law but it is an administrative act issued by the governorates. Therefore, the competent court for challenging such decisions should be an administrative court[83] and not a criminal court.[84]

Furthermore, as secondary legislation, the TPR contains a "hidden" provision that seems to unlawfully allow arbitrary detention. Article 8(3) of the TPR states that those who are excluded from temporary protection may, until their removal, be accommodated, for humanitarian reasons, in a special section of temporary accommodation centres or in other places determined by the provincial authorities "without an administrative detention decision" under the LFIP. Despite the use of the word "accommodation", this provision relates to an informal type of detention. This type of arbitrary deprivation of liberty would be in clear breach of the LFIP and the Turkish Constitution, as well as the ECHR and other obligations of Turkey under international law.[85] I strongly argue that if accommodation of a person in a temporary accommodation centre restricts the movement of a person, it will be equal to detention and so violates the responsibility of the Turkish

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80 **Bayraktaroğlu Özçelik**, Gülüm, Yabancılar ve Uluslararası Koruma Kanun Hükümleri Uyarınca Yabancıların Türkiye'den Sınır Dışı Edilmesi, (The Deportation of Foreigners from Turkey in the Provisions of the Law on Foreigners and International Protection), *Türkiye Barolar Birliği Dergisi*, (The Journal of the Union of Turkish Bar Associations), September-October 2013, No. 108, p. 241.

81 Article 57(6) of the LFIP.

82 **Ekşi**, İdari Gözetim, pp. 112, 116, 132.

83 Ekşi has mentioned that before the LFIP, some administrative courts reviewed the legality of administrative detention decisions but some of them did not review because they were considered the issue within the jurisdiction of criminal courts. **Ekşi**, Nuray, Yabancılar ve Uluslararası Koruma Hukuku (Foreigners and International Protection Law), Beta Kitabevi, İstanbul 2014, pp. 132-133, 149; **Ekşi**, Nuray, 6458 sayılı Yabancılar ve Uluslararası Koruma Kanunu'nda İdari Gözetim (The Administrative Detention in Law on Foreigners and International Protection), Beta Kitabevi, İstanbul 2014, pp. 16-27.

84 Similar view **Ekşi**, Uluslararası Koruma, 2014, p. 133; **Ekşi**, İdari Gözetim, 2014, pp. 80-81, 90.

85 **Skribeland**, 2016, p. 33.

government leading to the arbitrary detention of a person without an administrative detention decision.

A special Representative of the Council of State, Tomas Boček's visit in 2016 to the Temporary Accommodation in Düziçi confirmed that this accommodation centre was being used as a *de facto* detention camp for readmitted Syrians. Although the authorities insisted that those residing in the Temporary Accommodation centre were free to leave at any time, refugees in this camp are not allowed to leave the camp of their own volition and are regularly denied communication with anyone outside the camp.[86] The UNHCR representative in Athens also complained that the Düziçi Temporary Accommodation Centre is "a closed facility" and the UNHCR does not have "unhindered and predictable access".[87] The *de facto* detention camp and detention of readmitted Syrian nationals who are under the temporary protection regime has no justification in Turkish asylum law but it is violating both the principles of Turkish asylum law and international refugee law.

3.2. Living Conditions in Removal Centres

With the developing cooperation with the EU on reducing irregular migration flow into EU territory, the administrative detention capacity of Turkey has considerably increased due to both the financial assistance and encouragement of the EU. According to the statistics of the Ministry of Interior, Turkey had only 18 removal centres with a capacity of 6,670 before signing the EU-Turkey RA. However, by June 2016 the detention capacity of Turkey had doubled with 22 removal centres and a capacity to hold 14,020. In addition, there were 10 additional removal centres under construction and due to be finished in 2017. It was projected that by the end of 2017 Turkey will have a capacity of 17, 240 in removal centres.[88] Besides these new builds, the EU and Turkey recently decided to convert one reception centre with a capacity of 750 into a removal centre. Currently, Turkey has only one reception centre with a capacity to hold 750, available to accommodate vulnerable refugees, including women and children. It has, however, 22

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86 **Council of Europe,** Report of the Fact-Finding Mission to Turkey by Ambassador Tomas Boček, Special Representative of the Secretary General on Migration and Refugees, 30 May-4 June 2016, SG/Inf(2016)29, 10 August 2016, pp. 27-28. https://rm.coe.int/168069aa7f.

87 **Letter from the UNHCR,** Response to query related to UNHCR's observation of Syrians readmitted in Turkey', 23/XII/2016, http://www.statewatch.org/news/2017/jan/unhcr-letter-access-syrians-returned-turkey-to-greece-23-12-16.pdf.

88 DGMM, Göç İstatikleri/Geri Gönderme Merkezi, retrieved on 7 June 2016 from http://www.goc.gov.tr/icerik6/geri-gonderme-merkezleri_363_378_10094_icerik.

removal centres with a capacity of 14, 020. It is notable that these removal centres have also been built in a highly securitized and militaristic style, with almost no possibilities for detainees to enjoy even the minimum human rights guarantees.[89] This reflects the securitized approach of the EU's migration policy and its effect on Turkish migration policy.

The living conditions of removal centres were very poor before the LFIP.[90] At that time, foreigners for whom a deportation order had been issued were kept in refugee guesthouses or police and gendarmerie centres during the deportation process under 1983 Refugee Guesthouse Regulation.[91] But, in most cases, Turkey was in violation of Article 3 of the ECHR due to the living conditions of their detention centres. There was insufficient personal space (the recommended minimum area is 4 m² per person), lack of outdoor exercise and recreational activities, little natural light, inadequate medical assistance, basic sanitary and hygiene requirements, no special care or arrangements for disables, etc.

In this regard, *Abdolkhani and Karimnia v. Turkey* case is very famous. In this case, two detainees complained that the conditions of their detention in the police headquarters constituted inhuman and degrading treatment in violation of Article 3 of the ECHR. They alleged that the conditions at the police headquarters were very poor and they were not allowed to make or receive telephone calls and any indoor or outdoor activities. The ECtHR stated that

> …holding forty-two people in an area of 70 square metres, even for a duration as short as one day, constituted severe overcrowding. This state of affairs in itself raises an issue under Article 3 of the Convention…the conditions of detention at the Hasköy police headquarters amounted to degrading treatment contrary to Article 3.[92]

In another instance, in *Tehrani and Others v. Turkey* case, ECtHR ruled that

> …Persons in custody are in a vulnerable position, and the authorities are under a duty to protect them. Under Article 3 of the Convention the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that

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89 **Crépeau**, Human Rights Council Twenty-third Session, 2013, p. 13.

90 **Levitan**, Rachel & **Kaytaz**, Esra & **Durukan**, Oktay, Unwelcome Guests: The Detention of Refugees in Turkey's "Foreigners' Guesthouses", Canada's Journal on Refugees, vol. 26, no. 1, 2009, p. 81.

91 OGT, 29.04.1983, No: 18032.

92 **Abdolkhani and Karimnia v. Turkey**, paras. 30-31.

> the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, the individual's health and well-being are adequately secured…the overcrowding was so severe as to justify of itself a finding of a violation of Article 3 of the Convention.[93]

Currently, even though the LFIP requires many safeguards and improvement in living conditions of removal centres, the conditions still do not meet the required standards of the international law.[94] On September 2017, the ECtHR rendered a new important judgment on living conditions in the Kumkapı removal centre in *Khaldarov v. Turkey* case. The ECtHR concluded that

> …the conditions of the applicant's detention at Kumkapı Removal Centre caused the applicant distress which exceeded the unavoidable level of suffering inherent in detention and attained the threshold of degrading treatment prescribed by Article 3.[95]

This recent judgment of the ECtHR highlighted that the living conditions of the removal centres in Turkey are still failing to meet international standards.

The physical conditions of detention centres were also subjected to the Reports of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) in 2011 and 2015. These Reports underlined that physical conditions of detention centres were very poor and overcrowded. Immigration detainees were not provided with any outdoor activities of at least one hour per day. Furthermore, the particular needs of children and families were not taken into account during their detention period although they must be segregated from other detainees. The Committee found the conditions of removal centres insufficient and called the Turkish government to make necessary improvements.[96]

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93 **Tehrani and Others v. Turkey**, paras. 83-84. Similarly see **Yarashonen v. Turkey**, paras. 80-81; **Asalya v. Turkey**, paras. 53-54; **Aliev v. Turkey**, para. 87; **T. and A. v. Turkey**, para. 98; **Musaev v. Turkey**, para. 60.

94 **Özbek**, Nimet, AİHM Kararları Işığında YUKK'nda İdari Gözetimin Uygulandığı Mekanlar Hakkında Ortak Sorunlar (Common Problems on Removal Centres in the LFIP in the Light of the ECtHR Jurisprudence), Türkiye Barolar Birliği Dergisi, (The Journal of the Union of Turkish Bar Associations), 118, 2015, p. 45.

95 **Khaldarov v. Turkey**, Application no. 23619/11, 5 September 2017, para. 31.

96 Report to the Turkish Government on the Visit to Turkey Carried Out by the CPT Committee from 4 to 17 June 2009, CPT/Inf (2011)13, pp. 28-30; Report to the Turkish Government on the Visit to Turkey Carried Out by the CPT Committee from 9 to 21 June 2013, CPT/Inf . (2015)6, p. 21: Report to the Turkish Government on the Visit to Turkey Carried Out By the CPT Committee from 16 to 23

The National Human Rights Institution of Turkey, which is an independent administrative authority for investigations of human rights violations, also found the same deficiencies as the CPT. Although the Turkish Government promised to remedy these deficiencies to the CPT Committee, it was evident in the 2015 Report of the National Human Rights Institution of Turkey that living conditions of detainees had not much changed and still failed to meet international standards. Detainees are still living in very crowded spaces under the required 4 m^2 per person by international criteria. Furthermore, detainees cannot access outdoor activities for weeks and months due to the limited space.[97]

Besides living conditions, ill-treatment against detainees was also investigated by the National Human Rights Institution of Turkey in 2015. The suspected death of Lütfullah Tacik, an 18 years old detainee in Van removal centre, had been reported in the media. Although a doctor's report indicated that he died from leukaemia, it was alleged that his sudden death was caused by ill treatment by a police officer. However, the lack of a surveillance camera record on the removal centre, no doctor's report on his health situation before his death and the suspicious disappearance of the witnesses from the removal centre one day before the arrival of the National Human Rights Institution of Turkey prevented the Committee from establishing the real reason for the death of the detainee. However, the National Human Rights Institution of Turkey found the removal centres authorities responsible for not taking necessary measures to ensure the supervision of the physical and psychological wellbeing of the detainee.[98]

Poor living conditions of the removal centres have also been brought before the Turkish Constitutional Court (TCC) by individual detainees. On December 2015, in a very landmark case,[99] a Syrian detainee complained about the living conditions in İstanbul Kumkapi Removal Centre. The claim was that the conditions were so poor denying

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June 2015, CPT/ Inf (2017) 32, 17 October 2017, pp. 4-6.

97 **The National Human Rights Institutions of Turkey,** Report on İstanbul Removal Centre, 06.11.2015, pp. 20-25.

98 **The National Human Rights Institution of Turkey**, Report on the Death of the Lütfullah Tacik and Van Removal Centre, 18.12.2014, pp. 53-56: **Görendağ**, Volkan, Yabancıların Temsil Sorununun Cezasızlık Kültürüne Katkısı: Lütfillah Tacik Davası Örneği (The Contribution of the Problem of Representation of Foreigners to the Impunity Cultural Model: Lütfillah Tajik Case), Amnesty International, 02 Haziran 2017, https://amnesty.org.tr/icerik/yabancilarin-temsil-sorununun-cezasizlik-kulturune-katkisilutfillah-tacik-davasi-ornegi: Aktan, Irfan, Afgan Çocuğun Ölümü (The Death of Afghan Child), Gazete Duvar (Journal of Duvar), 20 Kasım 2017, https://www.gazeteduvar.com.tr/yazarlar/2017/11/20/afgan-cocugun-olumu/.

99 The TCC, **K.A.**, Application No. 2014/13044, 11 November 2015. OGT, 17 December 2015, No: 29565.

human dignity and breaching one's physical and spiritual integrity. Personal freedom and security were also breached due to prolonged detention (of 8 months and 10 days) and that there was no effective remedy concerning the circumstances the detainee was in. The TCC states that the Criminal Courts to which appeals are made against administrative detention orders solely review the legality of these orders but they do not examine the "appropriateness" of detention circumstances in regard to human dignity. It has found a breach of Article 17 of the Constitution[100] and the right to effective remedy which is guaranteed by Article 40 of the Constitution and Article 13 of the ECHR. Furthermore, in this judgment the TCC, by taking the 2015 Report of the National Human Rights Institution of Turkey into account, found that the detention conditions in the Kumkapi Removal Centre breached Article 17 of the Constitution due to their incompatibility with human dignity. Each detainee in the Centre had only 3 m² per person living area although it should be 4 m² at least. There was very limited access to fresh air and the applicant had been detained in those conditions for more than 8 months. In the end, the TCC has found in breach of Article 19 of the Constitution (right to personal liberty and security) since the applicant had been detained between 25/04/2014 – 28/04/2014 in Kumkapi Removal Centre without a detention order and without respecting the procedural guarantees set forth for administrative detention in Article 57 of the LFIP. In addition, the Court decided on compensation of 10.000 Turkish liras[101] for non-pecuniary damages.

On June 2016, the TCC rendered a new important judgment on living conditions in removal centres involving women detainee.[102] According to the judgment, AS, who was a pregnant woman with Russian citizenship was kept under administrative detention for 18 days, between 03.01.2014-20.01.2014. She claimed that the lights in the centre were constantly on, it was overcrowded and extremely noisy; people were smoking inside and she was denied access to fresh air and could not participate in social activities. Hygiene was inadequate, food was insufficient and detainees were kept in; all the windows and doors were iron fenced like prisons. Although she was pregnant she was seen by a doctor only once a week and denied the diet which is required due to her special condition. As a result, she made a claim under Article 17 of the Constitution that prohibits torture,

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100 Article 17(3) of the Turkish Constitution states that "No one shall be subjected to torture or maltreatment; no one shall be subjected to penalties or treatment incompatible with human dignity".

101 Equivalent to 2.000 Pound.

102 The TCC, **A.S**. Application No. 2014/2841, 09 June 2016.

inhuman or degrading treatment and treatment incompatible with human dignity. Having fully examined the national and international reports on Kumkapı Removal Centre, the TCC found a breach of Article 17 of the Constitution because the centre was overcrowded with less than 3 m² per person, common spaces were insufficient, there was very limited access to fresh air and the detention of a pregnant woman under these conditions was clearly against Article 17 of the Constitution. According to the TCC due to the inadequate conditions of the detention centre, where the applicant was kept while waiting for deportation, the "right to effective remedy" which is guaranteed by Article 40 of the Constitution is also breached. The TCC highlighted that

> There is no effective administrative or judicial remedy which is capable of providing a solution in theory and practice and which gives a reasonable success opportunity in protecting the legal values guaranteed by Article 17(3) of the Constitution in regard to the applicant who was kept under detention in the Removal Centre.

The TCC decided that the applicant should be compensated by 15,000 Turkish liras[103] for non-pecuniary damages.

A further decision delivered on April 2016 related to a pregnant Russian Federation citizen Albina Kıyamova[104] who claimed that, during her admission to the İstanbul Kumkapı Removal Centre on 11.11.2011, she was searched naked due to the prejudice that she was involved in prostitution, and this was a breach of Article 17 of the Constitution which prohibits torture, inhuman or degrading treatment incompatible with human dignity. According to the TCC,

> The applicant had a defendable claim about the breach of Article 17 of the Constitution and in this case, the State is under a requirement to conduct a comprehensive and effective investigation, which is capable of finding the persons who are responsible for punishing them.

The TCC reached this conclusion by taking into account her age, gender, nationality, pregnancy and the fragility of the applicant and stated that she was in a very difficult position to prove her claim against the state agents under whose control she was. In the light of the conditions of the present case, the TCC found that the claims of the applicant

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103 Equivalent to 3.000 Pound.

104 The TCC, **Albina Kıyamova**. Application No. 2013/3187, 14 April 2016.

were not investigated in "an effective manner" and decided on 5,000 TL[105] as compensation to be paid to the applicant for non-pecuniary damages suffered. The cases confirm that physical problems and ill treatment continue in removal centres and that women especially suffer. For this reason, the relevant authorities of removal centres should take the necessary measures immediately to ensure human dignity.

These judgments of the TCC on living conditions in removal centres are important because they make clear that the conditions of the removal centres must be made compatible with human rights and internationally acceptable standards immediately. The judgments have also revealed that there is still no effective legal remedy against administrative detention orders in Turkish law. It is necessary to amend the LFIP to this end in order not to breach the ECHR. Otherwise, the ECtHR will decide on compensation. Finally, the TCC has underlined the importance of the procedural guarantees for administrative detention as outlined in Article 57 of LFIP and request that the administrative authorities put into effect these procedural safeguards. These landmark judgments demonstrate that the TCC acts as the ECtHR at the national level by making references to relevant international treaties and judgments of the ECtHR guaranteeing human rights and personal security of the individual.

3.3. Procedural Safeguards against Arbitrary Detention

3.3.1. Can Detainees Apply for Asylum from Removal Centres?

The LFIP gives discretion to the public authorities to detain persons without distinguishing them as asylum seekers or migrants. For that reason, it is often difficult to access fair asylum procedures in the removal centres. Under the LFIP,[106] asylum application should be evaluated under the accelerated procedure in cases where the applicant "has been placed under administrative detention pending removal" and

> An applicant whose application is evaluated under accelerated procedure shall be interviewed no later than three days as of the date of application. The [assessment of the] application shall be finalised no later than five days after the interview.[107]

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105 Equivalent to 1.000 Pound.

106 Article 79(1) of the LFIP.

107 Article 79(2) of the LFIP.

The LFIP abolishes the right of the applicant to appeal to the International Protection Assessment Commission in the case of the accelerated procedures. Therefore, the applicant only goes to judicial appeal against negative decisions of the administrative authority.[108] Because of the very short time for interview and appeal, applicants are often unable to access any legal assistance. Detainees are not properly informed about their rights and how to ask for free legal assistance and appeal against the detention decision.[109]

NGOs and the EU's institutions have reported serious violations in accessing asylum at removal centres. François Crépeau, the UN Special Rapporteur on the Human Rights of Migrants and Hammarberg, the Commissioner for Human Rights of Council of Europe, found that asylum seekers faced significant barriers during applying for asylum while in detention.[110] The same problems had been reported by the UNHCR before the ECtHR in the case of *Abdolkhani and Karimnia v. Turkey*.[111] The representative of the UNHCR alleged that Turkish authorities

> …tended to refuse to grant temporary residence permits: …applications by persons whose claims were considered by the authorities to be in "bad faith", such as those submitted when arrested for lack of legal status in Turkey; applications by persons applying for asylum at international airports; …and applications by those whose stay in Turkey was considered to be a threat to national security.

The Grand National Assembly of Turkey Human Rights Investigation Committee visited Edirne Removal Centre in 2014 and reported that the percentage of the asylum applications from removal centres was incredibly low. Although the large numbers of irregular migrants apprehended on the border and the number of detainees had increased considerably, the number of asylum applications had stayed stable. Only 2 apprehended immigrants out of 7,596 in 2009; 4 persons apprehended immigrants out of 22,664 in 2011; 168 apprehended immigrants out of 17,448 in 2012; 171 apprehended immigrants out of 16,383 in 2013 and 99 apprehended immigrants out of 6,090 in 2014 had applied for asylum from Edirne Removal Centres.[112] Even though the LFIP provides the

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108 Article 80 of the LFIP.

109 **Mülteci-Der** and **Pro-Asyl**, Observation on the Situation of Refugees in Turkey, 22 April 2016, p. 8.

110 **Crépeau**, Twenty–third Session, 2013, p. 20; **Hammarberg**, Thomas, Commissioner for Human Rights of the Council of Europe, Human E-Rights of Asylum Seekers and Refugees, Com DH(2009)31, Original version, Strasbourg, 1 October 2009, pp. 10-11.

111 **Abdolkhani and Karimnia v. Turkey**, para. 103.

112 **Grand National Assembly of Turkey Human Rights Investigation Committee Report** on Illegal

necessary infrastructure for detainees to access asylum application from removal centres, there are deficiencies in legal assistance, interpreters and literature explaining the rights of detainees. These deficiencies have created a major barrier.

Amnesty International's report prepared in 2015 shows the challenges asylum seekers are actually facing in the removal centres. The report alleged that since the EU-Turkey deal, Turkish authorities have apprehended people trying to or suspected of planning to cross to Greece. Based on many interviews the report stated that after apprehension there is prolonged and unlawful detention of asylum seekers. Some of asylum seekers and refugees have stayed in isolated detention centres in the south or east of the country, not accessible to the outside world. No reasons are given for their detention, and some have faced ill treatment. Furthermore, it is alleged that refugees and asylum seekers faced "*incommunicado detention*".[113] This means that asylum seekers and refugees have been cut off from the outside world, with all phones confiscated and visits from lawyers and family members denied.[114] This practice is contrary to the LFIP, which stipulates that family members and lawyers must be given access to detainees.[115]

According to the Amnesty International Report in 2009, asylum seekers who can apply for refugee status while in detention are not given access to a procedure equal to that applicable to persons who apply from outside of detention. Legal assistance is not accessible in practice.[116] The recent European Commission report shows that 1,896 migrants were readmitted to Turkey between April 2016 and September 2017. Only 57 (3%) applied for asylum in Turkey: two have been granted refugee status, 39 applications are pending and nine have received a negative decision.[117] This low level of asylum application confirms that applying for asylum from a removal centre is more difficult than applying from outside due to arbitrary obstacles of officials. According to a Turkish

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Migration in Edirne, Term 24, Legislation Year 5, 2014, pp. 3-5.

113 **Amnesty International**, Fear and Fences: Europe's Approach to Keeping Refugees at Bay, November 2015, pp. 56-65.

114 **Amnesty International**, Europe's Gatekeeper: Unlawful Detention and Deportation of Refugees from Turkey, December 2015, p. 6.

115 Article 59(1)(b) and 68(8) of the LFIP.

116 **Amnesty International**, Stranded Refugees in Turkey Denied Protection, April 2009, p. 24.

117 **European Commission Report** to the European Parliament, the European Council and The Council, Com (2017) 470 final, Seventh Report on the Progress Made in the Implementation of the EU-Turkey Statement, 6th of September 2017, p. 5.

lawyer, the chance of applying for asylum from removal centre is "based on pure luck". Even lawyers and NGOs may not be succesful on lodging their clients' applications.[118]

Soykan argues that access to asylum from detention centres is much more difficult than for those who enter the country with their passports and approach the authorities as soon as possible with the intention of seeking asylum. She alleges that the Turkish asylum system tries to minimise the number of asylum applications because of the limited chances of resettlement of non-European refugees into third countries. The Turkish asylum system works to defer or deter asylum seekers through both informal and formal mechanisms. At the informal level, illegal forcible returns deter the arrival of asylum seekers onto the Turkish territory. On the other hand, prolonged administrative detention with its inhuman conditions works as a formal mechanism for deterring and deferring potential asylum seekers.[119]

3.3.2. Can Detainees Access to Legal Assistance and an Effective Remedy?

Asylum seekers and refugees, who do not have the financial means to pay a lawyer can benefit from state-funded legal aid in accordance with the LFIP.[120] However, access to legal assistance is not automatic or effective when it is provided. There are still ongoing practical obstacles and institutional deficiencies. First, the actual availability of lawyers for the majority of international protection applicants is significantly limited by a shortage of resources and expertise.[121] The Turkish Bar Association has insufficient financial resources to develop a dedicated operational capacity to extend its services to asylum seekers and migrants who cannot afford to pay a lawyer. The Bar Association requested that the government establish a separate fund and taking into account the numbers of international protection applicants they could give legal asisstance to[122] but so far the government has not agreed. Also, the lack of specialised lawyers in asylum and

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118 **Ulusoy**, Orçun & **Battjes**, Hemme, Situation of Readmitted Migrants and Refugees from Greece to Turkey under the EU-Turkey Statement, Vrije University Migration Law Series, No. 15, 2017, p. 6.

119 **Soykan**, 2012, p. 43.

120 Article 81 of the LFIP.

121 **Asylum Information Database**, Country Report: Turkey, Edited by ECRE, December 2015, p. 43; **Kaytaz**, Esra S., At the Border of "Fortress Europe" Immigration Detention in Turkey, Edited by Nethery, Amy & Silverman, Stephanie, J. Immigration Detention, The Migration of a Policy and Its Human Impact, Routledge Taylor & Francis Group: London, 2015, pp. 62-63: Report to the Turkish Government on the Visit to Turkey Carried Out By the CPT Committee from 16 to 23 June 2015, CPT/ Inf (2017) 32, 17 October 2017, p. 5.

122 **Human Rights Centre for Turkish Bar Association Report** on Asylum Seekers and Migrants, Prepared by **Altun**, Uğur & **Görel**, Özge, 311, February 2016, p. 36.

immigration law constitutes another barrier to effective legal assistance. There is a very few lawyers who choose to specialise in refugee law because this field is not perceived as an income earning practice.[123] The level of financial compensation afforded to lawyers within the state-funded Legal Aid Scheme is modest and only attracts young lawyers at the early stage of their professional careers. Furthermore, it is very difficult for legal aid lawyers to ask the Turkish Bar Association to cover any side expenses such as interpreting, translations or expert consultations. As a result, there are insufficient incentives for legal aid lawyers to dedicate time and effort into asylum cases.[124]

Second, irregular migrants generally do not have any documents to prove their identity. The experiences of most asylum seekers and refugees shows that they cannot authorise lawyers with "power of attorney" due to not having a passport, identity card, or other official documents. If there is no "power of attorney", lawyers cannot access their clients at detention centres or their files.[125] In order to address this issue, the Turkish Union of Notaries published a communique explicitly reiterating that all new forms of "residence permits", "stateless person identity cards" and "international protection registration documents" given by the Ministry of Interior to international protection seekers is accepted as an identity card by the notaries to produce power of attorney. The communique has only partially helped to address the barriers faced by refugees and asylum seekers in obtaining the power of attorney. The challenges facing migrants, who are apprehended over an irregular entry to or exit from Turkey remain unresolved. Those, who are detained in removal centres pending deportation are not given any form of identity documents and arbitrarily denied access to international protection.[126] These people still have problems with obtaining "power of attorney".

Furthermore, even if lawyers submit a "power of attorney" to examine files of refugees and asylum seekers in removal centres, administrative authorities attempt to prevent their demands by making excuses. For examine to access the files of their clients, lawyers have

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123 **Asylum Information Database**, Country Report: Turkey, Edited by ECRE, December 2015, p. 43.

124 ibid, p. 44.

125 **Human Rights Centre for Turkish Bar Association Report**, 2016, pp. 45-47; **Kaytaz**, 2015, pp. 62-63; **Yılmazoğlu**, Esat Caner, Judicial Review of Deportation Decisions on Foreigners before the Constitutional Court, (Yabancıların Sınırdışı Edilmesinin Anayasa Mahkemesinde Yargısal Denetimi), The Journal of Conflict Court (Uyuşmazlık Mahkemesi Dergisi), 5, 2015, p. 923.

126 **Refugee Rights Turkey**, Barriers to the Right to Effective Legal Remedy: The Problem Faced by Refugees in Turkey in Granting Power of Attorney, February 2016, pp. 2-3.

to submit a petition to the DGMM Offices, but these petitions are not replied to for a long time. In some cases, lawyers are not given access to see their clients or their files for security reasons.[127] If an asylum seeker or refugee is detained as a suspected terrorist, they will have been isolated from other detainees and any communications with their lawyers will be restricted.[128] In such cases, lawyers cannot defend their clients in court proceedings.[129] Furthermore, in some cases, migrants who faced human rights violations in removal centres cannot complain and ask for effective remedy due to the deficiencies in legal assistance. They are subjected to fast-track deportation and prevented from re-entry into Turkey for five years.[130] Therefore many complaints about human rights violations are not transferred to judicial authorities and remain unheard.

Third, a significant lack of interpreters hampers legal assistance and lawyers' work on behalf of their clients. The Grand National Assembly of Turkey Human Right Investigation Committee Report revealed that detainees have difficulty in expressing themselves to their lawyers due to lack of interpreters.[131] The Turkish Bar Association has emphasised the same problem that lawyers face communication problems with their clients in removal centres, reception and accommodation centres due to a poor translation service.[132] Also, the communication between the lawyer and client is also negatively affected by the shortage of private rooms in removal centres. There are no special rooms in the centres were lawyers can interview their clients in private. The lawyer can only speak with their clients in the corridor. This practice undermines the Advocacy Law in Turkey.[133]

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127 **Mülteci-Der** and **Pro-Asyl**, Observation on the Situation of Refugees in Turkey, 22 April 2016, p. 9; **Ulusoy**, Orçun & **Battjes**, Hemme, Situation of Readmitted Migrants and Refugees from Greece to Turkey under the EU-Turkey Statement, Vrije University Migration Law Series, No. 15, 2017, p. 20; **İzmir Barosu**, (İzmir Bar Association) İzmir Geri Gönderme Merkezlerinde Adalete Erişim Hakkı Çerçevesinde Yaşanan Sorunlar, (İzmir Bar Association's Report on Problems in Access to Legal Assistance in İzmir Removal Centres), 2017, pp. 10-11. http://www.izmirbarosu.org.tr/Yayin/752/izmir-geri-gonderme-merkezlerinde-adalete-erisim-hakki-cercevesinde-yasanan-sorunlar.aspx.

128 **Human Rights Centre for Turkish Bar Association Report**, 2016, pp. 70-71.

129 ibid, pp. 35-36.

130 **The National Human Rights Institutions of Turkey**, Report on İstanbul Removal Centre, 06.11.2015, p. 22.

131 **Grand National Assembly of Turkey Human Rights Investigation Committee Report**, 23 October 2012-2013, Term 24, 23 October 2012-2013, p. 81.

132 **Human Rights Centre for Turkish Bar Association Report**, 2016, p. 53.

133 ibid, p. 35; **İzmir Barosu**, (İzmir Bar Association's Report), 2017, pp. 11-13.

4. The Risk of Deportation of Readmitted Asylum Seekers

Since the EU-Turkey Statement came into force, irregular migrants and asylum seekers, who have been transited through Turkey and reached Greece are subjected to readmission procedures. Even though international protection claims are examined individually in Greece, due to the increasing burden on the country and deficiencies in the Greek Asylum Service, many of them are returned to Turkey without accessing asylum procedures and effective remedy. This section considers whether Turkey is a safe country for those readmitted migrants and asylum seekers and whether Turkish authorities use its sovereign power within the rule of law and human rights law when ordering the deportation of foreigners. Finally, how, if at all, this power is monitored and controlled, especially when deportation orders are on the grounds of "public order or public security or public health".

4.1. The Legal Basis of the Deportation Decisions in Turkish Asylum Law

The Turkish Constitution provides valuable safeguards for foreigners against deportation orders. Article 16 of the Turkish Constitution guarantees that fundamental rights of foreigners are only restricted by law in accordance with international law. This means that the reasons for deportation orders should be enshrined by the law and consistent with international and human rights law.[134]

Turkish asylum law also provides some safeguards against arbitrary deportation orders and regulates the deportation of foreigners in two categories. The first category of deportation decision is based on 13 reasons[135] such as peoples who breach the terms and conditions for legal entry into or exit from Turkey" or "pose a public order or public security or public health threat" or "submit untrue information and documents during the entry, and visa and residence permit irregularities will be subjected to deportation. Nevertheless, the grounds for justifying deportation of foreigners lack "clarity and precision"[136] and gives priority to public security concerns with a large discretionary power of the public authorities.[137] Administrative authorities issue deportation orders as

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134 See Article 19 of the Turkish Constitution: "Everyone has the right to personal liberty and security. No one shall be deprived of his/her liberty except in the following cases where procedure and conditions are prescribed by law…arrest or detention of a person who enters or attempts to enter illegally into the country or for whom a deportation or extradition order has been issued".

135 Article 54(1) of the LFIP.

136 **Kibar**, An Overview, 2013, p. 119.

137 **Bayraktaroğlu Özçelik**, 2013, pp. 227-228; **Kibar**, An Overview, 2013, p. 126.

a preventive administrative act, either upon instruction of the DGMM or *ex officio* by governorates.[138]

The second category is applied to asylum seekers or refugees,

> When there are **serious reasons** to believe that they pose a threat to the national security of Turkey or if they have been convicted upon a final decision for an offence constituting a public order threat.[139]

As seen in the expression of this provision, the LFIP requires "serious reasons" for deportation of an asylum seeker or refugee. Compared to the first category of deportation reasons, it provides more safeguards and less discretionary power to public authorities It seems to be in line with Article 32 of the 1951 Refugee Convention, which only allows deportation of refugees and asylum seekers on the basis of national security and public order.

In addition, the LFIP provides extra safeguards against the deportation of foreigners, who cannot gain a refugee status but are in exceptional situations.[140] The LFIP stops the deportation process if there are "serious indications" that concerned persons would be subjected to the death penalty, torture, inhuman or degrading treatment or punishment in the country to which they would be deported.[141] The term "serious indication" is a positive development regarding its scope and is in harmony with the ECtHR judgments.[142] The assessment of the persons' situation will be made on a case-by-case basis, and those foreigners may be asked to reside in a given address and report to authorities as requested.[143] Accordingly, foreigners under the above circumstances can obtain a humanitarian residence permit for one year.[144] With this provision, Turkey creates a category of "non-deportable" persons, which is compatible with the absolute

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138 Article 53(1) of the LFIP.

139 Article 54(2) of the LFIP.

140 Article 55 of the LFIP.

141 Article 55(1)(a) of the LFIP.

142 **Elçin**, Doğa, The Principle of Non-refoulement a Comparative Analysis between Turkish National Law and International Refugee Law, Edited by Sirkeci, İbrahim & Elçin, Doğa & Şeker, Güven, Politics and Law in Turkish Migration, 2015, p. 46; **Erkem**, 2013, p. 11.

143 Article 55(2) of the LFIP.

144 Article 46(1)(c) of the LFIP.

character of the Article 3 of the ECHR. It is a "manifestation" of the principle of *non-refoulement*.[145]

However, there are still problems in actual practice. Recent judgements of the ECtHR and the TCC reveal that public authorities have still applied for the deportation of foreigners on the grounds of public security and public order without assessing whether the individual concerned may face inhuman, degrading treatment if deported back to their country of origin. The reason for this unlawful deportation can be explained by the vagueness of Article 55 of the LFIP because the LFIP provides no explanations of who and how to assess the "serious indications" to stop the deportation process. The ECtHR in the *Abdolkhani and Karimnia v. Turkey* case ruled that an independent body should scrupulously investigate the situation of individuals whether there are "serious indications" to believe that s/he will be subjected to "death penalty, torture, and inhuman or degrading treatment*"*. Unfortunately, the LFIP did not envisage an independent body for assessing the situation of applicants.[146]

The important point is whether foreigners can avail themselves of effective protection against deportation decisions. The LFIP does not provide for an automatic judicial review on the deportation decisions unless the foreigner goes for an appeal. This provides fewer guarantees for foreigners compared to the EU Reception Directive. In accordance with the latter if administrative authorities order deportation of foreigners, member states will provide "a speedy judicial review of the lawfulness of the deportation to be conducted ex officio and/or at the request of the applicant".[147] It is interesting that although the LFIP was inspired by the EU common asylum law, it does not provide an automatic judicial review of deportation decisions. The researcher suggests that policymakers deliberately skipped automatic judicial review so as not to delay deportations of irregular migrants.

A more recent but important problem is Turkey's increasing security concern after many terrorist attacks in the metropolitan cities and the failed coup attempt in 2016. With the increasing security concern in the country, the Turkish government has changed its generous approach towards refugees and amended some of the provisions of the LFIP. In accordance with Article 54(1)(b)(d) and the newly added paragraph (k), foreigners who

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145 **Elçin**, 2015, p. 48

146 **Erkem**, 2013, p. 11.

147 Article 9(3) of the Reception Directive.

are "leaders, members or supporters of a terrorist organisation or a benefit oriented criminal organisation"; "pose a public order or public security or public health threat", and "are assessed by international institutions and organisation as being related to the terrorist organization" will be subjected to deportation. These deportation grounds have given great discretion to the administrative authorities. However, the LFIP does not establish any procedural criteria for how administrative authorities should decide whether the foreigner constitute a threat to public security. With the recent amendment to Article 53 of the LFIP, foreigners can be deported with the decision of administrative authorities without any judicial control mechanism. Before the amendment, administrative authorities could take the deportation decisions on the ground of public order or public security, but foreigners could go to the Administrative Court against this deportation order. During appeal procedures, the claimant could stay in Turkey and the deportation decision was suspended until the final verdict of the Court.

Now foreigners can appeal but they cannot stay until the completion of the appeal procedure. With this amendment, asylum seekers and refugees can only use individual application avenues by applying to the TCC and the ECtHR to stop the execution of an unlawful deportation decisions. This may trigger many new cases before the ECtHR. It is very clear that these new amendments put refugees and asylum seekers in a more vulnerable position than before.[148] From now on, administrative authorities can use these three paragraphs of Article 54 to deport foreigners without showing any concrete evidence or valid reason before the Court. Also, with new added paragraph into Article 54(2), international protection applicants or status holders who are assessed inside paragraph b), d) and k) of Article 54(1) can be deported at any time during the proceedings of their applications. Turkey can deport asylum seekers and refugees with the decision of administrative authorities without giving a chance to challenge the decision of deportation before the Court. There is no doubt that the new amendment is clearly against the principle of *non-refoulement* and jurisprudence of the ECtHR.

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148 **Görendağ**, Volkan, 676 Sayılı KHK İle Mülteci Hukukun Temel İlkeleri Askıya Alınıyor (The Fundamental Principles of the Law on Foreigners and International Protection is Suspended with the Decree-Law numbered 676) 3 Kasım 2016, http://www.multeci.net/index.php?option=com_content&view=article&id=378%3A676-sayl-khk-ile-muelteci-hukukunun-temel-ilkeleri-askya-alnyor&catid=31%3Agenel&Itemid=1&lang=tr. Retrieved on 10 November 2016.

4.2. Effective Remedy against Deportation Decisions

In Turkish jurisprudence, it is acknowledged that deportation orders fall under state sovereignty,[149] but that does not mean that deportation orders are exempt from judicial review. A foreigner may appeal against a deportation decision to the administrative court within 15 days of the date of notification. It is noteworthy that it is a general rule of Turkish law that bringing an action to the Turkish Council of State (TCS), which is the highest administrative court, or to any administrative court does not prevent the execution of the administrative act[150] unless otherwise specified in the law. Before the LFIP, appeal against a deportation decision had no suspensive effect on removal orders. For instance, prior to the LFIP in the *Asalya v. Turkey case*, the ECtHR expressly stated that

> Judicial review in deportation cases in Turkey could not be regarded as an effective remedy, since an application for the quashing of a deportation order did not have an automatic suspensive effect, thus exposing any person in the applicant's position to the risk of deportation at any moment without a prior independent examination of his claims.[151]

Therefore, in most cases, the ECtHR, taking into account the lack of automatic suspense effect in Turkish Law, issued an interim measure pursuant to Rule 39 of the Rules of Court[152] against the Turkish Government, in the interests of the parties and the proper conduct of the proceedings before the Court, that the applicant should not be deported to the country concerned.[153]

However, although the ECtHR issued an interim measure pursuant to Rule 39 of the Rules of Court against the Turkish government, there are some cases that even these interim measures cannot stop deportation. An example is found in the *Mamatkulov and Askarov*

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149 See. The TCS, Tenth Division, RN: 1993/3535, JN: 1995/4616, Date: 19.10.1995; The TCS, Tenth Division, RN: 1997/6513, JN: 2000/128, Date: 20.01.2000.

150 Article 27(1) of the Law on Procedure of Administrative Justice.

151 **Asalya v. Turkey**, Application No. 43875/09, 15 April 2014. Similarly see "*…the notion of an effective remedy under Article 13 requires …(ii) a remedy with automatic suspensive effect*." **Abdolkhani and Karimnia v. Turkey**, para. 108; **Dbouba v. Turkey**, para. 44; **Tehrani and Others v. Turkey**, Applications nos. 32940/08, 41626/08, 42616/08, 13 April 2010, paras. 62 and 64-67.

152 ECtHR, Rules of Court, 1 June 2015, Strasbourg.

153 See **Jabari v. Turkey**, para. 6; **Abdolkhani and Karimnia v. Turkey**, para. 3; **Asalya** v. Turkey, para. 26; **M.B. and Others v. Turkey**, para. 3; **Tehrani and Others v. Turkey**, para. 3; **Z.N.S. v. Turkey**, para. 3; **Ranjbar and Others v. Turkey**, para. 4; **Alipour and Hosseinzadgan v. Turkey**, para. 3; **Athary v. Turkey**, para. 2; **Moghaddas v. Turkey**, para. 2.

v. Turkey case.[154] The applicants, Mamatkulov and Askarov, both suspected of a terrorist attack on the President of Uzbekistan, alleged that if they were extradited to Uzbekistan from Turkey, they would be tortured. On their application to the ECtHR, the Court, on 18 March 1999, issued an interim measure to Turkey, indicating that it was desirable in the interest of the parties and for the smooth progress of the proceedings before the Court not to extradite the applicants to Uzbekistan until the Court had an opportunity to examine the application further at its forthcoming session on 23 March 1999. However, in breach of the interim measure, and in violation of Article 34 of the ECHR, Turkey handed the applicants over to Uzbekistan on 27 March 1999.[155] Moreover, a court in Uzbekistan found the applicants guilty and sentenced them to 20 and 11 years of imprisonment, respectively.[156] It is sad that Askarov died from torture just before his release from prison.[157]

After many judgements of the ECtHR against Turkey, the LFIP brought an exception to a general rule of Turkish law by stating that an appeal to the administrative court has a "suspense effect" and without prejudice to the foreigner's consent, s/he cannot be deported until completion of the appeal procedure.[158] This is entirely consistent with the ECtHR rulings and it provides an effective remedy against premature deportation decisions. Accordingly, the applicant may go to the Administrative Court against a deportation decision within 15 days, and the judgment of the Administrative Court is final. After exhausting the administrative court process, there is only one avenue for a foreigner in Turkish jurisdiction. The TCC operates as a higher court of last resort above the administrative court's final judgments on deportation orders given by the Ministry of Interior or Governorates. Also, the Court uses the "precautionary measure" in order to safeguard foreigner's fundamental rights and freedoms. However, it is important to note that "individual application" to the TCC does not stop deportation orders. Deportation orders can only be stopped if the TCC decides precautionary measures.

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154 **Mamatkulov and Askarov v. Turkey**, Application No. 46827/99 and 46951/99, 4 February 2005.

155 ibid, paras. 24-27.

156 ibid, para. 32.

157 http://www.ihh.org.tr/ru/main/news/0/uzbek-extradited-by-turkey-dies-from-torture-/54 (7 February 2016)

158 Article 53(3) of the LFIP; **Erten**, Rıfat, Yabancılar ve Uluslararası Koruma Kanunu Hakkında Genel Değerlendirme (A General Overview of Foreigners and International Protection Act), Gazi Universitesi Hukuk Fakültesi Dergisi (Gazi University Law Faculty Journal), 19(1), 2015, p. 32.

The individual application avenue for foreigners has become a new protection avenue in Turkish law since 23rd September 2012. Since then the TCC has contributed to the development of case law against deportation orders. The TCC reviews whether there is a serious, actual and personal danger towards the life or material or moral integrity of the applicant, in the light of the circumstances where the facts are known. It also views the general situation of the origin country. After that, the Court reaches a conclusion that either accepts[159] or dismisses[160] the precautionary measure request. By doing so, the TCC gives reference to relevant ECtHR judgments.

Also, TCC touches upon the notion of the "protection of the family" and "to ensure the children's best interests" in its judgments. In this context, according to TCC, if an applicant is deported to Afghanistan, he will have to live separately from his wife and five children who live in Turkey, so his family unity would deteriorate. This reason would constitute a grave danger to the "moral integrity" of the applicant. Using this logic, the Court ruled that the precautionary measure demanded by the applicant must be accepted.[161] This and other judgments show that the humanitarian approach of the TCC is fully compliant with the ECtHR jurisprudence. The TCC's approach is more liberal and supports human rights issues more than the administrative court judgments. It can be said that the establishment of an individual application avenue is a promising start regarding the role of the Court as a model of consistency through its jurisprudence.

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159 See the TCC, **R.B.**, Application no. 2013/9673, 30 December 2013; The TCC, **K.A.**, Application no. 2014/19101, 10 December 2014; The TCC, **I.M. and Z.M.**, Application no. 2015/2037, 19 February 2015; The TCC, **A.A.A.A. and J.A.A.A.**, Application no. 2015/3941, 27 March 2015; The TCC, **D.M.,** Application no. 2015/4176, 17 March 2015; The TCC, **Mohammad Abdul Khaliq**, Application no. 2015/6721, 14 May 2015; The TCC, **R.M.**, Application no. 2015/19133, 16 December 2015; The TCC, **Azizjon Hikmatov**, Application no. 2015/18582, 15 December 2015; The TCC, **A.A.K.**, Application no. 2015/17761, 02 December 2015; The TCC, **M.A.**, Application no. 2016/220, 20 January 2016.

160 See the TCC, **Enedjan Narmetova**, Application no. 2013/6782, 06 September 2013; The TCC, **Oksana Chicheishvili**, Application no. 2014/19023, 05 December 2014; The TCC, **A.D.**, Application no. 2014/19506, 25 December 2014; The TCC, **M.S.S.,** Application no. 2014/19690, 31 December 2014; The TCC, **A.K.K.**, Application no. 2015/757, 20 January 2015; The TCC, **Julia Anikeeva**, Application no. 2015/4459, 17 March 2015; The TCC, **Solmaz Mamedova**, Application no. 2015/6724, 20 May 2015; The TCC, **Mir Ahmed**, Application no. 2015/8021, 20 May 2015; The TCC, **Pidram Haydari**, Application no. 2015/8096, 21 May 2015; The TCC, **R.N.**, Application no. 2015/9291, 04 June 2015; The TCC, **Olga Dogot**, Application No. 2015/11252, 10 July 2015; The TCC, **Mahira Karaja**, Application No. 2015/18203, 01 December 2015.

161 The TCC, **Abdolghafoor Rezaei**, Application No. 2015/17762, 01 December 2015. See more the TCC, **Uthman Deya Ud Deen Eberle**, Application No. 2015/16437, 10 November 2015.

Although the LFIP provides more safeguards in accessing effective remedies against deportation decisions than the previous law, four deficiencies can be identified. First of all, the LFIP introduces accelerated appeal procedures against the deportation decisions. It states

> Foreigners may appeal against the removal decision to the administrative court within fifteen days as of the date of notification…Such appeals shall be decided upon within fifteen days. The decision of the court on the appeal shall be final.[162]

This provision is problematic in two ways. First, this very restricted time limitation for appeal against a deportation decision may hinder access to an effective remedy. As a rule, Article 7(1) of the Law on Procedure of Administrative Justice sets a time limit to apply to administrative courts within 60 days unless otherwise specified in the particular laws. Certainly, the LFIP is a specific law but in any event, the 15 days remain very short.

Second, the decision of the administrative court is final and against the Administrative Court's judgment, foreigners are not allowed to go to appeal although Turkish citizens can appeal to either the Regional Administrative Courts or the TCS. Considering the vulnerabilities of refugees and asylum seekers, they must have a right to challenge deportation orders before the Regional Administrative Courts or TCS.[163] In this regard, *Kibar* argues that accelerated appeal procedures have a paralysing effect on the development of case law[164] and trigger fast-track deportations. This consideration also found a voice in the Turkish Parliamentary Human Rights Commission Report during the discussion on the draft version of the LFIP. The Committee warned that the activating of a deportation decision without any control of a superior court might hinder the form of legal precedence in the long term and increase the application to the ECtHR and the TCC.[165] The reports of the Turkish Bar Association have also observed the same problems in actual practice during the implementation of the LFIP. They state that the judges of the administrative courts have not sufficient knowledge on the LFIP because unfortunately, the implementation of the law has been started without giving any training to judges. For this reason, there are huge interpretation differences between courts in practice. The final

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162 Article 53(3) of the LFIP.

163 **Erkem**, 2013, p. 12.

164 **Kibar**, An Overview, 2013, p. 125.

165 **Grand National Assembly of Turkey,** Human Rights, European Union Harmonization and Affairs Investigation Committees' Report on the Draft Law of the Foreigners and International Protection, 1/619, Term 24, Legislation Year 2, 2012, pp. 25-26.

character of the Administrative court judgments has exacerbated the situation in many cases, and it has led to infringements of individual's liberty and security, their right to effective remedy and the principle of *non-refoulement*.[166]

Thirdly, the individual application avenue to the TCC is the last resort of the individual to halt their imminent deportation but an individual's complaint to the TCC does not have a suspensive effect on deportation decisions. Thus individuals subjected to deportation orders must request a separate interim measure from the TCC. This does not provide an effective remedy in imminent *refoulement* situations in accordance with the ECtHR's established case law. The jurisprudence of the ECtHR on the case of *Al Hanchi v Bosnia-Herzegovina*[167] verified this deficiency saying individual complaint procedures without suspension did not fulfil the Article 13 of the ECHR standards in imminent *refoulement* cases. In fact, it is alleged by the reports of the ECRE that the ECtHR has accepted the applicants' claim subject to deportation decision in Turkey as admissible and granted an urgent interim measure to halt the deportation of the applicant despite the fact that the applicant did not use the individual application avenue to the TCC prior to the ECtHR Rule 39 request.[168]

Lastly, the LFIP does not provide free legal assistance to individuals who are subjected to deportation decisions. It is very significant that the LFIP provides international protection seekers free legal assistance during their appeal procedures on the rejection of their application and detention decisions but the same Law has declined to provide free legal assistance to foreigners subjected to deportation decisions. The policy makers explain this situation with their budgetary concerns. They argue that Turkey's transit role on the roads of migration flow will increase their expenditure on legal assistance, particularly with the implementation of the EU-Turkey Statement.[169] Turkish NGOs working on refugee issues confirm that finance does create a barrier to accessing effective remedies for persons who have no means to pay a private lawyer to go to appeal against

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166 **Human Rights Centre for Turkish Bar Association Report**, 2016, p. 33; **Yılmazoğlu**, 2015, p. 911.

167 **Al Hanchi v. Bosnia and Herzegovina**, Application no. 48205/09, 15 November 2011.

168 **Asylum Information Database**, Country Report: Turkey, Edited by ECRE, December 2015, pp. 41-42.

169 **Grand National Assembly of Turkey,** Report on the Draft Law of the Foreigners and International Protection, 1/6192012, p. 26.

the deportation decision and recommended that legal assistance should be provided.[170]

4.3. The Turkish and European Court of Human Rights Jurisprudence on Deportation of Asylum Seekers and Refugees

Before the LFIP came into force in 2014, Article 19 of the (repealed) Law on Residence and Travel of Foreigners in Turkey (No. 5683)[171] provided unfettered discretion to the Ministry of Interior on deportation of foreigners and international protection seekers. However, the TCS rightly pointed out in many cases the Ministry of Interior could not use this power unless the reason(s) for deportation or problems caused by the stay of the foreigner in Turkey *vis-à-vi*s general security were clearly identified.[172] Therefore, the administrative courts and the TCS found that deportation orders were not in accordance with the law in many cases.[173] Both the administrative courts and the TCS attributed considerable importance to the principle of *non-refoulement* and the resettlement of asylum seekers in third countries.[174]

Nevertheless, some vague terms can now be found in the LFIP. In accordance with Article 54(1)(d) of the LFIP, a foreigner can be deported for posing a threat to "public order, public security or public health". Also, asylum seekers and refugees can be deported "when there are serious reasons to believe that they pose a threat to national security of Turkey".[175] There are many examples where state authorities fail to assess whether the

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170 **İnsan Hakları ve Mazlumder İçin Dayanışma Derneği** (The Association on Human Rights and Solidarity for Oppressed People), Yabancılar ve Uluslararası Koruma Kanunu Tasarısı Hakkında Değişiklik Önerileri (Suggestions on the Draft Law on Foreigners and International Protection), 23.05.2012, p. 5.

171 OGT, 24.07.1950, No: 7564. The Law of 5683, however, was repealed by the LFIP in 2014. Article 19 states "Foreigners whose stay in Turkey is considered to be contrary to public security and political and administrative requirements by the Ministry of Interior shall be invited to leave the country within a specified period. Those who do not comply with this decision may be deported".

172 The TCS, Tenth Division, RN: 2003/111, JN: 2006/6142, Date: 30.10.2006.

173 See The TCS, Tenth Division, RN: 1999/154, JN: 2000/2756, Date: 25.05.2000; The TCS, Tenth Division, RN: 1999/5050, JN: 2001/823, Date: 14.03.2001; The TCS, Tenth Division, RN: 2004/1387, JN: 2007/3925, Date: 09.07.2007; The TCS, Tenth Division, RN: 2009/645, JN: 2009/10284, Date: 09.12.2009; The TCS, Tenth Division, RN: 2010/8380, JN: 2010/11501, Date: 31.12.2010; The TCS, Tenth Division, RN: 2008/7915, JN: 2012/3083, Date: 25.06.2012; The TCS, Tenth Division, RN: 2012/2243, JN: 2013/1296, Date: 18.02.2013; The TCS, Tenth Division, RN: 2010/9468, JN: 2014/7772, Date: 16.12.2014.

174 The TCS, Tenth Division, RN: 2005/3660, JN: 2007/6541, Date: 28.12.2007; The TCS, Tenth Division, RN: 2009/3924, JN: 2013/9506, Date: 30.12.2013; The TCS, Tenth Division, RN: 2009/13445, JN: 2013/9513, Date: 30.12.2013.

175 Article 54(2) of the LFIP.

person concerned faces the death penalty, torture, inhuman or degrading treatment or risk in the country to which they will be deported.

To verify this argument, three judgments of the TCC and two judgements of the ECtHR on deportation decisions will be examined.

4.3.1. Turkish Jurisprudence on Deportation of Asylum Seekers and Refugees

The following two cases are selected because administrative authorities and administrative courts did not take into account the special situation of asylum seekers and refugees even though the LFIP creates a group of people as non-deportable under Article 55. The first example is related to an Iranian applicant, who was subjected to a deportation order. In this case, although the applicant gained conditional refugee status and was waiting for his resettlement into another safe third country, the Ministry of Interior ordered his deportation on the ground of public order or public security. The applicant made an individual application to the TCC after exhausting all legal channels asking for an interim measure against the deportation order claiming that if deported, he would face torture and inhuman treatment in his country. The TCC granted an interim measure and suspended the execution of the deportation order accepting that the applicant did face the possibility of inhuman treatment if deported and the risk of losing his right, granted by the UNHCR, to be relocated in a safe third country.[176]

The second example concerned an Afghan applicant, who was subjected to a deportation order for breaching his weekly signature obligation on three consecutive occasions and breaching the terms and conditions for legal entry into or exit from Turkey. In this case, the applicant made an application to the TCC asking for an interim measure against the deportation order claiming that if he were deported, he would be persecuted due to his political opinions and religion. The Court granted an interim measure and suspended the execution of the deportation order on the ground that there is a serious risk to the life and spiritual existence of the applicant in Afghanistan if he was deported. Here the principle of *non-refoulement* was being invoked.[177]

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176 The TCC, **A.A.K.,** Application No. 2015/117761, 02 December 2015. See another similar examples: The TCC, **Azizjon Hikmatov**, Application No. 2015/18582, 12 December 2015; The TCC, **K.A**., Application no. 2014/13044, 11 November 2015.

177 The TCC, **Mohammad Abdul Khaliq**, Application No. 2015/6721, 14 May 2015. See another example: The TCC, **R.M.,** Application No. 2015/19133, 16 December 2015.

The third example is related to an Algerian applicant who was apprehended by the police for not having a passport and breaching the terms and conditions for legal entry into or exit from Turkey. The applicant claimed that he came to Syria for political reasons and then fled to Turkey due to the civil unrest in Syria, but he could not take his passport and other official documents due to the unstable situation in Syria. After his apprehension, he applied for asylum but the Ministry of Interior notified him that his application was rejected, and he could challenge this decision within 72 hours. He made an asylum application to the UNHCR, but the deportation order had been issued before a decision was reached. The applicant claimed that, if he was deported, he would face torture and inhuman treatment in his country and also his family union would be destroyed because his partner and children were living in Turkey as conditional refugees. The TCC considered that the threat to his life and risk of his material and spiritual integrity was serious and, therefore, issued an interim measure.[178]

4.3.2. The ECtHR's Jurisprudence on Deportation of Asylum Seekers and Refugees

Two judgements of the ECtHR on deportation decisions are examined below. The first case is related to repeated deportation of four families of Uzbek nationals, and 25 Uzbek conditional refugees to Iran on the ground of national security and public order. The applicants had been invited to police headquarters for distribution of food and school stationery, but they were forcibly deported to Iran on the same day without being notified of the reasons for their deportations or given any opportunity to appeal against the deportation decision. A week later the applicants re-entered Turkey illegally, but police officers deported them to Iran once again. According to the applicants, they had to walk between villages close to the Iranian-Turkey border for 10 days in winter conditions with their children. They asked for help from Iranian gendarmerie, but they first detained them and subsequently deported them back to Turkey.[179] The applicants complained that their repeated deportations to Iran even though they were recognised refugees by the UNHCR had violated their rights guaranteed in Article 3 and 13 of the ECHR. They further claimed Turkish authorities did not notify the reasons for their deportations and they had not obtained any guarantee from the Iranian authorities that they would be admitted to Iran.

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178 The TCC, **Rida Boudraa,** Application No. 2013/9673, 21 January 2015.

179 **Ghorbanov and Others v. Turkey**, paras. 11-16.

They were simply removed to Iranian territory by Turkish police officers, rather than handed over to the Iranian authorities.[180]

The ECtHR requested from the Turkish government

> Whether Iran had guaranteed admission of the applicants prior to their deportation; whether a deportation order had been issued for their deportation and whether the applicants had been notified of such a deportation order.

The Turkish government failed to respond to the Court's questions, and there were also no documents in the case file to show that a formal deportation order had been notified to the applicants. The Court concluded that

> The applicants-refugees recognised by the UNHCR- were illegally deported to Iran…in the absence of a legal procedure providing safeguards against unlawful deportation, and without a guarantee from the Iranian authorities that the applicants would be admitted to Iran. The Court is also particularly struck by the fact that the applicants' removal ...was not even officially recorded by the Turkish authorities.[181]

The Court found the violation of Article 3, 5(1) and 5(2) of the ECHR. The Court also stated,

> The national authorities considered some of the applicants to be dangerous for national security could not justify their removal in such circumstances.[182]

The deportation of the four Uzbek families on the ground of *public* order or public security shows only the tip of the iceberg of informal deportations at the eastern borders of Turkey. This incident was heavily criticised by the NGOs and they applied to the Grand National Assembly of Turkey to start a public investigation to find the officers in charge of this unlawful deportations and to share this with the public.[183] It was the first time that the Turkish Parliament established a sub-Committee to investigate the deportation of Uzbek families but also general problems in migration and asylum practices. The Committee invited security forces, experts from the Ministry of Foreign Relations,

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180 ibid, paras. 19-28.

181 ibid, para. 32.

182 ibid, para. 32.

183 **Kılıç**, Taner, Batı Sınırından Doğu Sınırına: Geri Kabul Anlaşması, "Push Back" ve Özbek Multeciler (From West to East Borders: Readmission Agreement, "Push Back" and Uzbek Refugees) http://multeci.net/index.php?option=com_content&view=article&id=370%3Abat-snrndan-dou-snrna-geri-kabul-anlamas-push-back-ve-oezbek-muelteciler&catid=3%3Aav-taner-klc&lang=en.

Ministry of the Interior and NGOs dealing with human rights and refugee issues. The senior officers from the Security Department and experts from Ministries emphasised the security aspects of the issues and claimed that Uzbek families were on the terrorist list of the USA and the EU. Hosting Uzbek families as refugees in Turkey may "disrupt the country's diplomatic relations" with Russia and also its reputation in the international arena for hosting terrorist groups within its territory.[184]

On the other hand, NGOs claimed that Turkey was generally deporting asylum seekers before registration on an irregular basis. They also claimed that Turkey deports registered refugees unlawfully so as not to disrupt its relations with neighbouring countries. They also emphasised that the biggest problems in Turkey was the deportation of migrants without accessing asylum procedures. The deportation of the Uzbek families is the only one example that the media helped to expose but there are many other cases and desperate situations.[185] After a comprehensive study in the field and discussions with experts, the Report of the Human Right Committee concluded that Turkey should respect the principle of *non-refoulement* and the right to seek asylum. Therefore, all irregular migrants apprehended on Turkey's borders and detained migrants should be informed about their right to asylum and their procedural rights.[186] However, no specific action was taken against the officials responsible for the deportation of the Uzbek families. The Committee shared its report with comprehensive suggestions but without any monitoring activity to follow the implementation of its suggestions in practice.

The second landmark case is related to deportation of a Palestinian applicant because of involvement in a terrorist act. The applicant, who was severely injured in a missile attack and became paraplegic after this incident was taken to Turkey by a humanitarian organisation to obtain better medical care,. The Ministry of Interior issued him with a long-term residence permit after his marriage with a Turkish national. However, he was then subjected to a deportation decision on the ground of national security reasons. After the deportation order, the applicant was first detained in Istanbul Kumkapi Removal Centre, where "he was denied some of the minimal necessities for civilised life".[187] For

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184 **Grand National Assembly of Turkey Human Rights Committee Report** on the Investigation of Problems of the Refugees and Illegal Migrants in Turkey, 2008, pp. 42-43.

185 ibid, p. 166 and pp. 99-123.

186 ibid, pp. 304-305.

187 **Asalya v. Turkey**, para. 53.

instance, the applicant had to sleep on a table, could not go to the toilet without any assistance and could not continue his treatment. The applicant requested the ECtHR to issue an interim measure to halt his imminent deportation from Turkey. The Court rendered an interim measure and also stated that the applicant was being subjected to degrading treatment incompatible with Article 3 of the ECHR considering the conditions of the detention centres.

Also the Court was particularly struck by the fact that Ankara Administrative Court, which was responsible for reviewing the deportation decision, actually did not

> …carry out a genuine inquiry into the allegations of the State authorities on the basis of information provided to it, such as by way of verifying the relevant factual circumstances and assessing whether genuine national security concerns were truly at stake. The domestic court's absolute silence on these matters raises the suspicion that it took the authorities' assertions at face value, rather than subjecting them to a rigorous scrutiny.[188]

The Court noted that the administrative court failed to assess whether the deportation of the applicant would interfere with his family life and whether such interference would strike a balance between competing interests, namely the public interests in protecting national security and the applicant's interest in protecting his family life. The Court concluded that the applicant did not have an effective remedy about his complaint under Article 8 of the ECHR, where the issues at stake were thoroughly examined in proceedings, and therefore there had been a violation of Article 13 of the ECHR in conjunction with Article 8.[189]

These cases once again demonstrated that deportation decisions applied by the administrative authorities have often been flawed. The LFIP, which regulates appeal procedures against deportation decisions, should be amended and automatic judicial review of the deportation decisions should be adopted to reduce arbitrary deportation decisions of administrative authorities. In addition to the automatic judicial review, there should be an independent authority to rigorous investigate whether there is sufficient evidence that the person subject to a deportation decision would be subjected to inhuman or degrading treatment in her/his country of origin.

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188 ibid, para. 117.

189 ibid, paras. 116-119.

5. Conclusion

The evidence above shows that the EU-Turkey Statement has brought many challenges to Turkey's delivery of human rights. Three main challenges have been identified. First, readmitted asylum seekers and refugees have been struggling to access effective asylum procedures and durable solutions in Turkey. Although Turkey provided assurances to the EU that non-European refugees would not be sent back to their country of origin and would be given the same equal rights as European refugees after readmission to Turkey, the LFIP does not provide permanent residence permits, citizenship after living a specified period of time in the country, family unification or free movement within the territory of the country. Therefore, these legal limitations constitute a serious barrier to the integration of asylum seekers and refugees. Turkey's asylum legislation has left large numbers of people in legal limbo and forced them to look for durable solutions in the EU, even risking their lives.

The other challenging aspect of the EU-Turkey RA is related to Turkey's increasing tendency to detain asylum seekers and irregular migrants on the grounds of loosely defined reasons; including "public order and public security" or "breaching the rules of entry into or exit from to Turkey". The recent experiences of Turkey have also shown that almost all readmitted refugees and asylum seekers may be subjected to administrative detention and living conditions of the removal centres which do not meet international standards. Turkey has systematically violated Article 3, 5 and 13 of the ECHR in many cases due to the prolonged detention in inhuman living conditions. Furthermore, recent judgments of the TCC and the ECtHR have underlined that there is still no effective administrative or judicial remedy against poor living conditions in the removal centres.

Lastly, the EU-Turkey RA contains a high risk of deportation of asylum seekers and refugees as irregular migrants without access to asylum procedures and effective remedy. Turkey's increasing security-oriented policies towards foreigners can trigger deportation of genuine asylum seekers to their country of origin without trying for a balance between public security and the right to life. Unfortunately, there are many examples where administrative authorities have failed to scrupulously investigate the special situation of individuals and have ordered deportation of even registered refugees for posing a threat to public order, public security and public health. Furthermore, the judgments of the ECtHR and the TCC have revealed that administrative courts fail to carry out genuine investigations into whether the reasons for deportation decisions are based on factual

circumstances and whether such decisions strike a balance between public interest and the applicant's interest. Turkey's increasing security-oriented policies are triggering the deportation of refugees and asylum seekers to their country of origin on grounds of public security and public order without balancing the rights to life and the security of the public.

All this evidence confirms that we are not far from Arendt's argument that refugees find themselves in a fundamental condition of rightlessness due to their dependence on the goodwill or generosity of nation states.[190] It is very clear that the EU-Turkey Statement left refugees and asylum seekers to the generosity of the Turkish government. The Statement did not mention anything regarding the fundamental rights of refugees and Turkey's responsibility towards them but only mentioned the resettlement plan and financial assistance due to Turkey. Thus, this refugee deal reduces the capacity of asylum seekers and refugees to access and to enjoy even their most fundamental basic rights, such as the right to seek asylum and the right to an effective remedy against human rights violations. The fieldwork findings indicate that refugees are exposed to the overwhelmingly coercive power of states through detention and deportation orders on many occasions. Even though they are considered within the privileged pale framework of law and can avail themselves of an effective remedy against unlawful acts of administrative authorities, they are routinely denied their access to judicial review due in part to deficiencies in legal assistance and interpreters but also to the hostile attitudes of state agents.

Given the precarious situation of refugees and asylum seekers in Turkey, it is recommended that Turkey strengthen its institutional capacity and legal safeguards to cope with large numbers of irregular migrants and refugees to avoid violating the principles of *non-refoulement*. Establishing an independent monitoring body to assess the special situation of asylum seekers and refugees subjected to deportation and detention decisions could reduce infringements of the principle of *non-refoulement* and human rights violations. Furthermore, Turkey should adopt an automatic judicial review of contested administrative detention and deportation decisions. An automatic judicial review would give foreigners equal rights as citizens and considerably decrease the imbalance of power between public authorities and foreigners. Besides establishing an

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[190] **Arendt**, Hannah, The Origins of Totalitarianism, Third Edition, George Allen & Unwin Ltd: London, 1966, p. 283.

automatic judicial review, providing an effective legal assistance system to support asylum seekers and refugees would also help to increase appeals before the Courts and to decrease human rights infringements against asylum seekers and refugees. For this reason, the Turkish government should allocate a separate budget to the Turkish Bar Association.

Having examined the effects of the implementation of the EU-Turkey Statement on Turkey's delivery of human rights obligations, the next chapter analyses the original interview data generated by my fieldwork. The fieldwork data provides further evidence upon which to assess whether refugees and asylum seekers can access their civil and political rights in practice.

CHAPTER VI: Fieldwork Findings: The Impact of the EU-Turkey Readmission Agreement on the Civil and Political Rights of Refugees

> Hell is no longer a religious belief or a fantasy, but something as real as houses and stones and trees. Apparently, nobody wants to know that contemporary history has created a new kind of human beings-the kind that are put in concentration camps by their foes and in internment camps by their friends.[1]

1. Introduction

Turkey has been hosting more than 3 million refugees and asylum seekers over the last six years. Although Turkey's outstanding effort deserves to be applauded by the international community, it is clear that there are serious deficiencies in its refugee protection system. Considering Turkey's capacity, the implementation of the EU-Turkey RA carried many challenges for the principle of *non-refoulement* and the fundamental rights of refugees as envisioned by the 1951 Refugee Convention and other human rights instruments. To explore the real situation of readmitted refugees and asylum seekers, the researcher conducted interviews with 18 key actors including five representatives of NGOs, four judges, five lawyers and four senior officials and experts.[2] The data drawn from the fieldwork has thrown great light on the real situation of refugees in Turkey both confirming the findings of other researchers and giving a picture of the situation in 2016.

The participants addressed the serious problems that refugees and asylum seekers are facing in Turkey. These problems can be divided into two categories namely access to civil-political rights and access to socio-economic rights. The first category is the main focus of this chapter which builds on Arendt's reflections on statelessness in its analyses of the responses of the participants about refugees and their situation in Turkey. As Arendt highlighted, the deficiencies in accessing civil and political rights leave many refugees and asylum seekers in a "rightless" position. They have "no right whatsoever and live under the threat of deportation".[3] Arendt argues that every individual should be

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1 **Arendt**, Hannah, We Refugees, Edited by Robinson, Marc, Altogether Elsewhere, Writers on Exile, Faber and Faber: Boston, 1943, p. 111.

2 See Chapter I for a discussion of the methodology used in the research and for the way in which the participants are identified.

3 **Arendt**, Hannah, The Origins of Totalitarianism, Third Edition, George Allen & Unwin Ltd: London,

recognised as a subject of law and claim their fundamental human rights as part of the global community. However, the ability of refugees and asylum seekers to access and enjoy their fundamental rights depends on their legal status. The current situation of refugees in Turkey supports Arendt's interpretation on statelessness and the precarious situations of refugees.

The statements of the interviewees indicate that refugees can live outside any legal status for years without gaining refugee status or citizenship status and this lack of legal status has been affecting their access to fundamental human rights. They are subjected to the coercive power of the state authorities through detention and deportation decisions but they cannot avail themselves of effective remedies due to complex legislative procedures, lack of translators or legal assistants. They, therefore, fall outside the rule of law. The fieldwork findings support my argument that Turkey is not a safe third country for refugees and asylum seekers and the EU-Turkey Statement is leading to a breach of Article 3 of the ECHR and Article 33 of the 1951 Refugee Convention.

2. Perception of the Participants about the EU-Turkey Agreement on Refugees

The fieldwork first sought to establish how the participants evaluate the EU-Turkey Statement. Except for one participant, there was agreement that the EU-Turkey Statement aims to stop the refugee and irregular migration flow into the EU territory but it has neglected the humanitarian side of the issue. As E1[4] said**,**

> The EU aims to use Turkey as a cheap hotel for refugees…there is no benefit for refugees.

He thought that Turkey had to accept the EU's offer to gain some advantages from the EU and get out from the stifling position in its international relationships. On the other hand, the EU also desperately needs Turkey to stop refugee flow. He alleges,

> The Agreement had been signed between two losers. None of them care about refugees and their rights but only use them as a bargaining chip. Turkey has consistently used refugees for threatening the EU saying if you do not give visa liberalisation for Turkish citizens, we will open the border gates and release all of them…Also, the EU wants to

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1966, p. 283.

4 I will use abbreviations to protect participants' anonymity. "E" refers to "expert" in the migration and refugee areas. I will add numbers E1 and E2 to distinguish experts. E1 works as a Vice Director of a Migration Research Centre of a prominent University.

> stop refugee flow by signing an agreement with Turkey whatever the cost even though this refugee deal is not compatible with human rights…There is hypocrisy.

In line with E1's argument, NGO1[5] also expressed the same concerns in his interview stating:

> When I look at the content of the EU-Turkey RA, I can see the EU's two-faced behaviour…There is no way to stop migration flow without ending the reasons behind it; wars, economic instability and unfair income distribution…The EU is now building a wall to redirect migration and refugee flow into another country. This approach especially shows the EU's two-faced approach and conflicts with its human rights centred perspective.

Considering the unfair refugee burden on Turkey, he criticised the hypocritical approach of the European member states during the Syrian refugee crisis. He stated that even though the EU has a population of more than 500 million and a gross domestic product per capita of about 27, 000 dollars, it took only 1 million refugees, which constitutes less than 0.2 per cent of the EU's population. In contrast, Turkey has a population of 75 million and a GDP per capita of 9,000 dollars but it has been hosting more than 3 million refugees, which is equal to 3.5 % of its population. It is very contradictory that although EU countries are far more prosperous than Turkey, they are still looking for ways to shift its responsibility to Turkey. This is against the moral values the EU has defended for years and the principle of fair sharing of refugee responsibility.

E2[6] also harshly criticised the EU-Turkey Statement from a human rights approach and commented on its serious consequences for refugees and asylum seekers. She said,

> The EU insisted Turkey sign it from the start of 2011. From the outset, it knew that the EU-Turkey RA would violate human rights but it just ignored it. I think that the EU-Turkey RA is a historic disaster. If this continues in this way, it will trigger many human rights violations both in Turkey and in Greece.

Furthermore, E2 underlined the negative impacts of Turkey's generous refugee policy on the country's security. She alleged that this open door policy makes Turkey a haven for

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5 This was taken from the interview with the President of an NGO, which provides legal assistance to refugees and asylum seekers. He is also working as a lawyer. I numbered the participant as NGO1.

6 This was taken from the interview with a university lecturer who is specialised on the EU-Turkey RA.

terrorists. Now Turkey is not safe even for its own citizens. Turkey is fighting inside and outside against terrorists.

It should be admitted that E2's view connecting refugees with the security of the country is not unique in Turkish public policy. Especially after terrorist attacks happened in metropolitan cities in Turkey, this view has become prevalent and it triggered some restrictive policies towards refugees and asylum seekers. Following the failed coup attempt in 2016 the Turkish government changed some provisions of the LFIP related to deportation of international protection seekers on the grounds of public security and public order. As stated in chapter V, this approach has criminalised asylum seekers and refugees and makes their stay in Turkey more difficult than before.

Contrary to other interviewees, NGO2[7] has positioned himself in favour of the EU-Turkey RA saying:

> The EU-Turkey RA has been criticised by many human rights organisations and NGOs but if we look at refugee movements last year, especially deaths in the Aegean Sea, I can say that the refugee deal between the EU and Turkey was inevitable. Turkey was an indispensable partner of the EU in resolving the refugee crisis…If we did not sign this agreement with the EU, we would definitely talk of more deaths of refugees in the Aegean Sea. I believe that the EU-Turkey RA could produce some benefits for refugees.

NGO2 also underlined the importance of working close with EU member states and that if both contracting parties cooperate on refugee issue effectively, it will improve living conditions of refugees in Turkey. However, the tensions on a political level have always been hampering the dialogue.

The interviewees overwhelmingly emphasised that the EU's demands are unfair and inconsistent with its human rights approach. The EU wants to use Turkey as a "gatekeeper to Europe" or "guardian of Fortress Europe". To reach its aim, the EU uses membership and visa liberalisation as a carrot to "make good use of Turkey".[8] This refugee deal has "unveiled a paradox of a EU that has spent several decades preaching its own standards to neighbouring countries" but now it has been using this legal framework to contain or

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7 This was taken from the interview with the President of the NGO, Journalist and former spokesperson of the UNHCR.

8 **Tolay**, Juliette, Turkey's "Critical Europeanization": Evidence from Turkey's Immigration Policies, Edited by Paçacı Elitok, Seçil & Straubhaar, Thomas, Turkey, Migration and the EU: Potentials, Challenges and Opportunities, Hamburg University Press: Hamburg, 2012, p. 54.

readmit refugees to Turkey.[9] Turkish participants are well aware of this contradictory nature of the EU migration and asylum policies and thus they heavily criticised the EU-Turkey RA for being unethical.

The interviewees also criticised Turkey for using refugees as a "bargaining chip" against the EU. During the negotiation of the refugee deal, Turkey was well aware of its upper hand and gained valuable bargaining leverage over the EU on a variety of issues. In accordance with leaked minutes of a meeting between the EU and Turkey, the President of Turkey said,

> We can open the doors to Greece and Bulgaria anytime…so how will you deal with refugees if you don' t get a deal? Kill the refugees?[10]

Concerning Turkey's increasing negotiation power, Turkey uses mass migration as a weapon to reach its demands. As an opportunist player, Turkey has no direct role in the creation of the migration crisis but simply exploits the existence of the refugee flow generated by others.[11] Accordingly, the evidence in the bargaining process of the EU-Turkey Statement shows that refugee protection responsibility has been shared between sovereign powers in accordance with their power relations.[12] However, it is so distressing that both parts followed their national interests in the negotiations but they have neglected refugees and their precarious situation. As Spain's socialist opposition leader's description, the EU-Turkey refugee deal is the "pact of shame" from human rights perspective.[13]

3. The Precarious Legal Standing of Refugees

In the fieldwork, the participants were asked whether Turkey is a safe third country concerning refugee protection. The participants answered this question by looking at a different dimension of the subject. Drawing from the participants' views, this section

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9 **Collet**, Elizabeth, The Paradox of the EU-Turkey Refugee Deal, Migration Policy Institute, March 2016, http://www.migrationpolicy.org/news/paradox-eu-turkey-refugee-deal.

10 **Greenhill**, Kelly, Open Arms Behind Barred Doors: Fear, Hypocrisy and Policy Schizophrenia in the European Migration Crisis, *European Law Journal*, 22(3), May 2016, p. 327.

11 ibid, pp. 325-332.

12 ibid. pp. 325-332; **Snyder**, Jack, Realism, Refugees, and Strategies of Humanitarianism, Edited by Betts, Alexander & Loescher, Gil, Refugees in International Relations, Oxford University Press: Oxford, 2004, pp. 53-57.

13 Spain's Sanchez Wants EU-Turkey 'Pact of Shame' Altered, Politico, 31.11.2016, http://www.politico.eu/article/sanchez-rajoy-turkey-eu-deal-refugees-migration-crisis-illegal-pact-of-shame/.

considers whether Turkey provides an efficient and accessible refugee protection regime to readmitted migrants who are seeking international protection and respects the principle of *non-refoulement* in practice.

3.1. No Legal Status: "Bare Humanity"

Despite the generous humanitarian approach of the Turkish government, integration of refugees remains problematic within Turkish asylum law.[14] In the current legal framework, conditional refugees and temporary protection beneficiaries cannot gain Turkish citizenship as other foreigners can even if they fulfil the long-term residence requirement.[15] There is no provision in the Turkish asylum law about gaining citizenship except through marriage to a Turkish citizen or being a child of a spouse married to a Turkish citizen. Furthermore, Article 25 of the Temporary Protection Regulation openly excludes the temporary protection beneficiaries from applying for Turkish citizenship.[16] Accordingly, although granting citizenship is the most durable long-term solution to end refugee status of the individual in refugee law, there is no option of naturalisation in Turkish asylum law unless the Turkish Parliament alters the law. Accordingly, refugee children who are born in camps or a satellite city cannot gain their country of origin's citizenship or Turkish citizenship and they can only obtain a temporary ID card. These newborns remain as stateless.[17]

Turkish asylum law also does not provide refugee status but only temporary protection, conditional refugee or subsidiary protection status. Article 11 of the Temporary Protection Regulation[18] cannot provide temporary protection beneficiaries access to refugee status even after the temporary protection ends. Accordingly, Syrian refugees are living under temporary protection status for nearly six years but they do not know what will happen if their temporary protection status ends. This extreme uncertainty puts asylum seekers and refugees in a precarious situation, and it is assessed as a major push

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14 **Skribeland**, Özlem Gürakar, A Critical Review of Turkey's Asylum Laws and Practices, Seeking Asylum in Turkey, Norwegian Organization for Asylum Seekers, 2016, p. 21. http://www.asylumineurope.org/sites/default/files/resources/noas-rapport-tyrkia-april-2016_0.pdf.

15 Article 11 of the Turkish Citizenship Law requires foreigners to be resident in Turkey "without interruption for five years before applying for Turkish citizenship".

16 Article 25 of the Temporary Protection states that "the period of stay in Turkey under Temporary Protection shall not be added to required total period to reside in Turkey to apply for citizenship".

17 **Cagaptay**, Soner & **Menekse**, Bilge, The Impact of Syria's Refugees on Southern Turkey, *Washington Institute for Near East Policy*, Policy Focus 130, July 2014, pp. 9-10.

18 OGT, 22.10.2014, No: 29153.

factor.[19] Considering prolonged stay of refugees under temporary status, Hathaway and Costello suggest that it is very vital to define a maximum time limit for temporary protection to eliminate uncertainty and provide a dignified life for refugees. Although the 1951 Refugee Convention does not envisage any time limit for temporary protection, Hathaway and Costello suggest a period of five years as the maximum time limit for temporary protection.[20] In another article, Hathaway and Neve suggest that refugee-hosting states should determine an optimum time limit for temporary protection in accordance with two main elements: "revitalization" of the capacity of hosting states and "the physiological needs of refugees".[21] Given the displaced Syrian refugee population in Turkey for six years, it is recommended that it is essential to clarify when temporary protection beneficiaries can have access to full permanent residency permit or citizenship status. Granting permanent residence is one of the most effective ways that the states can facilitate the integration of refugees as required by Article 34 of the 1951 Refugee Convention. It would facilitate their access to their fundamental rights and reduce their feeling of insecurity.[22] Furthermore, the Turkish government should remove the barrier to naturalisation after five years or more. This would reduce their rightless position and their integration into Turkish community may revive its economy.[23]

During my interviews with the participants, were asked whether the Turkish Government facilitates the integration of refugees into the Turkish community and how they evaluate the situation of refugees in the long term in Turkey. Participants overwhelmingly stated that temporary protection status or conditional refugee status constitutes the main obstacle to the integration of refugees into the Turkish community. Integration requires a long-term residence permit with the facilitation of Turkish citizenship[24] but because of security

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19 **Skribeland**, 2016, p. 21; **Ineli-Ciğer**, Meltem, How Well Protected are Syrians in Turkey? Open Democracy, 17 January 2017, https://www.opendemocracy.net/mediterranean-journeys-in-hope/meltem-ineli-ciger/how-well-protected-are-syrians-in-turkey.

20 **Costillo**, M. Angel & **Hathaway**, James C., Temporary Protection, *Refuge: Canada's Journal on Refugees*, 15(1), 1996, p. 11.

21 **Hathaway**, James C. & **Neve**, R. Alexander, Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection, *Harvard Human Rights Journal*, 10, 1997, p. 182.

22 **Şimşek**, Doğuş & **Çorabatır**, Metin, Challenges and Opportunities of Refugee Integration in Turkey, Research Centre on Asylum and Migration, December 2016, pp. 98-99.

23 **Al-Omar**, Saleem, Turkey is Missing Out on an Opportunity to Integrate Syrian Refugees and Revive Its Economy, Atlantic Council, 19 May 2017, http://www.atlanticcouncil.org/blogs/syriasource/turkey-is-missing-out-on-an-opportunity-to-integrate-syrian-refugees-and-revive-its-economy**.**

24 As stated in Article 34 of the Refugee Convention states should "facilitate the assimilation and

concerns after the failed coup and fragile social acceptance of refugees, it will not happen in the near future.

NGO2 underlined temporary status of refugees under Turkish asylum law and its negative effects on establishing a durable life for refugees. He said,

> Turkish asylum system does not provide a permanent status to refugees. Thus refugees cannot see their future in Turkey. Even though they establish their own work or go to university, they are not entitled to get long-term residence permits or citizenship at the end. We should ask ourselves this question: How do we ordinary people plan our life? Refugees also have a right to plan their life or their children's life as we do. If they do not have any legal status, how can they foresee their future? For this reason, Turkey is not a safe third country for refugees.

NGO1 also underlined Turkey's humanitarian assistance to refugees in his interview,

> Turkey's standpoint towards refugees is mainly based on a humanitarian foundation. Since the beginning, the government's priority has always been providing them with a shelter and food for their survival. Turkey does not foresee any integration policies.

E1 complained about the approach of the DGMM, which deliberately ignores integration of refugees into Turkish community:

> Turkey has never had integration policies towards Syrian refugees and other refugees. Turkey thought very simply: Assad regime in Syria would end in a very short time and all Syrians would go back to their country. Thus, the authorities did not need any integration policies, such as education, eliminating cultural differences and other welfare policies. In the first two years, Turkish authorities even did not register them. After two years, the UNHCR insisted Turkey did register them. So, Turkey's policy based on their return failed. After five and half years, Turkish authorities started to realise that they will not go back to their countries. So far the word, 'integration' has not been deliberately used by the DGMM. If they start to use this word, they have to admit that refugees will stay in Turkey.

Even though there are many deficiencies in integration attempts of refugees into Turkish community, it is a very welcoming development that President Erdoğan made in his statement about granting citizenship status to Syrians[25] in 2016. Even though his

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naturalisation of refugees".

[25] **The Telegraph**, Turkey Plans to Offer Citizenship to Syrian Refugees, 3 July 2016, http://www.telegraph.co.uk/news/2016/07/03/turkey-plans-to-offer-citizenship-to-syrian-refugees/.

statement was welcomed by refugees and refugee organisations, it has not found support in Turkish society. The news spread quickly on the social media and the hashtag #IDon'tWantSyrianInMyCountry (#ÜlkemdeSuriyeliİstemiyorum) became a trending topic worldwide.[26] There was a growing concern amongst the opposition parties that refugees would be used as a political instrument by the government in the future elections.[27] Also, the religious background of Syrian refugees, who are overwhelmingly Suni Arabs, makes the issue very complex. Also, Kurdish nationalists and secularists worry that political leaders will use refugees to transform the national identity, cultural and political values and thus they have a concern that the long-term refugee settlement may end up with their marginalisation in their home towns.[28] Some of the tough nationalists have also disliked Syrian refugees and accuse them being "traitors". One of the 20 years old Turkish citizens expressed his dislike with the following words:[29]

> People are curious to know why the Syrians came to Turkey. If I were them I wouldn't leave my country. I would stay home and fight back against the enemy to protect my homeland. Syrians are cowards, that is why they left their country. They are traitors.

Recently this kind of discourse has become common among Turkish citizens and a popular conservative-pious-Muslim poet, İsmet Özel, supported his view in his speech saying,

> Syrians who came to Turkey are traitors.[30]

After these unexpected criticisms, the President had to change his statement and said that only some refugees who contribute to the Turkish community may be granted Turkish citizenship. However, this statement of the President fundamentally conflicts with refugee protection regime and human rights law. The discussions about granting

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26 **Europe Report**, Turkey's Refugee Crisis: The Politics of Permanence, International Crisis Group, Report No: 241, 30 November 2016, p. 23.

27 **Kılıç**, Taner, Türkiye'de Mülteci Hukuku Uygulamaları, Geri Kabul Süreci, (The Asylum Law Practice of Turkey: Readmission Process), Birikim Dergisi, Ağustos-Eylül, 2016, pp. 69-70.

28 **Europe Report**, Turkey's Refugee Crisis: The Politics of Permanence, International Crisis Group, Report No: 241, 30 November 2016, p. 15; **Kaya**, Ayhan, Syrian Refugee and Cultural Intimacy in İstanbul: "I Feel Safe Here", European University Institute, Robert Schuman Centre for Advanced Studies, RSCAS 2016/59, 2016, p. 1.

29 This quotation was taken from **Kaya**, Ayhan, Syrian Refugee and Cultural Intimacy in İstanbul: "I Feel Safe Here", European University Institute, Robert Schuman Centre for Advanced Studies, RSCAS 2016/59, 2016, p. 19.

30 **Özel**, İsmet see the following video recorded on 16 December 2016 https://twitter.com/fazzare/status/677191012738011140.

citizenship to Syrians maintains its vitality and importance but the failed coup attempt overshadowed it and so far there has been no policy explanation from the Turkish government. It should be underlined that giving citizenship status to refugees is seen as a very positive step from the view of a rights-based approach but concerning reactions; it would jeopardise the very fragile social acceptance within Turkish society.[31]

E1 underlined the fragile situation of refugees in satellite cities due to increasing hostility and violent attacks towards refugees after the President's declaration about granting citizenship to Syrians:

> When Recep Tayyip Erdoğan shared his government's preparation about granting citizenship to Syrian refugees, it had led to many attacks against Syrian refugees and their workspaces. Unfortunately, due to lack of transparency, public authorities did not prosecute these incidents and also they did not launch any criminal investigations against concerned suspects. I met many refugees, who had lost all their belongings during these incidents.

E1 also shared his concern if the government grants citizenship to Syrians:

> As far as I am concerned, granting citizenship to Syrians is very absurd. If Turkey grants them citizenship, no cooperation with international organisations will be left. This only adds another three million poor people into Turkish population. Nobody wants that…Furthermore, Turkey has still applied the geographical limitation of 1951 Refugee Convention to avoid becoming a buffer zone for non-European refugees. If we grant citizenship to Syrians now, then every irregular migrant will think that if we head to Turkey, we would take our chance to reach the EU but if not, then we would stay in Turkey. After some time, the Turkish government would grant us citizenship like Syrians. At that time Turkey will have turned into to a refugee heaven.

Another interviewee, NGO3,[32] also assessed the importance of granting citizenship to Syrian refugees and he warned about the fragility of the issue. He also suggested:

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31 **Erdoğan**, Murat & **Kavukçuer**, Yudum & **Çetinkaya**, Tuğçe, Development in Turkey: The Refugee Crisis & The Media, Freedom Research Association, Liberal Perspective Analysis, 5, April 2017, p. 12; **Csicsmann**, Lâszló, The Syrian Refugee Crisis Reconsidered: The Role of the EU-Turkey Agreement, *Corvinus Journal of International Affairs*, 1(1), 2016, p, 95; **Kılıç**, 2016, p. 69.

32 This was taken from the interview with the participant who is the coordinator of the NGO.

> Granting citizenship to Syrian refugees would meet with terrible resistance by the Turkish community and opposition parties. Without preparing the society, these political discourses will open the door to new attempts of lynching against refugees.

NGO2 focused on the deficiencies in adopting durable solutions at the governmental level:

> There is no strategic planning at the governmental level about the long-term integration of refugees. Only some decisions are taken like patchwork but it seriously affects refugees' life and the cooperation between the EU and Turkey. In Turkey, the refugee issue has been completely dropped from the agenda of the government after the failed coup attempt on 15th of July 2016. To overcome these shortcomings in practice, more transparent policies need to be created by the Turkish government.

Considering the participants' view on granting citizenship to refugees, it is very clear that neither Turkish community nor Turkish politicians are ready for it.

The research study on "Syrians in Turkey: "Social Acceptance and Integration" which was conducted in three border cities and three non-border cities in Turkey with 144 in-depth interviews (72 with Syrians and 72 with local people) reaffirmed the fragile social acceptance within the Turkish community and rising hostility towards refugees. This provides significant data about refugees' relations with Turkish society, future expectations of Syrians and the level of "social acceptance" in Turkey. Although all participants in the research evaluate Turkey's open door policy towards Syrians as a humanitarian act and they thought that it is right to help them on moral grounds, nearly all of them say that they want to Syrians to return to their country. Nearly 80 per cent of the Turkish participants opposed granting citizenship to Syrians and they do not want Turkey to take more refugees. They demand that refugees are not allowed to stay in cities but should only stay in camps far from cities. The research suggests that Turkish citizens see refugees as an economic burden on country's resources. This complaint is more related to the intensive refugee existence in the metropolitan cities. Nearly 90 % of Syrians are living outside the camps and this has led to inevitable social-economic and political interaction with the Turkish community.[33]

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[33] **Erdoğan**, Murat, Syrians in Turkey: Social Acceptance and Integration Research, Hacettepe University Migration and Politics Research Centre (HUGO), November 2014; **Erdoğan**, Murat, Perceptions of Syrians in Turkey, Commentary, *Insight Turkey*, 16(4), 2014, p. 69.

As Kirişçi and Elman describe, the majority of the Turkish community feel that their hospitality comes to near of the limits. Their acceptance towards refugees is declining and if the Turkish government grants more rights to Syrian refugees, the hostility may grow and explode in an unexpected way.[34] Limited job opportunities, especially in low paid jobs are a major issue. It is estimated that 400,000 refugees work informally in Turkey and this is very problematic given the high unemployment rate of 11.2 per cent.[35]

Resentment towards refugees has been observed in the language of the Turkish media. The very well known columnist, Ertuğrul Özkök, wrote in his column headlined "Friend Know Your Place If You Are A Guest" in Hürriyet Newspaper.[36] This is the most striking example that Turkish community only sees refugees as a "guests". Thus, even in very small incidents, they are reminded of their "guest" status and they are subjected to marginalisation, exclusion and harassment. Unfortunately, no strategic plan, which encourages interactive integration, has been made by the Turkish authorities to reduce this increasing hostility towards refugees.[37] This situation affirms Chimni's foresight that when the international community fails to share the refugee responsibility fairly, it may lead to downgrading the core principles of refugee protection regime in the refugee-hosting communities. This increasing burden on hosting countries may end up with the violation of the principle of *non-refoulement*[38] and downgrading the living condition of refugees.

3.2. Struggles in Accessing Asylum Procedures

One of the aims of the fieldwork was to determine whether readmitted refugees and asylum seekers have the opportunity to apply for asylum. The participants' responses indicate that the deficiencies in bureaucratic procedures both in Greece and in Turkey

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34 **Kirişçi**, Kemal, Syrian Refugees and Turkey's Challenges: Going Beyond Hospitality, Brookings, May 2014, pp. 1-3; **Elman**, Pinar, From Blame Game to Cooperation: EU-Turkey Response to the Syrian Refugee Crisis, The Polish Institute of International Affairs, Policy Paper, No. 34(136), October 2015, p. 7.

35 **Erdoğan** & **Kavukçuer** & **Çetinkaya**, 2017, p. 9.

36 **Özkök**, Ertuğrul, "Friend Know Your Place If You Are A Guest" (Arkadaş Misafirsen Misafirliğini Bil), Hürrriyet Gazetesi, 27 Temmuz 2012, http://www.hurriyet.com.tr/arkadas-misafirsen-misafirligini-bil-21077508.

37 **Kılıç**, Taner, Türkiye'de Mülteci Hukuku Uygulamaları, Geri Kabul Süreci, (The Asylum Law Practice of Turkey: Readmission Process), *Birikim Dergisi*, Ağustos-Eylül, 2016, p. 67.

38 **Chimni**, B.S. The Principle of Burden Sharing: Some Reflections, Presentation to the Summer School in Forced Migration, University of Oxford, July 1999, p. 7; **Betts**, Alexander & **Milner**, James, The Externalisation of EU Asylum Policy: The Position of African States, Working Paper No. 36, University of Oxford, 2006, p. 32.

have hindered asylum seekers from using their right to seek asylum. The responses of the participants verified the recent reports of the human rights organisations that despite significant financial and human resources support from the EU to Greece, the Greek asylum system is still unable to ensure efficient access to quality asylum procedures for all.[39] The systemic use of the safe third country concept in the admissibility procedures is also undermining the effectiveness of procedural safeguards and access to the asylum procedures.[40] This deficiency in asylum procedures in Greece has led many asylum seekers to find themselves in Turkey without having been given a chance to apply for asylum in Greece.

Because of these deficiencies in the Greek Asylum Service, Turkey should provide fair and accessible asylum procedures for readmitted persons under the EU-Turkey Statement to prevent further removal and chain *refoulement*. My interviewees overwhelmingly highlighted that Turkey's new asylum policy provides some safeguards to asylum seekers but many challenging issues are still hampering the right to seek asylum in practice. The first challenge is related to the negative approach of the governmental authorities to the readmission procedure. As L1[41] emphasised in his interview,

> The EU-Turkey RA fueled many discussions in the Turkish Parliament and the main opposition party, Republican People's Party (CHP), accused the Government of signing the agreement with the EU without considering national interests. Against these accusations, the government defended itself stating that the EU-Turkey RA will not be a burden on Turkey and every readmitted migrant will be sent back to their country of origin on the same day of readmission to Turkey. What I have experienced in the field indicates that Turkey will try to send back all readmitted migrants to their country of origin and there is no chance to apply for asylum for readmitted migrants in Turkey.

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39 **Amnesty International**, A Blue Print for Despair, Human Rights Impact of the EU-Turkey Deal, January 2017, p. 11.

40 **ECRE**, The Implementation of the Hotspots in Italy and Greece, 2017, p. 34, http://www.ecre.org/wp-content/uploads/2016/12/HOTSPOTS-Report-5.12.2016..pdf.; **Lovertt**, Asleigh & **Whelan**, Claire & **Rendón**, Renata, The Reality of the EU-Turkey Statement**:** How Greece has Become a Testing Ground for Policies that Erode Protection for Refugees, Publishers: International Rescue Committee & Norwegian Refugee Council and Oxfam Joint Agency, Briefing Note, 17 March 2017, p. 2; **Sklerapis**, Dimitris, The Greek Response to the Migration Challenge: 2015-2017, Konrad Adenauer Stiftung, 16 March 2017, p. 4.

41 This was taken from the interview with the lawyer and a Chairman of the NGO in Turkey. I will use abbreviations to protect participants' anonymity. "L" refers to "lawyer" in the migration and refugee studies. If there is more than one participant in the same position, I will add numbers like L1 and L2 for two lawyers.

The second problem is related to procedural safeguards for accessing asylum application. Although the LFIP provides some safeguards, it does not work effectively in practice due to institutional deficiencies. Thus, many readmitted asylum seekers have been deported to their country of origin without applying for asylum as soon as they arrive in Turkey. L1 shared his experience as a lawyer after the EU-Turkey refugee deal on 18th March 2016. He witnessed readmission of five Congolese nationals without accessing asylum procedures in Greece under the EU-Turkey refugee deal. After their readmission to Turkey, they asked for asylum in Turkey, but Turkish authorities refused their applications without taking any official application from them. After their second attempt to apply for asylum in written form, the authorities said,

> 'You have no right to apply for asylum because you were readmitted from Greece, you should have asked for asylum there'…As soon as I was informed about their situation I went to see them in Kırklareli Removal Centre. I studied their file as their lawyer, and I realised that they signed the notice of deportation decision without knowing what they had signed. Although they cannot speak any word of English but, only French, the deportation notice was written in English and notified to them in English…After examination of the file, I found out that they missed the required time to apply to the Court for annulment of the deportation decision. Since people who are subjected to deportation decision should go to Administrative Court within 15 days after notification of deportation order in accordance with LFIP. To halt the deportation decision, I opened the case alleging that administrative authority did not notify my clients about their deportation orders in their language.

After L1's allegation before the Court, the Director of Provincial Migration Management in Kırklareli brought a French translator from another city and took asylum applications of these five Congolese asylum seekers in their language. Three of them were released from the removal centre after their asylum applications were accepted. The other two were also released after five months detention in Kayseri Removal Centre. However, there is no doubt that without L1's involvement, these five Congolese asylum seekers would have been deported to their country of origins. He said,

> I think these Congolese asylum seekers were the luckiest group, who accessed their lawyer and had a chance to apply for asylum.

As exemplified in the above case, procedural and administrative deficiencies in removal centres have made it difficult for readmitted migrants to get access to asylum procedures

before their deportation takes place. NGO3 highlighted some of the difficulties in applying for asylum from removal centres. He said,

> Non-Syrian refugees have a weak chance to access asylum procedures from removal centre. There is no possibility that they will be released. If somebody is held in a removal centre, they will automatically be removed to their country of origin. As far as I know, all readmitted non-Syrian refugees had been sent to Kırklareli Removal Centre and we did not know what happened to them after their detention. No government agencies have made any statement about them so far.

NGO3's statement also highlights that non-Syrian asylum seekers face a high risk of *refoulement*. This problem originates from Turkey and the EU's discriminative approach towards refugees. After the EU-Turkey Statement, the EU asked Turkey to guarantee that Syrian refugees would not be r*efoule* after their readmission procedure. As stated in chapter V, Turkey amended its Temporary Protection Directive and provides a legal ground to reactivate or examines asylum claims of Syrian refugees after their readmission to Turkey. Unfortunately, the EU did not ask for any legal guarantee for non-Syrian refugees and Turkey only wrote a letter that gives non-Syrians a chance to ask for asylum when they are readmitted to Turkey. This has no binding effect on Turkish law. Therefore, non-Syrian refugees are subjected to fast-track removal procedure without asking for asylum after their readmission to Turkey. If there is no readmission agreement between Turkey and refugees' country of origin, they are just sent back to their country with travel documents obtained from their consulates in Turkey.

L1 and NGO4[42] expressed their concerns about misinformation or no information given to readmitted migrants about asylum procedures at the removal centres. They said that asylum application procedure is not transparent and detained migrants are not properly informed about their rights. They do not know how to apply for asylum at removal centres or to ask for free legal assistance when they are subjected to a deportation order, detention or their asylum application is rejected. Also, L1 explained:

> In some cases, the staffs deliberately misinform detainees. They said that if they applied for asylum, they would be detained for months. These attitudes discourage people from applying for asylum.

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[42] This was taken from the interview with the participant who is the Member of the Human Right Association and the Euro-Mediterranean Human Rights Network (EMHRN), Research Assistant at the University.

L2[43] also complained about administrative authorities' neglectful behaviours towards asylum seekers. He said,

> Turkey does not respect the principle of *non-refoulement*. I advised my clients to apply for asylum at the Provincial Migration Management, but they did not take his asylum application. After my insistence, they were obliged to take my client's asylum claim. Also, I witnessed many times that the administrative authorities did not want to take the application of detainees, who are subjected to deportation orders. For example, an asylum seeker asks for asylum, but the authorities do not reply or ignore her/his request. I thought that after transferring of the Migration Management from police department to civil authority, it would become more civilised and leave behind its security-based approach. But so far what my observation is that the previous approach has not changed in practice. In fact, we admitted that the security-based approach has gained weight in civil bureaucracy due to increasing terrorist attacks in Turkey, stemming from ISIS and PKK.

NGO1 highlighted negative behaviours of administrative authorities towards asylum seekers and procedural deficiencies at the airports and border zones. There is no monitoring body to ensure that Turkey respects the principle of *non-refoulement*. He witnessed unlawful deportation of an Uzbekistan national although his lawyer had helped him to apply for asylum. He says,

> After his lawyer left the airport, the police officer tore his asylum application in front of his eyes and said, "Who can save you now?" Unfortunately, such things frequently happen at borders and airports. If lawyers are engaged with asylum applications, the administrative authorities will develop very hostile approaches towards asylum seekers.

NGO1 called the head of the airport police many times to stop the deportation of his client due to his particular situation. Unfortunately, the head of the airport police refused his client's asylum application stating,

> "There is no official asylum application in our hand. We cannot do anything without his individual asylum application". After my insistence, the head of the airport police said, "There was nothing you could do to stop his deportation to Uzbekistan".

As NGO1 underlined in his interview, this case is very common in Turkish practice. There are many unheard cases that asylum seekers are being sent back to their country of origin

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[43] This was taken from the interview with the participant who is a lawyer and Vice President of the Non-Governmental Organisation.

without claiming asylum. Unfortunately, there is a general prejudgment towards irregular migrants amongst police officers. If someone is caught by the police without any valid passport, they will be seen as fraudulent and returned to their country on the first flight even though they would like to apply for asylum. Thus, many *refoulement* cases happen at the airports and border zones. However, there is no evidence because no application or registration is taken before their removal to their country of origin. For NGO1,

> These kinds of *refoulement* cases are even more dangerous than pushing back boats in the sea. Although people in the sea have a chance to survive with their life vest, these people do not have a chance to survive in their countries after their readmission to the oppressive governments. For example, if any Uzbekistan or Tajikistan nationals is readmitted to their countries, they would face the death penalty or ill-treatment in their countries of origin even they did nothing wrong.

Considering these participants' claims and evidences it is difficult to say that individuals who are seeking international protection can access their fundamental right to seek asylum. A recent leaked letter of the UNHCR complained that Turkey does not "systematically" share the legal status and whereabouts of readmitted Syrians, and it is making monitoring more problematic.

Vincent Cochetel, who oversees the UNHCR's European operations, said:

> Despite its best efforts, the UNHCR has not been able to contact the majority of the others. We thought we had permission but we were not given access. For us, that is an important aspect of the safeguards.[44]

3.3. No Guarantee Against *Refoulement*: Deportations of Refugees on the Ground of Public Security and Public Order

After assessing the availability of fair and effective asylum application procedures, the most important point is whether Turkey respects the principle of *non-refoulement*. The fieldwork findings indicate that Turkey has developed more securitized and restrictive policies towards refugees after the EU-Turkey Statement.[45] This change from an open-

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[44] **EU Observer**, UN Struggles to Monitor Fate of Readmitted Syrians in Turkey, 18 January 2017, https://euobserver.com/migration/136591. Accessed online on 18 March 2017.

[45] The Report of the Amnesty International reaffirmed this finding that Turkish authorities' humanitarian and generous approach towards refugees and asylum seekers had changed with the opening of negotiations of the EU-Turkey Statement. See **Amnesty International**, Unlawful Detention and Deportation of Refugees from Turkey, December 2015, p. 12.

door policy to a more security-oriented approach can be explained with Turkey's increasing refugee burden, geographical proximity to the conflict zones and increasing internal security concerns.[46] Especially many terrorist attacks happening in metropolitan cities have become a major factor in changing the generous approach of the Turkish government towards refugees.

The interviewees, especially lawyers and judges are well aware of this securitized approach of the administrative authorities and highlighted the increasing deportation of international protection seekers on the ground of public security. I asked the participants whether there is an increased risk of deportation of asylum seekers and refugees. The judges agreed there was an increase in deportations of foreigners on the grounds of public security and public order. Even at the Constitutional Court level, rapporteur judge J1[47] asserted that nearly 80 per cent of their workload was related to deportation decision of foreigners for public security and public order reasons. In addition, the Ministry of Interior's declaration on entry bans on foreigners confirmed these allegations that there is an increasing public concern related to foreigners living in Turkey. This is supported by recent statistics that 47.000 foreigners were subjected to an entry ban in accordance with Article 9 of the LFIP. Furthermore, the Ministry of Interior deported 3.000 foreigners for being suspected of being terrorists under general security codes, so-called G87 or Ç-114.[48] The widespread use of entry bans and deportation of foreign nationals or international protection seekers, who are residing in Turkey, constitute a serious threat to the principle of *non-refoulement*.

I asked interviewees whether these deportations of persons on the ground of public security or public order conflicts with the principle of *non-refoulement*. L2 found these deportations unlawful and against the principle of *non-refoulement.* He argued,

> Article 54(2) and 64 of the LFIP gives administrative authorities a wide range of discretion to declare some of the foreigners as an undesirable person or terrorist without

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46 **Kılıç**, Taner, Türkiye'de Mülteci Hukuku Uygulamaları, Geri Kabul Süreci, (The Asylum Law Practice of Turkey: Readmission Process), Birikim Dergisi, Ağustos-Eylül, 2016, pp. 66-67.

47 This was taken from the interview with the participant who is the Rapporteur Judge at the Turkish Constitutional Court. I will use some abbreviations to protect participants' anonymity. "J" refers to "judge" in the Court. If there is more than one participant in the same position, I will add numbers like J1 and J2 for two judges.

48 **Haber Turk**, The Minister of Interior M. Ala: Entry Ban on 47.000 Foreigners, 5 February 2016, http://www.haberturk.com/gundem/haber/1191518-icisleri-bakani-ala-37-bin-kisiye-giris-yasagi. Retrieved on 22 March 2017.

> conducting any criminal proceedings. For this reason, this provision absolutely violates the fundamental principle of presumption of innocence and the principle of *non-refoulement*. There are many examples that asylum seekers and refugees are subjected to deportation orders for being suspected of being terrorists without any serious pieces of evidence. Unfortunately, recent terror attacks happening in many metropolitan cities of Turkey have exacerbated these security-oriented practices, and the DGMM has positioned itself as a guardian of the country rather than protecting the rights of individuals, especially refugees.

L3[49] underlines the same concerns and said that Turkey has been accused of allowing foreigner fighters to pass into the Syrian international arena. Thus Turkey has recently adopted very strict security oriented perspective and started to see every foreigner as a prime suspect of being a member of ISIS. This security-based approach has victimised and labelled many foreigners as terrorists. He also underlined the increasing pressure of the governmental authorities on NGO's helping asylum seekers and refugees on a voluntary basis:

> Yesterday I had spoken with the Director of İstanbul Migration Management and he was accusing me of helping terrorists. He threatened me saying, "We are now in a state of emergency. If any of them you helped are terrorists, you will be persecuted due to trying to overthrow the constitutional order." It is not easy to help people who are accused of being a terrorist in this climate. So far, many of asylum seekers' claims were rejected due to public security concerns and I annulled many cases in the Administrative Courts in these matters… What I learned during this process is that if somebody were suspected of being a terrorist, the DGMM would reject his or her application for asylum. The expert only writes a note on the file saying, "International protection was rejected due to public security concern".

L3 also argues that it is not a legal action to refuse the application of asylum seekers without considering their claims on public security grounds. Article 4 of the LFIP provides absolute protection from *refoulement* without any exception and there is no exception for security reasons. This security-oriented perspective is totally against the international protection regime. Every individual case should be examined in context and

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[49] This was taken from the interview with the participant who is Lawyer and Members of the Refugee Rights of Turkey.

in accordance with Article 61, 62 and 63 of the LFIP. Unfortunately, there is no individual assessment in actual practice.

L3 also criticised the Turkish government's widespread practice of entry bans on foreigners. In accordance with the LFIP, an entry ban can only be put on foreigners in two conditions; Firstly, it may be put on aliens who are subjected to deportation orders due to committing a serious crime. Secondly, foreigners who are already outside the country and seen as a threat to the security of the country can be banned from entering the country. However, currently, the practice of Turkish authorities is conflicting with the LFIP. Foreigners, who have been living in Turkey with residence permits and not committing any crime, are now subjected to entry ban using G87 code and deportation orders. L3 said,

> The standard rule is upside down…I think the entry ban on international protection seekers is entirely arbitrary because the LFIP does not give permission to the public authority to put an entry ban on foreigners who have already been living legally in the country. It is not logical.

NGO1 referred to the same problems in his interview. He said that Turkey is using these deportation decisions as evidence of its fight against ISIS in the international arena. Unfortunately, these deportation decisions have led to many human rights infringements. Many residence permit holders have been subjected to G87 code and deported to their country of origin. These deportation decisions are mainly based on ‘national security’ and ‘public order’ without any substantive examination of whether the concerned person is a real threat to national security or public order. The information stems from different national intelligence units, for example, Egypt, Israel, Uzbekistan, Kirgizstan and Russia. He shared some of his experiences in the field:

> Even 64 year’s old women or 8-month-old babies are sometimes subjected to G87 code. We have filed many cases against these arbitrary decisions…however, without any support of civil organisations, individuals cannot do anything against this kind of arbitrary decisions. Turkish administrative authorities consider every foreigner as a potential terrorist and this security-oriented perspective conflicts with the international responsibilities of Turkey towards refugees.

L2 narrated his experience about the practice of an entry ban on his client. He said,

> I brought three cases against G87 codes in Ankara Administrative Courts. One of them was related to a Chechen national, who came to Turkey five years ago. After Russian

> intelligence units accusing him of belonging to an ISIS terrorist group in Syria or international fighters, the DGMM put G87 code on him. He learnt this when he went to the Director of Provincial Migration Management to extend his residence permit. Against this accusation, he submitted his hospital documents as a proof before the Court that he was under care at the hospital due to a traffic accident at that time. What I learned from this case was that the DGMM generally put entry ban on foreigners using Turkish intelligence reports. However, these reports are gathered from different intelligence units but they are not based on concrete pieces of evidence. Unfortunately, Russia is using its relations to put pressure on its political dissidents in Turkey.

According to the experiences of lawyers, judges and NGOs, the deportation decisions are often based on collected information from different intelligence units, but they are not based on concrete criminal evidence. Considering the position of political dissidents in Turkey, relying on the information served by the country of origin definitely conflicts with the principles of the international refugee protection regime. It is very well known that some countries may produce false reports to put pressure on political dissidents fleeing from their country. Also, the common practice shows that when individuals challenge these administrative decisions before the Administrative Courts or TCC, the DGMM cannot submit any substantial evidence to the Court. The judges I interviewed brought up this issue. For instance, Judge J2[50] complained about the lack of necessary information about claimants and deportation reasons in the file. She said,

> Although the DGMM alleges that the concerned person has become a threat to national security due to connection with ISIS and other terrorist organisations, we cannot find any evidence in the file. Also, the quality of interviews is very poor because they are generally taken by police officers or unqualified persons. In these situations, we do not want to reach a verdict without seeing reports of the intelligence unit or other evidences. The Court investigates the claimant's special situation from the intelligence units and different channels but sometimes we do not receive any information, or it takes longer than 15 days. It is problematic because the LFIP requires the Court to decide upon deportation decision within 15 days but collecting all the necessary information takes more than six months.

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[50] This was taken from the interview with the participant who is the Head Judge at the Administrative Court.

Ankara 1. Administrative Court applied to the Constitutional Court for annulment of 15 days of time limitation for judicial review under Article 80(d) of the LFIP. The Administrative Court alleged that it is very difficult to render a decision within 15 days considering the complexity of the issues and difficulties in collecting enough information from different units. Unfortunately, the Constitutional Court rejected[51] the claim of the Administrative Court although the Administrative Court had explained its reasons very clearly. The Constitutional Court affirmed that the cases related to international protection applications should be concluded in a fast and efficient manner considering both public and foreigner's interest. From a human rights perspective, the closer analysis of the Court's verdict reveals that this interpretation definitely reflects the securitized approach of administrative authorities and does not see refugees and asylum seekers as equal right holders before the law. Even though Turkish citizens can go to appeal in 60 days, the Court found 15 days enough for asylum seekers and refugees who are vulnerable both economically and socially and have no idea how to go to the Court. This approach reflects Arendt's criticism about the mythical position of the universalistic human rights in the contemporary world. Even though the 1951 Refugee Convention and related human rights provide a basis for refugee protection, in fact, refugees mainly depend on the generosity or goodwill of national states. The decision of the Court reveals the continuing relevance of Arendt's arguments about the rightlessness position of refugees and asylum seekers. The ruling of the Court poses a challenging question about the legal persona of individuals who have lost their citizenship and are forced into a position of "bare humanity" to claim any rights.

The judge participants also gave some insights about the approach of the Courts towards asylum seekers as individuals who are looking for a dignified life. It is significant that there are differences between the approach of the Administrative Court and the Turkish Constitution Court towards asylum seekers and refugees. For instance, judge, J2, of the Administrative Court highlighted security-oriented approach of the Court on deportations of asylum seekers and refugees stating:

> When the Court cannot see any pieces of evidence in the file, but the DGMM alleges that the concerned person is a terrorist, considering last terrorist attacks in Turkey, we have expanded the sovereign power of the state at the expense of individual's liberty.

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[51] **The TCC**, RN: 2016/29, JN: 2016/134, Date: 14.07.2016, OGT. 23.09.2016, no. 29836.

> The Court thought that if any foreigner would become a threat to public security in Turkey, the foreigner could go to another country to ask for asylum but not in Turkey.

This approach has prevented many international protection seekers from entering into Turkey without considering enough evidence on the ground of public security. This statement of the J2 reveals that even though there is no concrete evidence in the file about the criminality of the individual, the asylum seekers might face deportation or an entry ban due to the excessive power of the State. Considering the "rightless" and precarious legal standing of an asylum seeker, this approach prevents them claiming their fundamental right to seek asylum and reduce them "bare humanity" without any civil and political rights.

Contrary to the perspective of the Administrative Courts, Rapporteur judge, J1[52] in the TCC, explains the current perspective of the TCC concerning deportation cases and the Court's stance in the conflict situation between the right to life and security of the country. He stated

> The TCC has a very reflexive and right-based approach in asylum cases…For example, sometimes refugees and asylum seekers could face deportation decisions due to public security reasons. In these cases, the Court looks at whether the claimant would face the death penalty or torture in her/his country of origin if s/he were deported. The rights of individuals always come first compared to public security or public order.

Rapporteur judge, J1 also mentioned about the TCC's changing approach after January 2016 on interim measure decisions. Before that date, the TCC did not give automatic interim measure decisions on deportation of foreigners but this led to some unlawful deportation of asylum seekers while awaiting the decision of the TCC. Once, an Afghan national was deported to his country of origin by the DGMM without waiting for the decision of the TCC. Also, in another case, a Chechnya national was deported to Russia two hours before the TCC's interim measure decision. Thus, the TCC changed its procedure in January 2016 and started to give interim measure decision within 48 hours after the application of the claimants. This has prevented many violations of human rights and *non-refoulement* cases. It has also prevented claimants from going to the ECtHR. This approach reflects the TCC's human right-based approach. It imitated the structure of

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[52] This was taken from the interview with the participant who is the Rapporteur Judge at the Turkish Constitutional Court.

the ECtHR and aims to reduce the files going to the ECtHR as an individual application avenue. Its human rights approach has been subjected to many criticisms by the governments so far. However, its human rights centred approach is very promising for asylum seekers and refugees who are subjected to deportation or arbitrary power of the state authorities.

It is worthy of note that after my fieldwork study, some of the provisions of the LFIP changed in 2016. As mentioned in chapter V, these provisions restricted some procedural guarantees against deportation decisions on the ground of public security reasons. Since then, foreigners can be deported to their country of origin after 15 days of the DGMM decision without effectively challenging this decision. This new amendment should be considered within the debate whether Turkey is a safe country for refugees. I think it is a very important indicator of the ineffectiveness of Turkey's refugee protection system. The deportation of asylum seekers on the ground of largely undefined public security reasons may constitute the main threat to the principle of *non-refoulement* and Turkey's safety for refugees.

3.4. Detention in Inhuman Conditions: Punishment Without Crime

The EU-Turkey refugee deal has triggered the detention of many individuals who are being held in one of the border provinces or readmitted to Turkey.[53] Turkey's removal centre capacity has been increased considerably since the EU-Turkey RA. Considering the increasing capacity of the removal centres and the pressure of the EU on Turkey to reduce irregular crossing of refugees and migrants, the condition of the removal centres and safeguards against arbitrary administrative detention has become very important. To find out more about the real condition of detainees at the removal centres, I asked my participants their experiences and observations about whether detainees access to their basic necessities and challenge the administrative detention if inhuman conditions apply. The participants, especially lawyers and NGOs emphasised that prolonged detention and inhuman conditions were characteristic of removal centres. Although the LFIP provides alternatives to administrative detention, including residence in satellite cities, some asylum seekers are still detained in inhuman conditions for long periods of time without access to their lawyers. Kumkapı Removal centre is the largest and located in İstanbul

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53 **Amnesty International**, Unlawful Detention and Deportation of Refugees from Turkey, December 2015, pp. 4-7.

but it is known for its poor conditions and infringements of human rights. As shown in the recent judgments of the TCC[54] and the ECtHR,[55] even after the adoption of the LFIP, living condition at Kumkapı have not improved. So far, the TCC and the ECtHR have rendered many judgments due to inhuman conditions in removal centres where conditions are still equal to inhuman conditions as envisaged in Article 3 of the ECHR.

I asked E3[56], the General Director of Migration Management, about the situation in the Kumkapı removal centre and his plan for the future. Even though there have been many negative decisions of the Constitutional Court and the ECtHR about inhuman conditions, there is no plan of the Migration Management to replace it. The Director referred to continued attempts to find land outside İstanbul to build a new centre but these attempts have not reached any success yet.

Aşkale removal centre is also well known for its poor treatment of detainees although it is a very new and "luxurious" removal centre. It is designed for detainees who are suspected of being terrorists. As L3 underlines,

> The DGMM has been sending all foreigners, who are suspected of being terrorists. So, both civil servants and security forces have developed prejudgment towards detainees in Aşkale removal centre. Thus staff working in this centre treats detainees as criminals. Some of the migrants are subjected to solitary confinement. I went to Aşkale several times to see my clients. Even though I have a warrant of attorney, the Director of Aşkale Removal Centre would not allow me to speak with my clients.

L2 also narrated his experience with his clients, who had been detained in Aşkale. He said,

> One of my clients was subjected to cell punishment during the winter season at Aşkale. My client was deliberately kept in a freezing and small room for ten days. At that time it was December…I asked the TCC for interim measure about administrative detention due to inhuman conditions of the removal centre. After prosecutor's investigation, my client was removed from the cell and put into another common room with other detainees. But the Director of the Removal Centre threatened my client and pressured

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54 The TCC, **K.A.**, Application No. 2014/13044, 11 November 2015. OGT, 17 December 2015, No: 29565; The TCC, **A.S**. Application No. 2014/2841, 09 June 2016; The TCC, **Albina Kıyamova**. Application No. 2013/3187, 14 April 2016.

55 **Khaldarov v. Turkey**, Application no. 23619/11, 5 September 2017, para. 31.

56 This was taken from the interview with the participant who is the Director of the Migration Management.

> him to say at the Court, 'I certainly was not subjected to any ill-treatment, I have no complaints against anyone'. My client said to the Court what the Director said to him before because he was afraid of being sent to his country of origin.

After the transfer of his client to another removal centre, L2 opened a case against the Director of the Removal Centre. However, the Criminal Court could not find any evidence of ill-treatment or torture on the body of the detainee, and in the end, it closed the case without giving any punishment to the Director of the Removal Centre. Unfortunately, it has become a regular situation in Turkey that the mistreatment towards detainees incurs no punishment in practice. This encourages ill treatment towards detainees.

Lawyers and experts also allege that there is an increase in violence towards detainees at removal centre. L5[57] says,

> I think there is an increase in violence at the removal centres. This is very critical… The civil administration has caused this increase after demilitarisation of removal centres. Before the transfer of removal centre into the DGMM, these removal centres had been controlled by the police until 2014. During this period, we witnessed many human rights infringements. Some of the detainees were subjected to torture and ill treatment. Although we were waiting for some improvements after these centres' transfer into the DGMM, unfortunately, we could not see considerable improvements in conditions of removal centres and administrative authorities' approach.

He gave two reasons for the increasing violence against migrants in the removal centres: One was the lack of institutional capacity of the DGMM and two was no monitoring system in the removal centres. In fact, the DGMM has continued to recruit police officers due to lack of qualified personnel. Also, there is no independent monitoring body to observe human rights infringements. The Human Rights Institution of Turkey was replaced with the Human Rights and Equality Institution but it has not functioned very well due to political interference. The Ombudsman also has not functioned very well from the start.

NGO1 expressed the same concern in his interview. He said,

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[57] This was taken from the interview with the participant who is the lawyer and an expert in Migration and Human Rights Law and former rapporteur of the National Human Rights Institution of Turkey.

> I have to admit that we have been facing more difficulties and human rights violations in removal centres than before. At least police officers had work experience and followed the instruction of their supervisor, but now civil officers do not have any work experience and any work discipline at all.

NGO3 also complained about the deficiency of a civil monitoring authority to observe whether refugees have access to their fundamental rights, such as health and free legal advice. He said,

> So far the National Human Rights Institution of Turkey had monitoring duty but Human Rights Institution of Turkey was closed recently. The Institution was replaced with Human Rights and Equality Institution of Turkey. However, in contrast to the previous structure of the Institution, all members were appointed by the Government as a government officer. The problem is how this institution can pursue an effective monitoring if the institution is not independent of the government control.

L3 and NGO1 complained about restricted communication of detainees with their families and lawyers. L3 said,

> Some removal centres removed payphones to make difficult the communication of migrant detainees with outside world.

Although there is no restriction on lawyer's access to their clients in the law, the practice works very differently. The DGMM has brought a new accreditation system, and lawyers have to obtain the permission of the DGMM in advance to speak with their client detainees. Unfortunately, restrictive approaches of administrative authorities have triggered more human rights violations in practice.

NGO1 also complained about problems in accessing his client in his interview:

> When I tried to access my client, the Director of the Removal Centre said to me ‘Are you a terrorist? Why are you defending these terrorists?’…Although we are NGOs working voluntarily and have very close connection with the Government officers and high level bureaucrats, I have been facing great difficulties in accessing my clients. I cannot imagine this is happening to other lawyers. God gives them patience…without changing this restrictive approach, the conditions of detainees could not be improved very much. Since even senior officials and staff have seen them as a terrorist and treat them in accordance to this.

It is of concern that as explained in chapter V, the LFIP does not provide an effective remedy against the conditions of removal centres. The Criminal Courts only assesses the

legality of the administrative detention decisions but cannot examine the living conditions at removal centres whether there is inhuman conditions or torture or ill treatment of detainees. The TCC has recognised this deficiency and lack of an effective remedy and has started to accept this kind of application at a first instance court. Considering this deficiency, J1, Rapporteur Judge at the Turkish Constitutional Court suggested;

> The LFIP should be amended to give migrants the right to go to the Criminal Court against inhuman conditions of removal centre.

Considering the problems identified by the interviewees, it is surprising that there are not more cases challenging inhuman conditions of removal centres before the TCC or the ECtHR. This can only be explainable with the struggles that detainees have in accessing free legal advisors and other procedural safeguards. Given the very limited cases before courts, we cannot say that Turkey is a safe third country for refugees. All the evidence from my fieldwork points to Turkey failing to provide proper living conditions at removal centres for readmitted migrants and asylum seekers. There is no doubt that the EU-Turkey RA has been the cause of many human rights violations but these also occur because of the precarious legal position of refugees.

4. Rightlessness: No Effective Remedy against Human Rights Infringements

Effective remedies against human rights infringements are very important for providing a safe and a dignified life for asylum seekers and refugees who have been forced to live in Turkey. Turkey's adoption of the LFIP gave considerable procedural safeguards for asylum seekers and refugees, but this has not been effectively applied in practice yet. As NGO3 expressed in his interview,

> The EU’s acceptance of Turkey as a safe third country regarding Turkey’s written legislation without considering problems in practice is a shortsighted and impetuous approach and conflicts with moral values and international human rights laws. This perspective is entirely wrong, and it ignores sociologic, economic and political dimensions of the subject.

L5 also underlined the same problems with the implementation of the LFIP in practice saying,

> I took part in the preparation of the LFIP and I know that it had been prepared with good intentions, but it does not work very well in practice. The problem is not the LFIP, but it is related to Turkey's capacity. Turkey's institutional capacity is not enough to implement the Law. There are not sufficient human resources educated in this area. For

> example, Law Faculties do not teach Migration and Asylum Law in their curriculum...Even the judges in this area are not qualified. They have been looking at such cases for the first time in their professional life…there is a big gap in the level of consistency between the court decisions…So, in this situation, it is not very surprising to see human rights infringements both at administrative and judicial levels.

The interviewees also highlighted that refugees do not feel safe in Turkey. Even if they become the victim of an incident, they cannot go to Court or sue the person or take action due to being afraid of being deported to their country of origin. Turkey's recent deportation orders and entry bans on foreigners are playing a major role in the creation of this fear. NGO3 commented on his experience of this issue;

> Nearly sixty-four refugee women came to our Kilis office to complain about sexual harassment. We gave them free legal assistance about what actions should be taken during this process. We also told them the risks that they might face during their judicial proceeding…63 of them abstained from taking legal action before the court due to fear of being deported to their country of origin. Only one woman had filed a case due to her pregnancy.

NGO1 also complained about lack of effective remedies. He said,

> Even if refugees go to the police to complain about any infringements of their rights, the police do not take their complaints seriously and investigate them. Furthermore, the involvement of foreign nationals in any incidents could be considered the reason for a deportation decision even if the foreigner is the victim of the incident. I experienced on many occasions that security forces do not look at whether the foreigner is a victim of an incident or a criminal. The involvement in any incident is enough for their deportation on the ground of public security.

He also narrated his experience with a Syrian refugee, who was subjected to ill treatment by a soldier. In this case, the soldier raped the Syrian girl when she was trying to cross the Turkish border with her father. The Syrian girl's father had witnessed his daughter's assault. NGO1 said,

> We convinced the girl and her father to report this sexual harassment and opened a case at the Military Court but the public prosecution office refused the case…After the refusal of the Military Court, we opened the case in the Criminal Court. Unfortunately, the judicial authorities were late in collecting evidence from the girl's body. The Court took some samples from the girl after seven days and sent to the Forensic Pathology Institution, but the Institution could not reach a conclusion with the evidence due to the

> delays in collecting samples. I am so regretful that we worked very hard to convince the family to take this issue but judicial authorities' neglectful behaviours hampered the legal process and the truth did not come out. As a result the soldier, who was accused of sexual assault towards the refugee woman, did not face any penalty.

L2 also gave an example of the suspicious death of a young Syrian refugee, who had died while being detained at the Aşkale removal centre in 2015. In this case, he was accused of participating in a protest and being a member of an illegal organisation. After his suspicious death, the Directorate of the removal centre claimed that he committed suicide in his cell but his lawyer spoke to the media, asking "how a young man, 1.8 meters tall, who was very happy that he would be released soon, could hang himself from a bunk bed and die".[58] His lawyer was not allowed to see the cell he died in or to speak with other detainees who might have had some idea about his death. L2 highlighted the ignorance and failure to act of the public authorities to investigate these suspicious deaths:

> It is very interesting that the Parliamentary Human Rights Investigation Committee had visited Aşkale removal centre after the incident, but it had not published its report. Unfortunately, no actions were taken against unlawful behaviours of public servants and this has strengthened their impunity.

4.1. Difficulties in Accessing Free Legal Advisors and Translators

Article 81(2) of the LFIP provides free legal assistance in cases where "the applicant and international protection beneficiary is unable to afford the attorney's fee for their judicial appeals." As explained in chapter V, the LFIP would like to establish a "check and balance"[59] system for providing a free legal advisor to international protection seekers. In doing this, it is aimed to limit the power of the administrative authority by an effective judicial control mechanism. Thus, accessing legal advice has become a really important safeguard for scrutinising administrative authority's activities. However, the interview with lawyers, NGOs and experts has revealed that although these safeguards are all present in theory, the actual practice is deficient.

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[58] **Bianet**, http://bianet.org/bianet/insan-haklari/170800-1-80-boyundaki-dervis-kendini-atkiyla-ranzaya-nasil-asar. Retrieved on 1st of November 2016; **Görendağ**, Volkan, Yabancıların Temsil Sorununun Cezasızlık Kültürüne Katkısı: Lütfillah Tacik Davası Örneği (The Contribution of the Problem of Representation of Foreigners to the Impunity Cultural Model: Lütfillah Tajik Case), Amnesty International, 02 Haziran 2017, https://amnesty.org.tr/icerik/yabancilarin-temsil-sorununun-cezasizlik-kulturune-katkisilutfillah-tacik-davasi-ornegi.

[59] **Kılıç**, 2016, p. 63.

NGO3 complained about the capacity of the Bar Association in providing legal advisors. He argued that although the LFIP provides detainee's access to the legal advisor during their appeal procedures, the allocated fund to the Turkish Bar Association does not even meet Turkish citizens' demand. The Ministry of Justice requested a bigger budget for supporting the Turkish Bar Association, but there is no positive reply yet. L4[60] also underlined the same problems,

> The Turkish Bar Association has been providing legal assistance, but it depends on their capacity. In some of the little cities, the Bar Association has not enough funds or personnel to provide free legal advisors.

And also NGO4 repeated the same problems,

> The Turkish Bar Association is providing free legal assistance to refugees and asylum seekers, but it is not enough due to its lack of funding and experienced lawyers in refugee law. This is contradicting Article 6 of the ECHR, which protects the right to a fair trial. In accordance with this provision, access to legal representation and free assistance of an interpreter is a fundamental part of the right to a fair trial.

L2 brought a different aspect to the issue. He alleged that although the LFIP gives the Turkish Bar Association the responsibility to provide a free legal advisor to international protection seekers, it has not worked in practice because the lawyers are afraid of losing their income. Also, the DGMM has not supported a free legal advisor system. In fact, we suggested both the Bar Associations and the DGMM put the telephone numbers of the Bar Association where detainees can easily see and reach by phone but neither of them is enthusiastic about this. The DGMM is deliberately neglecting the idea of free legal advisors. They think that if they facilitate access to a free legal advisor, it might obstruct the deportation process of irregular migrants. The Bar Association also does not want to take their files because they think it would increase the demand for lawyers and education programs on asylum issues.

NGO3 and NGO1 emphasized administrative authorities' resistance and restrictions as primary barriers to accessing and benefitting from legal advisors. NGO3 said,

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[60] This was taken from the interview with the participant who is the lawyer at the UNHCR Turkey Office.

> Administrative authorities do not give permission to lawyers to speak with their detainees in removal centres. The administrative authorities generally have used arbitrary power against detainees, but there is nothing to do in this unbalanced power.

According to NGO1, the main problem is that lawyers have been facing many bureaucratic obstacles in getting permission from administrative authorities to access their clients. Although the LFIP provides an opportunity for detainees to access their lawyers, in practice, it is nearly impossible for lawyers to access their clients in removal centres. Lawyers can only see their clients after getting the permission of the Directorate of Provincial Migration Management in removal centres. NGO1 also compares the condition of removal centres with prisons and said,

> It is very surprising that access to prisons is easier than access to removal centres. Even criminals' conditions are better than detainees in removal centres. For example, prisoners can have access to open air and sports activities on a daily basis, and their lawyers can see them easily. In contrast, some removal centres, especially Erzurum Aşkale, are like maximum-security prisons, no access is allowed.

The other problem is related to the representation of refugees by their lawyers. Turkish law faculties do not teach migration and refugee law. Lawyers generally have no idea about international and refugee law. J2 shared her experience once at Court,

> Some of the lawyers came to the Court without knowing anything about the refugee law and their files. Once, the foreigner complained about his lawyer's lack of competence and asked the Court to change his lawyer. I said to him 'you can request from the Bar Association, but the court cannot dismiss the lawyer.

L3 complained about deficiencies in translation services. He said,

> There is no translation service available in removal centres. As a lawyer, I cannot communicate with my clients due to language barriers. Thus, sometimes I call my friends to translate my clients' statements to me. This is a very difficult situation for lawyers. The translator is very important for asylum seekers since they have to apply for asylum in two different languages: first in their own language, second in Turkish. Unfortunately, if they do not know Turkish and there is no available translator, they cannot apply for asylum in removal centre.

Also, L1 experienced the same problems in many cases. He underlined that

> Detainees are not informed properly in their language. For example, when I checked my Congolese clients' files, I saw an information note about their rights in Turkish, but they do not know Turkish, but just French.

4.2. Difficulties in Getting a Power of Attorney

As discussed in chapter V, foreigners have to fulfil some procedural requirements to benefiting from a legal advisor. For instance, Turkish law requires individuals to take power of attorney from a notary to allow a lawyer to follow their case before the courts. It is a procedural issue, but it is a very fundamental issue for foreigners who cannot pursue their own cases before the Court because of their unfamiliarity with the Turkish judicial system and language barriers. Judge J2 underlined the fundamental procedural deficiencies in getting a power of attorney. She said,

> Some asylum seekers came to Turkey by illegal ways without any valid passport or ID. Thus, they cannot prove their identity to a public notary to obtain a power of attorney. After seeing problems in practice, the DGMM has started to provide international protection seekers with an identity card to facilitate their access to lawyers. Although this decisive step has solved some of the problems, the other part has continued. Although some asylum seekers can access identity cards after their asylum application, some of them have to wait until their asylum application is accepted. In these cases, they cannot get a power of attorney from the public notary. We took this issue to the Constitution Court alleging that Article 76(2) of the LFIP conflicts with Article 36 of the Constitution[61], which gives the individual a right to benefit from a fair trial before the Court.

However, the Constitutional Court recently found the issue out of its competence and rejected the case.[62] It said that the issue is related to the Code of Civil Procedure and Notary Public Law, and it is not related to the LFIP. Thus, the problem remained unresolved at the Constitution level, but it will lead to another case in the future.

J3,[63] Rapporteur Judge at the Turkish Council of State, has also highlighted the same issue. He said,

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61 "Everyone has the right of litigation either as plaintiff or defendant and the right to a fair trial before the courts through legitimate means and procedures".

62 **The TCC**, RN: 2016/29, JN: 2016/134, Date, 14.07.2016, OGT. 23.09.2016, no. 29836.

63 This was taken from the interview with the participant who is Rapporteur Judge at the Turkish Council of State.

> The Council of State does not accept the cases, which do not have the warrant of attorney. If the concerned claimant cannot provide the warrant of attorney, the Council of State have to decide that the procedural necessities of the case are not being completed successfully, and thus we will shelve the case without deciding on its substance. So far the Council of State has received 60 cases, which had no power of attorney in the file.

Also, L4, a lawyer at the UNHCR, said,

> Unfortunately, there are still problems in getting a power of attorney for detainees…Without an ID card, it is impossible to get a power of attorney from a notary. Considering problems of asylum seekers to obtain a power of attorney, some of the courts have developed an alternative procedural way for helping refugees and asylum seekers. They have started to accept cases without a power of attorney… This method has been developed by the initiative of the judges, but the LFIP does not provide any solution. Now, only Antalya, Ankara and İstanbul Administrative Courts follow this method, there is no uniformity. Lawyers are still complaining about the problems of getting a power of attorney to file a case. Also, lawyers are still facing difficulties in accessing their clients in removal centres. The administrative authorities do not give permission to lawyers without a power of attorney but in fact, they cannot get a power of attorney without seeing their client. There is a vicious circle.

Regarding these problems, NGO4 also suggests that

> Considering refugees' and asylum seekers' condition is of paramount urgency, state authority should modify its common rules to consider the vulnerability of asylum seekers. From the human rights perspective, the rule of the state should be equitable and fair for all individuals without differentiating refugees and asylum seekers from its citizens. We should change our approach.

All judges I interviewed also confirmed the problems of notifying the decision of the Court to international protection seekers, who cannot give a permanent address to the Court. Judge J2 and J3 described their experience in their interviews. They said, many refugees and asylum seekers are living in satellite cities but they have no permanent address because they are living in the street, parks or mosques. Also, some of them are changing their address frequently due to their fragile economic situation. We have so many files that we cannot notify the decision of the Court to the concerned individuals. J2 said,

> Once a refugee tried to give a contact address to the Court that it was under construction where he was working as a labourer. One of them also gave the Court his mobile number, but the Court could not contact with him on the phone because he cannot speak Turkish.

The Judges of Administrative Courts and the Council of State underlined that they have many files in their hands because the claimants have not been found in their contact address for one year. In these cases, the Court tried to contact the claimant twice. If the claimant cannot be found, the case will be suspended for one year. After one year of suspension, if the claimant does not attempt to reopen the case again, the Court will close the file without discussing its content.[64] Judge J2 shared her concerns about these cases saying,

> If these people are deported to their country of origin without effectively challenging the decision of the administrative authorities, it will infringe the rights of many individuals and the principle of *non-refoulement*. These cases will certainly go to ECtHR and Turkey will face many compensations.

5. Conclusion

The main justification of the Turkey-EU Statement is based on the assumption that Turkey is a safe third country to which asylum seekers and refugees can be returned. The interviewees' statement from the fieldwork reveals that Turkey has a huge reservoir of support and moral integrity amongst its NGOs, civil servants, experts and judges, who play a special role in promoting respect for human rights of refugees. This generosity of the Turkish community towards refugees could be boosted with meaningful and effective burden sharing by the EU but so far, the EU has not gone beyond giving financial assistance to Turkey to strengthen its borders. All the evidence drawn from the fieldwork indicates that despite Turkey's welcoming attitude and tremendous effort, refugees are struggling to access their basic fundamental human rights, especially civil and political rights. The interviewees' observations and experience in the field point to three main problem areas that need to be resolved to ensure that Turkey is a safe third country for readmitted asylum seekers.

The first important problem is related to Turkey's geographical limitation to the 1951 Refugee Convention. Turkey only provides humanitarian protection to refugees but it

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64 Article 26(3) of the Law on Procedure of Administrative Justice.

does not foresee any integration policies considering its increasing refugee protection responsibility. Asylum seekers cannot gain refugee status, long-term resident permission or citizenship status even though they live in Turkey for their lifetime. It is a fact that even newborn babies cannot obtain Turkish citizenship and so are de facto stateless. They are deprived of any *"*legal personhood"[65] and this deprivation of legal status reduces them to "non-persons" or "legal ghosts".[66] Turkey's President Erdoğan declared his government's intention to give citizenship to Syrian refugees after six years of residence with temporary protection status in 2016 but this has not been popular within Turkish society. There is a growing concern amongst the opposition parties, secularist and Kurdish nationalist groups that the Turkish government will use refugees to transform identity, culture and political values in Turkey. Also, some Turkish citizens see refugees as an economic burden on the country's resources and a threat to their livelihood. The increasing resentment amongst Turkish citizens towards refugees is an indication of the fragile social acceptance within Turkish community. If the integration of refugees into the Turkish community cannot be handled delicately and this hostility grows, it will jeopardise the EU-Turkey cooperation on the refugee issue.

Second, although Turkish asylum law provides many safeguards to asylum seekers for their access to asylum procedures, Turkey is struggling to provide fair, efficient and accessible procedures due to its institutional deficiencies in legal assistance, translators and transparent administrative procedures. People who are readmitted to Turkey under the EU-Turkey refugee deal are not properly informed about their rights and subjected to a fast-track removal process without being given assistance with asylum applications. Non-Syrians, who are readmitted to Turkey, are facing more risk of deportation than Syrians due to the discriminative approach of both the EU and Turkey. Although the EU asked Turkey to guarantee support for Syrians after their readmission to Turkey, neither the EU nor Turkey considered non-Syrians and the consequences of their readmission to Turkey. It is evident that non-Syrian nationals have difficulty in claiming their fundamental right to seek asylum either in Greece or Turkey.

Third, Turkey has changed its generous and open door policy towards refugees and

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65 **Arendt**, 1966, p. 277.

66 **UNHCR**, September 2006, "Refugees by Numbers 2006 Edition", cited by **Hayden**, Patrick, From Exclusion to Containment: Arendt, Sovereign Power, and Statelessness, *Societies Without Borders*, 3(2), 2008, p. 249.

adopted more securitized and restrictive policies after the EU-Turkey Statement. Amended Turkish asylum law provides large discretion to administrative authorities to declare international protection seekers as undesirable persons on the basis of "public security" without any criminal proceedings. This security-based approach has victimised and labelled many international protection seekers as terrorists. The participant respondents, especially lawyer and judges, overwhelmingly agreed that widespread use of entry bans and deportation of international protection seekers constitutes a serious threat to the principle of *non-refoulement*. There is an appeal procedure against these acts of administrative authorities, but it has no suspension effect on deportation decisions. Administrative courts and the TCC examine the reasons for deportation orders rigorously and request substantial evidence for deportation of foreigner on the basis of public security but in a continuing state of emergency, lawyers' restricted access to their clients at the removal centres, deficiencies in legal assistance and the 15 days time restriction on courts all have an effect on deportation decisions.

Having looked in detail at the degree of respect, or otherwise, of the civil and political rights of readmitted refugees and asylum seekers, the next chapter critically investigates the extent to which readmitted refugees and asylum seekers can access their socio-economic rights as envisioned in the 1951 Refugee Convention and other human rights instruments.

CHAPTER VII: Fieldwork Findings: The Impact of the EU-Turkey Readmission Agreement on the Socio-Economic Rights of Refugees

> We lost our home, which means the familiarity of daily life. We lost our occupation, which means the confidence that we are of some use in this world. We lost our language, which means the naturalness of reactions, the simplicity of gestures, the unaffected expression of feelings. We left our relatives in the Polish ghettos and our best friends have been killed in concentration camps, and that means the rupture of our private lives.[1]

1. Introduction

From the start of Turkey's accession negotiations, the EU has always used the concept of Europeanization and, more recently, visa liberalisation as a lever to transform Turkey into a refugee hosting country and to push it towards taking responsibility for refugees and asylum seekers.[2] The EU-Turkey Statement has been used to hold the refugee population in Turkey for over 18 months. That is time enough to see whether Turkey is providing equivalent protection to non-European refugees as for conventional refugees as alleged by the European Commission.[3] Once again using Arendt's theory in her book *Human Condition* in the section on "labour, work and action", [4] this chapter exposes the difficulties refugees face in accessing their socio-economic rights in Turkey. The same 18 key actors, including five representatives of NGOs, four judges, five lawyers and four senior officials and experts were interviewed to discover their views on Turkey's record in ensuring the safety of refugees, and their access to socio-economic human rights including accommodation, healthcare, education services and the labour market in Turkey.

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1 **Arendt**, Hannah, We Refugees, The Jewish Writings, Edited by Kohn, Jerome & Feldmen, H. Ron, Schocken Books: New York, 2007, p. 264.

2 **Tolay**, Juliette, Turkey's "Critical Europeanization": Evidence from Turkey's Immigration Policies, Edited by Paçacı Elitok, Seçil & Straubhaar, Thomas, Turkey, Migration and the EU: Potentials, Challenges and Opportunities, Hamburg University Press: Hamburg, 2012, pp. 49-50; **Tokuzlu**, Lami Bertan, Burden-Sharing Games for Asylum Seekers between Turkey and the European Union, European University Institute, Florence Robert Schuman Centre for Advanced Studies, EUI Working Paper RSCAS, May 2010, p. 1.

3 **European Commission,** Report on Progress by Turkey in Fulfilling the Requirements of Its Visa Liberalization Roadmap, COM (2014) 646, 20.10.2014, p. 17.

4 **Arendt**, Hannah, The Human Condition, The University of Chicago Press: Chicago, 1958, p. 7.

The fieldwork findings indicate that although the interviewees come from different backgrounds, the common perception about the safety of Turkey for refugees is a negative one. The participants overwhelmingly thought Turkey cannot provide effective protection for refugees and asylum seekers as envisioned in the 1951 Refugee Convention and human rights law. More specifically, Turkey cannot provide an adequate standard of living, such as access to housing, education, healthcare and labour market. In practice, the EU-Turkey Statement is leading to a breach of Article 3 of the ECHR and Article 33 of the 1951 Refugee Convention and thus brings the responsibility of the EU Member States.

As discussed in chapter III, the ECtHR's jurisprudence states that refugees are entitled to their fundamental rights in accordance with the 1951 Refugee Convention beyond the principle of *non-refoulement*. As seen in the case of *M.S.S. v. Belgium and Greece,* the transferring country should evaluate the accessibility to these basic human rights before transferring the responsibility for asylum seekers to third countries.[5] The UNHCR's consideration on the safe third country concept also shares the same perspective with the jurisprudence of the ECtHR. The UNHCR underlines that states should take into account third countries' capacity to provide basic living standards, reception conditions and longer-term integration facilities, including their absorption capacity[6] before starting to use the safe third country concept. In line with the UNHCR, Legomsky highlights that formal effectiveness is not enough to regard a country as safe for refugees. Actual practice should be the main indicator of whether a third country is safe for an asylum seeker or refugee.[7] Considering these interpretations, current returns from Greece to Turkey are not consistent with this human rights perspective.

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5 **M.S.S. v. Belgium and Greece**, Application no. 30696/09, 21 January 2011, paras. 367-368; See **Tarakhel v. Switzerland**, Application no. 29217/12, 4 November 2014, paras. 66-68.

6 **UNHCR**, Considerations on the "Safe Third Country" Concept, Vienna, 8-11 July 1996, pp. 3-4; **Goodwin-Gill**, Guy S. & **McAdam**, Jane, The Refugee in International Law, Third Edition, Oxford University Press: Oxford, 2007, p. 393; **Kneebone**, Susan, The Pacific Plan: The Provision of "Effective Protection"? *International Journal of Refugee Law*, September 29, 2006, p. 696; **ECRE**, The Way Forward Europe's Role in the Global Refugee Protection System, Guarding Refugee Protection Standards in Regions of Origin, European Council on Refugees and Exiles, December 2005, p. 6.

7 **Legomsky**, Stephen H, Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection, *International Journal of Refugee Law*, 15(4), 2003, pp. 630- 664.

2. Turkish Interviewees' Views on the Safety of Turkey for Refugees

The significant contribution of this section is to investigate what the participants think about the safety of Turkey for refugees. The researcher asked the participants what they think about the actual situation of refugees in Turkey today and whether the Turkish government provides effective protection for refugees in accordance with international and human rights law. The participants overwhelmingly agreed that the management of the refugee crisis is a very complex issue and involves more than simply providing humanitarian aid and respecting the principle of *non-refoulement*. Beyond the humanitarian aid, the most important challenge is to provide a decent quality of housing, health, education services and employment opportunities. Participants assessed Turkey's safety from two different perspectives: First, whether Turkey respects the principle of *non-refoulement* and second, whether Turkey provides fundamental living conditions to refugees to facilitate their long-term integration into society.

For NGO2,[8] Turkey is a safe third country for refugees from the first perspective because Turkey respects the principle of *non-refoulement.* Even though this view has been refuted by Amnesty International and other NGOs arguing that Turkey do *refoule* both conditional and Syrian refugees to their country of origin, NGO2 thought that

> If you ask me, this was a bit exaggerated criticism. This campaign and reports aim at defamation of Turkey. We witnessed some specific *refoulement* cases in the past but Turkey always stays respectful to the principle of *non-refoulement* since its approval of the Convention…This campaign has aimed to create a false picture of Turkey going to totalitarianism in the political arena and using refugees as an instrument against Turkey. In fact, Turkey treated refugees more generously than many European countries and hosted 3 million Syrian refugees until now…I don't believe that Turkey violates the principle of *non-refoulement*.

NGO2 also evaluates Turkey's safety for refugees in accordance with the second perspective more negatively,

> If you ask me whether Turkey is a safe third country or not, I will say 'no' because refugees cannot find a life consistent with human dignity in Turkey. The LFIP has provided humanitarian assistance, but it did not provide long-term solutions. Thus

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[8] This was taken from the interview with the President of the NGO, Journalist and former spokesperson of the UNHCR.

> refugees try to reach the EU territory to find durable solutions…I argue that international refugee protection should not only comply with the principle of *non-refoulement* but also provide some fundamental human rights envisioned by the 1951 Refugee Convention. Turkey, due to its geographical limitation, does not recognise the rights envisaged in the Convention. In that respect, Turkey's asylum system does not provide a permanent status to refugees, so they cannot see their future in Turkey. Even if they establish their own workplace or go to university; they are not entitled to get long-term residence permits or citizenship at the end. How do we as ordinary people plan our life? Refugees should have a right to plan their lives or their children's lives. If you do not have any status, you cannot know what there is at the end of the tunnel. For this reason, I do not think that Turkey is a safe third country for refugees.

NGO4[9] emphasised the precarious legal position of refugees and found Turkey an unsafe country for refugees again from the second perspective;

> This temporary protection status leaves refugees to the mercy of Turkish authorities and constitutes a barrier to accessing their fundamental rights arising from the 1951 Refugee Convention and international law. If we see Syrians, Iraqis or Afghanis as equal individuals with rights stemming from the international human right law, this could change our approach towards them and help to develop recognition of those rights of refugees and asylum seekers in Turkey. For example, when Syrian refugees first entered Turkey in 2011, public authorities did not even register them appropriately. Now Turkish authorities do not know how many refugees and asylum seekers live in Turkey and what their special needs are, such as health, education and qualifications to access to the labour market. If the Turkish government saw them as human beings and rights holders like citizens, it would want to know where they live and what their specific needs are to plan their access to education, welfare and health services at the beginning of their arrival.

NGO3[10] also found Turkey as an unsafe country for refugees due to their struggle in accessing basic public services. He said,

> There is no plan how refugees and asylum seekers access public services, such as health, education or welfare services. The DGMM has also no action plan, budget or trained experts, who can manage migration issues. Today we have been exposed to the law

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9 This was taken from the interview with the participant who is the Member of the Human Right Association and the Euro-Mediterranean Human Rights Network (EMHRN), Research Assistant at the University.

10 This was taken from the interview with the participant who is the Coordinator of the NGO.

> without any policy background. This is the essence of the issue…As a human right activist, I can say that the desired effects of the existing law cannot be seen in the field.

L5[11] highlighted inadequate living conditions of refugees and he stated that Turkey is not a safe third country for refugees.

> The lack of adequate living conditions in Turkey constitutes a violation of Article 3 of the ECHR…Without burden sharing, readmission agreement will not be a solution to the refugee crisis because it makes the situation of refugees even worse.

L3[12] found Turkey an unsafe country for refugees due to their poor living conditions.

> Safety of the country for refugees does not only include being free from persecution or *non-refoulement* but it also provides access to fundamental living conditions. If we look at the conditions of refugees in Turkey, we can easily see that they are struggling with accessing their fundamental rights…As an individual, I ask myself how many days I can survive in the street without any prospect of a better life or what happens to my children and me after 30 years.

NGO5[13] also referred to Turkey's institutional capacity during her evaluation of Turkey's safety. She said,

> I cannot say that Turkey is not a safe third country for refugees considering its hospitality towards a large number of refugees for nearly five years. However, there are serious problems in practice. These problems are mainly related to Turkey's institutional capacity. Turkey has developed its legislative basis for refugees compatible with international standards but the increasing refugee flow and refugee deal put Turkey's institutional capacity under pressure. We have to admit that Turkey has difficulty in ensuring that the fundamental rights of refugees and asylum seekers are met.

It is very clear that the respondents do not see Turkey as a safe third country for refugees. The most important determinant factor in this perception is the deficiencies in accessing dignified living conditions.[14] Considering the huge refugee protection responsibility of

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[11] This was taken from the interview with the participant who is the lawyer and an expert in Migration and Human Rights Law and former rapporteur of the National Human Rights Institution of Turkey.

[12] This was taken from the interview with the participant who is the Lawyer, members of the Refugee Rights of Turkey.

[13] This was taken from the interview with the participant who is the Expert at the International Organisation for Migration-Turkey Office.

[14] **Amnesty International**, No Safe Refuge: Asylum Seekers and Refugees Denied Effective Protection in Turkey, 2016, pp. 18-21.

Turkey, the institutional deficiencies and lack of resources are leading to some serious human rights violations in the field. Without fair refugee responsibility sharing between Turkey and the EU, it is unreasonable to expect Turkey to provide a dignified life for all refugees.

3. The Struggles of Refugees in Accessing Dignified Living Conditions: Expulsion from Humanity?

Most refugees in Turkey are living in dire conditions. Both the EU and Turkey have been avoiding responsibility regarding the long-term needs of refugees and are playing a "blame game".[15] Kılıç alleges that Turkish politicians have deliberately not improved the living conditions of refugees and keep it as basic as possible due to the fear of encouraging more refugees to come into Turkey. Thus, Turkey only provides humanitarian aid, such as providing temporary shelters and food in an emergency situation.[16]

In accordance with the Turkish asylum law, the LFIP and TPR provide various provisions related to the social and economic rights of refugees but none of these are binding upon the Turkish government. Article 95(2) of the LFIP states that the DGMM may establish reception and accommodation centres to meet the housing, food, healthcare, social and other needs of applicants and international protection beneficiaries. However, these regulations give large discretion to the public authorities. Also, Article 26 of the Temporary Protection Directive also states that foreigners within the scope of this Directive may be provided with health, education, and access to the labour market, social services, and interpreting and similar services. Again, when we look at the articles, those services that are listed are not defined as the rights of foreigners but they can ask for them from Turkish state. They are assessed as the services of the Turkish State it gives large discretion to the public authorities. The support provided to refugees and asylum seekers is perceived as an act of charity as opposed to legal rights or obligation of the State.[17] Due

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15 **Elman**, Pinar, From Blame Game to Cooperation: EU-Turkey Response to the Syrian Refugee Crisis, *The Polish Institute of International Affairs*, Policy Paper, No. 34(136), October 2015, pp. 3-4; **Banulescu-Bogdan**, Natalia & **Fratzke**, Susan, Europe's Migration Crisis in Context: Why Now and What Next? 24 September 2015, http://www.migrationpolicy.org/article/europe-migration-crisis-context-why-now-and-what-next.

16 **Kılıç**, Taner, Türkiye'de Mülteci Hukuku Uygulamaları, Geri Kabul Süreci, (The Asylum Law Practice of Turkey: Readmission Process), Birikim Dergisi, Ağustos-Eylül, 2016, p. 67.

17 **Zetter**, Roger & **Ruaudel**, Héloïse, Refugees' Right to Work and Access to Labor Markets-An Assessment, KNOMAD Global Partnership on Migration and Development, Part II: Country Cases (Preliminary), September 2016, p. 118: **Betts**, Alexander & **Ali,** Ali & **Memişoğlu**, Fulya, Local Politics and the Syrian Refugee Crisis: Exploring Responses in Turkey, Lebanon, and Jordan, Oxford

to lack of concrete legal grounds when requesting the socio-economic rights of refugees, there are serious deficiencies in accessing these rights in practice. The general lack of awareness on the part of refugees and the delays in the registration process hinder refugees' access to the limited or permitted socio-economic rights. Thus, many refugees are living in "abject poverty" and relying on external aid.[18]

During the fieldwork, the participants have identified four major problems: no state-funded accommodation, limited access to health services and education, and difficulties in accessing legal employment.

3.1. Housing

In accordance with Article 95(1) of the LFIP, "Applicants and international protection beneficiaries shall provide their own accommodation." This means that asylum seekers and refugees are expected to secure their own self-financed accommodation in designated satellite cities and the DGMM has no legal duty to establish European style reception facilities. Turkey has actually established two reception centres in the provinces of Yozgat and Erzurum with a capacity to accommodate 850 refugees but it is certainly not enough considering the size of the refugee population.[19] In fact, five reception centres had been built within the framework of the EU twinning project with the European Commission's financial support but after the EU-Turkey Statement, they were transformed into removal centres.[20] Apart from these two reception centres, there are temporary accommodation centres, which are strictly used for Syrian refugees and were constructed in 26 locations since the Syrian refugee crisis. However, their capacity is limited to around 300.000 Syrian refugees and only host 10% of the total Syrian refugee population.[21] Thus, nearly 90 per cent of the Syrian refugee population is living outside the camp area. This has led to increasing rents of the houses and many refugee families are forced to live together. These difficulties in accessing reliable housing assistance have

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Refugee Studies, 2017, p. 23.

18 **NOAS Report**, Norwegian Organization for Asylum Seekers, Seeking Asylum in Turkey, A Critical Review of Turkey's Asylum Law and Practices, 2016, pp. 10-11; **Elman**, 2015, p. 5.

19 **AIDA**, Asylum Information Database, Types of Accommodation, Refugee Rights of Turkey, http://www.asylumineurope.org/reports/country/turkey/types-accommodation. Retrieved on 5th of November 2016.

20 **Asylum Information Database**, Wrong Counts and Closing Doors, The Reception of Refugees and Asylum Seekers in Europe, ECRE, March 2016, pp. 25-26.

21 **UNHCR Turkey Report**, 3RP Regional Refugee & Resilience 2016-2017 In Response to the Syria Crisis, p. 7.

driven many families to move from city to city without registering or sending their children to school. This poverty driven movement and bad housing conditions have caused many health problems, low enrolment rates in school and malnutrition problems as a domino effect.[22] Most reports and research have focused on the Syrian refugee population but the non-Syrian refugee population is more vulnerable than Syrian refugees. Inside the Turkish refugee reception facilities, while Syrians have been hosted in the temporary accommodation centres, non-Syrian asylum seekers from countries such as Algeria, Morocco, Tunisia, and Afghanistan are not accommodated in these temporary centres. Thus, non-Syrian refugees, especially women and children, are facing a high risk of destitution while waiting for their resettlement into another safe third country.[23]

Considering the deficiencies in state-funded reception centres, nearly 90% of refugees and asylum seekers are living in satellite cities without any assistance of the Turkish government.[24] However, they are not free to choose where to live. They have to stay in designated satellite cities and report to the provincial authorities on a regular basis.[25] If conditional refugees or subsidiary protection beneficiaries fail to comply with the reporting obligation three consecutive times without an excuse or, leave the place of residence without permission, their asylum application will be considered withdrawn.[26] These compulsory residency obligations had not been applied to temporary protection beneficiaries until 2016 but after many irregular movements of Syrian refugees from Turkey into the EU territory, Turkey has brought compulsory accommodation for temporary protection holders in designated cities with the insistence of the EU after 18 March 2016. The DGMM circulated a written instruction to the Governorates across Turkey, ordering provincial authorities to control the movement of Syrians.[27] Now temporary protection holders are also subjected to compulsory residence in designated

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22 **Çorabatır**, Metin, The Evolving Approach to Refugee Protection in Turkey, Assessing the Practical and the Political Needs, Transatlantic Council on Migration, Migration Policy Institute, September 2016, pp. 12-13; **Şimşek**, Doğuş & **Çorabatır**, Metin, Challenges and Opportunities of Refugee Integration in Turkey, Research Centre on Asylum and Migration, December 2016, p. 83.

23 **Asylum Information Database**, 2016, pp. 25-26.

24 **UNHCR Turkey Report**, 2016-2017, p. 7.

25 Article 71 of the LFIP states that "Administrative obligations may be imposed upon the applicants such as to reside in the designated reception and accommodation centres, a specific location or a province as well as to report to authorities in the form and intervals as requested".

26 Article 77(ç) of the LFIP.

27 **Zetter** & **Ruaudel**, 2016, p. 114.

satellite cities, otherwise, they can lose their temporary protection status.

It should be underlined that Turkey's compulsory residence in satellite cities restricts the mobility of refugees and has a negative impact on their integration. Even though the satellite city system is more advantageous than refugee camps for refugees' integration into Turkish community and gives an opportunity for them to earn their living expenses without any humanitarian assistance, some fundamental deficiencies in refugee protection system place them in "perilous conditions of living".[28] The fieldwork findings reaffirmed the problems of refugees in accessing reliable and healthy housing conditions. The respondents claimed that there is no opportunity of state-funded accommodation for asylum seekers and refugees even though they are vulnerable, especially women and children. This leads to the impoverishment of thousands of refugees in the satellite cities and leaves them in destitution. This has been exacerbated by the rapid rise in rents and exploitation by landlords. Turkish landlords abuse the vulnerability of refugees by charging too much or forcing them to live in very crowded conditions.[29]

NGO3 illustrated the delicate situation of refugees during renting a house in Turkey:

> Refugees are totally left to the mercy of local community and NGOs. If they do not have any Turkish family friends, they might have real difficulty in finding accommodation or Turkish landlords might overcharge them.

L1[30] also emphasized the deficiencies in the satellite city system in his interview. He said that there is no support system to assist refugees and asylum seekers on their arrival. Even the DGMM has no reception assistance to help refugees when they first arrive in their designated satellite cities. People have stayed in public parks for months if they have no money to rent a house. Some of them live in the garden of mosques or in streets with the help of the local community. NGO3 also complained about sending refugees to satellite cities without considering differences in the cultural and religious approaches of local community and refugees:

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28 **Baban**, Feyzi & **Ilcan**, Suzan & **Rygiel**, Kim, Syrian Refugees in Turkey: Pathways to Precarity, Differential Inclusion, and Negotiated Citizenship Rights, *Journal of Ethnic and Migration Studies*, 43(1) 2016, pp. 1-2; **Amnesty International**, No Safe Refuge, 2016, pp. 23-25.

29 **Elman**, 2015, p. 5.

30 This was taken from the interview with the lawyer who is working as a Chairman of the NGO in Turkey.

> The DGMM has settled LGBT refugees and asylum seekers into very conservative satellite cities like Konya or Kayseri without considering their sexual preferences.

Recent research has reaffirmed the allegation of NGO3 that some of the refugees who are coming from different backgrounds are facing discrimination and prejudgment persecution in their residences. Sometimes they have to move to another city but it is very difficult to obtain permission from the DGMM. For instance, Dom and Abdal were reported very recently as facing discrimination by the host community due to their differences they were Syrian gypsies.[31]

Because of these problems, some asylum seekers and refugees abstain from registering and they live as unregistered as long as they do not face any deportation decision. However, without registration, they cannot benefit from health services, enroll their children in state schools or get work permits. This situation of refugees was highlighted by L3:

> Some of the refugees do not want to go to satellite cities. To abstain from this obligatory residence in these cities I advise them to apply for humanitarian residence permits. There is no residence obligation for humanitarian residence holders and they do not have to notify the police once or twice a week in the satellite cities.

L5 also underlined alluded to the same problem saying,

> Many of asylum seekers have preferred to stay unregistered in metropolitan cities because there is no difference between registered and unregistered refugees considering their living conditions. Even living as unregistered is more advantageous than registered ones. Because if you are registered, the State knows where you live and put a restriction on your mobility. As I observe from the field that many Syrians living in metropolitan cities are not registered officially. Therefore, I assume that the real number of refugees and asylum seeker living in Turkey is much more than official records. I have to accept that Turkey could not register all refugees living in its territory before debating how to deliver their fundamental rights.

L1 gave an example of Congolese asylum seekers' difficulties in satellite city, Kayseri. These Congolese asylum seekers were readmitted to Turkey from Greece under the refugee deal without being given an opportunity to ask for asylum in Greece. After their

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[31] **Yıldız**, Yeşim Yaprak, Nowhere to Turn: The Situation of Dom Refugees from Syria in Turkey, September 2015, p. 51.

readmission, they were subjected to administrative detention awaiting deportation to their country of origin. After the acknowledgment of the Amnesty International Office, they were given a legal advisor and applied for asylum in the removal centre. After their last-minute asylum application, they were released from the removal centre approximately six months later. They were sent to a satellite city, Kayseri, but they faced many difficulties. L1, who was the lawyer in Amnesty International, shared their difficulties;

> After the release of the Congolese asylum seekers from the removal centre, they were sent to Kayseri to wait for their asylum application proceedings. They were free in the city, but they have to go to the police once or twice a week to sign a document. They had to arrange their own accommodations in Kayseri. However, after their stay in the removal centre for five months, some of them were not good mentally and one woman was in a deep depression. You just put yourself into Congolese asylum seekers' position in Kayseri. You have to live in very traditional Turkish city, and you have no idea about their language, culture and where to live. You have only 1000 dollars in your pocket. You may feel as a fish living out of the sea…I desperately searched all alternatives to find them a solution using my network inside NGOs but they said, 'We cannot find a place for even pregnant women.' I asked my friend 'Did I do the wrong thing in helping them to get release from the removal centre?' At least they had a bed and free meal in the removal centre. They are free now, but they have no home to stay or meal to survive'.

L1 also shared what happened to these Congolese asylum seekers after their settlement in the satellite city. He said, they decided to leave Kayseri after struggling to continue their daily life, even taking the risk of forfeiting their refugee status. They understood that they could not survive in Kayseri without any financial support. Although the new Regulation gives them the right to work as conditional refugee status holders but there is no opportunity for foreigners to work legally in satellite cities. Due to language barriers, the quota on foreign workers and difficulty in finding a job in the local area, foreigners prefer to go to metropolitan cities to work and find their own community and benefit from their support. Although we suggested they stay in Kayseri not to lose their refugee status and wait for their resettlement to another third country, they left to go to İstanbul. According to the LFIP, asylum applications cannot proceed anymore when asylum seekers leave their designated satellite cities. Thus they lost their chance of gaining refugee status. L1 underlined,

> The procedural success we got with difficulty has become upside down again. In other words, they are in an illegal position again. When the police arrest them, they will be subjected to deportation order again.

The recent report of the Mülteci-Der has confirmed the difficulties of refugees and asylum seekers in accessing accommodation and their desperate situation. They conducted interviews with 93 asylum seekers and refugees in six satellite cities. According to the report, refugees have difficulty in finding accommodation and may live on the streets or in parks or mosques at night. For example, one Sudanese refugee shared his experience saying, "I stayed eight months on the street. At nights I stayed in the garden of mosques". Also, some of them stayed in one small rental room with their extended family without any bathroom or kitchen facilities and often without any heating.[32] The findings of their fieldwork have shown that settlement of refugees into satellite cities without any housing assistance leaves them in a rightless position and makes their integration more difficult.

Despite the Turkish government's knowledge of these problems, it is not possible to give them accommodation assistance. As NGO1[33] stated,

> Turkish government cannot provide accommodation assistance to a large number of foreigners because there is no accommodation assistance for even the poorest Turkish citizens…Turkish nationals have never had housing or unemployment benefits so far. How can it be expected from the Turkish government to provide financial assistance to a foreigner? It would lead to resentment on the part of Turkish nationals.

3.2. Healthcare

Access to healthcare services was the biggest struggle for refugees and asylum seekers until 2013 when the Turkish government took an important step and provided free healthcare services to temporary protection beneficiaries. After this improvement, free healthcare services were also provided to individual international protection holders in 2014.

As NGO1 states,

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[32] **Mültecilerle Dayanışma Derneği Uydu Kentler İzleme ve Raporlama Projesi**, Türkiye'de Mültecilerin Kabul Koşulları, Hak ve Hizmetlere Erişimleri, (Satellite Cities: Monitoring and Reporting- Project: Reception Conditions of Refugees and their Access to Rights and Services), Egus Matbaacılık: İzmir, 2015, p. 43.

[33] This was taken from the interview with the President of the NGO, which provides legal assistance to refugees and asylum seekers. He is also working as a lawyer.

> Even Turkish nationals could not benefit from free health care services until Syrian refugees come to Turkey. After that time, Turkish nationals, who cannot afford to pay social security payments, have started to benefit from free healthcare services.

Despite these positive developments, there are still problems in accessing healthcare services. First, problems are generally related to delays in registration of international protection applications because refugees cannot benefit from free healthcare without registration. Although the DGMM has taken some precautions to reduce the numbers on the waiting list for registration, there are still many asylum seekers waiting or they have chosen to stay unregistered deliberately. Second, as described by NGO3, refugees and asylum seekers cannot access basic healthcare services due to language barriers:

> For example, some hospitals have no translator services in their emergency and other departments. Even in big metropolitan cities, such as İstanbul, Ankara and İzmir, patients cannot explain their situation properly. This situation constitutes a serious problem for refugees in practice.

Lastly, refugees and asylum seekers should pay some percentage of prescribed medications themselves but considering their economic conditions, and this has led to serious problems, especially with chronic diseases. Although some Social Assistance and Solidarity Foundations in the provinces have helped refugees to buy their prescribed medicines, there is no systematic assistance. This means that patients who have chronic diseases, such as heart, cancer, diabetes, high blood pressure etc. but cannot continue their treatment due to deficiencies in systemic financial support.

3.3. Education

Access to education is seen as another important avenue for the integration of refugees into the host community. Of the 3.1 million Syrian populations in Turkey, more than half are children. Providing education to these is a significant challenge for the Turkish Authorities. According to the latest statistics, Turkey is hosting 942,000 school-age refugee children (5-17) in 2017.[34] Turkish asylum law provides refugees primary and secondary school education free of charge in the public schools.[35] In addition to public

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[34] **UNHCR Turkey Report**, 2016-2017, p. 7; **Achilli**, Luigi & **Yassin**, Nasser & **Erdoğan**, Murat, Neighboring Host-Countries' Policies for Syrian Refugees: The Cases of Jordan, Lebanon, and Turkey, European Institute of Mediterranean, January 2017, p. 40.

[35] According to Article 89 of the LFIP and Article 8 of the Temporary Protection Directive, refugees and temporary protection status holders can access to elementary and secondary education free of charge in the public schools.

schools, Syrian refugees can also benefit from "temporary education centres" during their primary and secondary education. These centres are usually Syrian-run, teach a Syrian curriculum in Arabic and have been granted recognition by the Turkish authorities. Due to language problems, many Syrian families choose to send their children to temporary education centres. In accordance with the latest statistics, while 255,000 children (85, 000 in the camps, 170,000 outside the camps) have accessed one of 400 temporary education centres, 75,000 Syrian children access Turkish state schools. In this sense, out of 942,000 school age children, around 600,00 children have not attended school in the last six years.[36]

Although there is no legal obstacle to refugee children accessing Turkish state schools, nearly two-thirds have been out of education for six years and risk become a "lost generation". The continuation of low enrollment has led to child labour, child begging, early marriage and also creates the risk of marginalisation and radicalization.[37] The important question is why the rate of schooling is so low even though the Turkish legal system is no obstacle. The report of the European Council reveals that the rate of schooling differs dramatically amongst refugees living in camps and satellite cities. While refugees in camps can access education services very easily and benefit from temporary education centres, non-camp refugees have many difficulties in accessing the temporary education centres and state schools. Thus, the rate of participation in education among refugee children living in satellite cities has been decreasing sharply compared to those who live in the camps.[38]

The shortfalls in accessing education in the satellite cities can be explained in three ways. First, even though the right to education is available for all under Turkish law, refugee families cannot enroll their children in the state schools due to the lack of clear regulations explaining the formal procedures for the enrollment of students and the lack of space in classrooms. The majority of families believe that residency permits or passports are required for registration but many families still live unregistered due to abstaining from living in determined satellite cities. Also, the Turkish education system is not ready to

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36 **Achilli** & **Yassin** & **Erdoğan**, 2017, p. 40.

37 **The International Crisis Group**, Turkey's Refugee Crisis: The Politics of Permanence, Europe Report no: 241, 30 November 2016, p. 5.

38 **Reports of the Council of Europe**, Fact-finding mission to Turkey by Ambassador Tomáš Boček, Special Representative of the Secretary-General on Migration and Refugees, 30 May-4 June 2016, p. 11.

cope with this huge increase in the number of school-age children. Approximately 40,000 teachers and 30,000 new classrooms are required to integrate the rest of the refugee children into Turkish state schools.[39] Second, Turkish state schools teach in Turkish and there is no preparatory or catch up classes for refugee children. This constitutes an important obstacle to refugee children in their access to state schools and they have a hard time following the Turkish curriculum.[40] Furthermore, Syrian families think that they have no status in Turkey and finally they have to return to their country. In this sense, they prefer to send their children to the temporary education centres but these centres have the negative impact on the integration of refugees by failing to teach Turkish.[41] Third, refugee families cannot afford their children's education. For example, many families cannot afford their children's school uniform or other school materials. Also, many school-aged children have to work in the informal sector to support their families. Due to the low paid jobs, all family members have to work to pay their rents, foods and other basic necessities.[42]

Against the shortfalls in accessing the right to education, the Turkish government and its international partners have commenced some significant initiatives to increase the rate of enrolment. In January 2016 at a conference in London, "Supporting Syria and the Region", the Turkish government committed to enrolling all Syrian children in schools

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39 **Erdoğan**, Murat & **Kavukçuer**, Yudum & **Çetinkaya**, Tuğçe, Development in Turkey: The Refugee Crisis & The Media, Freedom Research Association, Liberal Perspective Analysis, 5, April 2017, pp. 8-9; **Şimşek** & **Çorabatır**, 2016, pp. 83-84; **Human Rights Watch**, When I Picture My Future, I See Nothing, November 2015, pp. 23-24.

39 **Asylum Information Database**, Wrong Counts and Closing Doors, The Reception of Refugees and Asylum Seekers in Europe, ECRE, March 2016, pp. 25-26.

40 **Human Rights Watch**, 2015, pp. 39-40.

41 **Erdoğan** & **Kavukçuer** & **Çetinkaya**, 2017, pp. 8-9; **Biner**, Özge & **Soykan**, Cavidan, Suriyeli Mültecilerin Perspektifinden Türkiye'de Yaşam (The Life in Turkey from the Perspective of Syrian Refugees), Mülteci-Der & Sivil Düşün, Nisan 2016, pp. 15-16; **The International Crisis Group**, 2016, p. 5; **Human Rights Watch**, 2015, pp. 32-33.

42 **Asylum Information Database**, Country Report: Turkey, Edited by ECRE, December 2015, pp. 84-85; **Kirişçi**, Kemal, Turkey's Role in the Syrian Refugee Crisis, *Georgetown Journal of International Affairs*, 17(2), 2016, p. 81; **Elman**, 2015, p. 5; **Reports of the Council of Europe**, Fact-finding mission to Turkey by Ambassador Tomáš Boček, Special Representative of the Secretary-General on Migration and Refugees, 30 May-4 June 2016, p. 11; **Amnesty International**, No Safe Refuge, 2016, pp. 29-31; **Aras**, Bülent & **Yasun**, Salih, The Educational Opportunities and Challenges of Syrian Refugee Students in Turkey: Temporary Education Centres and Beyond, IPC-Mercator Policy Brief, July 2016, pp. 10-12; **Ineli-Ciğer**, Meltem, How Well Protected are Syrians in Turkey? Open Democracy, 17 January 2017, https://www.opendemocracy.net/mediterranean-journeys-in-hope/meltem-ineli-ciger/how-well-protected-are-syrians-in-turkey

by the end of the 2016-2017 academic year.[43] However, considering the lack of teachers, especially after the dismissal of 30,000 teaching personnel suspected of affiliation with terrorist groups, the Turkish government's declared benchmarks will not be easy to reach. Considering Turkey's institutional deficiencies, the UNICEF's Turkey representative emphasised the importance of much more investment into non-formal education. In the meanwhile, the Emergency-Social Safety Network Programme for basic needs has been started in 2017 as part of 3 billion Euros of aid under the EU-Turkey Statement. This Programme is expected to help families conditionally under "education cash grant". Under this Programme, each low-income Syrian family will receive 35-60 TL (11-18 dollar) monthly for each child attending school. Syrians welcome this financial help but they do not see it as the sustainable response to their precariousness.[44]

During my fieldwork, I asked the participants whether Turkey allows refugees a dignified life during their stay but the majority of the participants linked the question with the right to access primary and secondary education free of charge. The participants highlighted the reason behind the low enrolment rate in satellite cities and shared their observations on the actual practice.

L1 explained the low enrolment rate of refugee children in terms of economic difficulties of families,

> There is no legal barrier in front of Syrian children for their access to education but only one-third of the Syrian refugees are able to access education services. The problems are mainly economical and physiological. First, there are no supportive language courses in Turkish state schools. Secondly, families' economic situation have forced children to start work at a very early age. Thus, unfortunately, there is a growing lost generation.

NGO3 agreed:

> Some of the children have started Turkish state schools without being offered any Turkish lessons in advance. Language has created a serious barrier in front of their success at the state schools and after a while, they fall behind in class and their school friends and teachers excluded them…Unfortunately, Turkish government deliberately did not open Turkish courses and encourage families to send their children to Syrian community schools because Turkish authorities thought that if they were offered

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43 **The International Crisis Group**, 2016, p. 5; **Hürriyet Daily News**, Only 30 per cent of Turkey's Syrian Children have Access to Education: Disaster Agency Head, 31 March 2016.

44 **The International Crisis Group**, 2016, pp. 5-7.

> Turkish lessons and education in state schools, they would not return to their country when the war ends.

He also mentioned that many refugees and asylum seekers send their children to work to supplement the family income, rather than enrolling them in schools. They are working in textile and shoe workshops in very exploitative conditions. Although Turkish law prohibits child labour, no preventive mechanism is available in practice.

E1[45] also stated the same,

> Some of the children would like to learn the Turkish language when they first arrived, but authorities refused their requests. Since the administrative authorities are afraid of their integration into Turkish community. They thought if they integrated into Turkish community, they would not go back to their country of origin. It is a very deplorable picture. Why do they go to community schools teaching Arabic? It is nonsense…Turkey should have acted immediately to integrate these refugee children into its state education system but Turkey has some institutional deficiencies to sort out. Concerning the large numbers of refugee children, Turkey needs to employ 45,000 additional teachers and create many classes…If the EU and Turkey do not find a solution to this problem, unfortunately, refugee children will be open to any ideological and religious manipulations in the future. This growing population may darken both the future of Turkey and the EU.

NGO1 underlined the differences between the rate of schooling in camps and satellite cities. He said,

> I do not want to say that Turkey is not a safe third country for refugees. However, there are many problems in the field…For instance approximately 600.000 of the Syrian children (equal to 65% of them) have not accessed education for five years. The government only report the schooling percentage of children living in the camps, but it ignores the others living outside the camps. This statistical data is misleading considering the number of people living outside of the camps, which constitute nearly 90% of them.

NGO5 emphasised the effects of family's preferences in children's school attendees. She stated,

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[45] This was taken from the interview with the participant who is Vice Director of…University Migration and Politics Research Centre.

> We observed that some families do not want to send their children to Turkish state schools due to language barriers, cultural differences and deficiencies in integration motivation. Some families see Turkey only as a transit country to reach the EU rather than settling down. Last year approximately one million refugees entered the EU through Turkey. We saw that they only stayed in Turkey for one month. They did not have any motivation to continue their life or integrate into Turkish community.

3.4. Economic Self-Sufficiency: Employment

The current refugee protection system has been forcing refugees to choose from three impossible options: "encampment, urban destitution and dangerous journeys". In accordance with the refugee protection system, states have mainly focused on humanitarian needs of refugees, such as dealing with their immediate safety and accommodation in the camp areas rather than focusing on empowering them to rebuild their lives in their host countries. It assumed that refugee protection is a "zero-sum game". If we give some rights, such as the right to work to refugees, it will negatively affect the rights of citizens and their economic situation.[46] In the case of the EU-Turkey Statement, the European Commission insistently claims that Turkey provides effective protection to refugees by showing that Turkey gives shelter to nearly 3 million refugees. However, it ignores the most significant part of the deal and does not look at whether refugees really find a dignified living condition in Turkey. Economic self-sufficiency is the most important part of a dignified life but states are not willing to give refugees a right to work. Even if they give this right to refugees legally, they put so many legal and bureaucratic obstacles in the way of refugees getting work.[47]

If we look at the Turkish asylum law practice, even though some positive steps were taken to provide access to the labour market, it is far from adequate and cannot be used effectively in practice. Article 89(4) of the LFIP allows conventional refugees access to the labour market as soon as they get their status. They are not subjected to any work permit. Their identity documents substitute for a work permit but there are very few people benefitting from this right. Conditional refugee status and subsidiary protection holders have to apply for a work permit six months after they lodged their claim for

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46 **Betts**, Alexander, Our refugee system is failing. Here's how we can fix it, TED Talk, February 2016.http://www.ted.com/talks/alexander_betts_our_refugee_system_is_failing_here_s_how_we_can_fix_it.

47 **Kılıç**, 2016, p. 67.

international protection.[48] The Turkish government adopted a Regulation on international protection applicants on 26 April 2016.[49] This Regulation was adopted to determine how conditional refugees and subsidiary status holders can fulfil the administrative requirements for permission to work. However, temporary protection status holders did not have the right to work until January 2016 when the Turkish Council of Ministers adopted the Regulation Concerning Work permits for Temporary Protection Beneficiaries.[50] This Regulation made it possible for Syrians to apply for work permits after being resident in Turkey for more than six months. It is a fact that this work permission was given with the insistence of the EU after the EU-Turkey Statement to reduce the secondary movements of Syrian refugees by giving them an opportunity to earn money and continue their life without help. This is the main indicator of "the shift of Turkish government's approach from humanitarian aid to livelihoods support" and facilitates the integration of Syrians into the Turkish community.[51]

Work permission for conditional, subsidiary protection and temporary protection holders is a significant development, but there are still obstacles in exercising their fundamental right to work. These include insufficient legislation, bureaucratic work procedures, language barriers and socio-cultural differences. In addition, the domestic economy is suffering from high unemployment rates and shortage of jobs. These obstacles are consistently preventing refugees from accessing the formal labour market.[52] To increase formal employment, the first priority should be to lift all regulatory and bureaucratic restrictions. For instance, Article 8(1) of the Regulation on Work Permits for Temporary Protection Beneficiaries states that the number of temporary protection holders in a workplace cannot exceed 10 per cent of the total numbers of Turkish workers within the same workplace. This quota system is particularly problematic in border areas, where

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48 Article 89(4) of the LFIP.

49 OGT, 26.04.2016, No: 29695.

50 OGT, 15.01.2016, No: 29594. Article 5 of the Regulation on Work Permits of Foreigners under Temporary Protection states that temporary protection seekers may apply for work permission after six months of their registration.

51 **İçduygu**, Ahmet & **Diker**, Eleni, Labor Market Integration of Syrian Refugees in Turkey: From Refugees to Settlers, *Journal of Migration Studies*, 3(1), 2017, p. 18.

52 **Zetter**, Roger & **Ruaudel**, Héloïse, Refugees' Right to Work and Access to Labor Markets-An Assessment, KNOMAD Global Partnership on Migration and Development, Part II: Country Cases (Preliminary), September 2016, p. 115; **Kirişçi**, 2016, p. 81; **Şimşek** & **Çorabatır**, 2016, pp. 100-102; **ILO**, Workshop on Problems Faced by Syrian Workers, Employers and Entrepreneurs in Labour Market and Suggestions for Solution Overall Evaluation, 13 June 2016, pp. 3-4.

Syrians may make up over 50% of the population.[53] The other important obstacles in hiring refugees are related to the application procedure. For instance, refugees cannot make an application for the work permit by themselves, but they should go to the Employment Office with their employer who is willing to hire them. A yearly work permit fee is around 650 Turkish liras (equally to 130 pound).[54] It is quite difficult to get employers to pay this amount of money because, in the low-skill sectors, such as textiles, construction and manufacturing, potential employers do not have enough incentive to take on the administrative and financial burden of hiring a foreign national.[55] In addition, Turkey must facilitate refugees' access to the formal market by recognizing their qualifications acquired abroad and provide special training schemes that would enable them to adapt their knowledge and acquire new skills.[56]

Furthermore, even though there is a legal framework that facilitates formal employment, the informal market still remains more attractive both for refugees and employers. Refugees use competitive advantage over Turkish citizens by accepting lower payment without social security. If they demand formalization of their informal status, there is no possibility that Turkish employers will hire refugees instead of Turkish citizens. Also, if employers hire refugees formally, they must pay the minimum wage plus social security contributions and taxes. The majority of refugees are employed in the low-skilled sectors, such as agriculture, textiles, construction and manufacturing because these employers benefit from the low wages they pay. If they do not receive enough incentive to take over the additional financial and administrative burden of formally hiring a foreign national, they will refrain from hiring refugees and hire Turkish citizens.[57] To tackle the increasing informal labour market, it is recommended that the Turkish government should give employers some incentives to encourage them to formally employ refugees. These could include between two and four years waiver of social security payments for women and

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53 **Reports of the Council of Europe**, Ambassador Tomáš Boček, 2016, p. 10.

54 Article 5(2) of the Regulation on Work Permits of Foreigners under Temporary Protection require temporary protection beneficiaries and conditional refugees to take work permission before starting legally work.

55 **Asylum Information Database**, Country Report: Turkey, Edited by ECRE, December 2015, p. 84.

56 **The International Crisis Group**, 2016, p. 8; **İçduygu**, Ahmet, Turkey: Labour Market Integration and Social Inclusion of Refugees, Directorate-General for International Policies Policy Department Economic and Scientific Policy, 2016, p. 33.

57 **Asylum Information Database**, Country Report:, 2015, p. 84; **İçduygu** & **Diker**, 2017, p. 22.

young adults.[58] Yet, the most important risk is that these incentives may increase growing resentment between local workers against refugees.[59] Del Carpio and Wagner found that the informally employed refugees have a negative impact on the employment of Turkish citizens in low-skilled sectors and leads to large scale displacement of Turkish workers from the informal sector, around 6 natives for every 10 refugees.[60]

Unfortunately, due to these significant problems and barriers in front of refugees in accessing formal employment opportunities, the number of work permits granted to refugees is unexpectedly low. According to the latest DGMM statistics, there are more than 1.7 million Syrians of working age between 15-65 years old in Turkey.[61] Yet, only 20, 981 have been granted work permits including Syrian entrepreneurs since 2011. This accounts for only 1% of the total working age population.[62] As a result, most of them have continued to work without work permits, which subjects them to a different kind of abuse and exploitation. For instance, women are forced into prostitution by financial difficulties, while child labour is becoming a serious problem. Furthermore, refugees working in the informal sector have no social security or other benefits. They cannot sue if they are not paid or abused.[63]

L1 described the reason for low rates of employment of refugees and asylum seekers in his interview arguing that the legal basis for international protection seekers to access the labour market is designed to obstruct rather than enable them. In accordance with the Employment Regulation, conditional refugees and temporary protection seekers should get the permission from the Ministry of Labour and Social Security to work legally. L1 says,

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58 **The International Crisis Group**, 2016, p. 8; **İçduygu**, 2016, p. 33.

59 **İçduygu** & **Diker**, 2017, p. 25.

60 **Del Carpio**, V. Ximena & **Wagner**, Mathis, The Impact of Syrian Refugees on the Turkish Labor Market, World Bank Group Social Protection and Labor Global Practice Group, Policy Research Working Paper, August 2015, p. 4.

61 **DGMM Statistics** on Temporary Protection http://www.goc.gov.tr/icerik6/gecici-koruma_363_378_4713_icerik.

62 Presentation by the Ministry of Labor and Social Security at BETAM Turkey, Labour Market Network Meeting on 26. 01. 2017 at Bahçeşehir University, cited by **İçduygu** & **Diker**, 2017, p. 23.

63 **Zetter**, Roger & **Ruaudel**, Héloïse, Refugees' Right to Work and Access to Labor Markets-An Assessment, KNOMAD Global Partnership on Migration and Development, Part II: Country Cases (Preliminary), September 2016, p. 115; **Şimşek** & **Çorabatır**, 2016, pp. 80-82.

> If Turkish legislation says that there is a need for permission, you must forget it. It is very difficult to get permission from administrative authorities in practice even if there is no barrier legally.

Given the bureaucratic difficulties, the Employment Regulation does not produce any benefits for refugees in practice. Many asylum seekers and refugees are working illegally but the Ministry of Labour and Social Security inspectors do not enforce the Employment Regulation strictly because penalties are too high for both refugees and employers. For example, if one Syrian refugee is caught while working illegally, s/he has to pay 7.000 Turkish Liras (equal to £1.750) as a fine. Also, they will be subjected to a deportation decision. So Turkey has to turn a blind eye to the ongoing illegal working situation of refugees. However, this is used as a trump card in the hands of abusive employers who sometimes do not give refugees their money or force them to work long hours against human rights.

NGO1 offered some explanations for the increasing number of refugees working unofficially was:

> Nearly 35 per cent of the Turkish economy has been established in the informal sector. Some of the employers would like to take advantage of Syrians and other refugees. For example, if an employer hires a person officially, he has to pay 2.000 Turkish liras (equal to £400). But now refugees are working for 500 or 600 Turkish liras (equal to £100), …Turkish businessmen thought that if they have to pay insurance and the officially minimum wage in accordance with the Employment Directive, why would they hire foreigners instead of Turkish nationals? There is no advantage.

He also highlighted some restricted sectors for foreigners that they cannot work in legally. For example, foreigners cannot work as judges, lawyers, pharmacists and even porters. Also, Turkey does not have a system for the recognition of the professional qualifications of refugees and asylum seekers. As a result, they cannot find appropriate employment for their education and previous occupation. Thus, many doctors, academics and architects have to work in unskilled jobs in very exploitative conditions. It mirrors Arendt's description of refugees in her essay "We Refugees".[64]

> If we are saved we feel humiliated, and if we are helped we feel degraded. We fight like madmen for private existences with individual destinies since we are afraid of becoming

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64 **Arendt**, 2007, pp. 268-269.

> part of that miserable lot of schnorrers whom we, many of us former philanthropists, remember only too well.

L4[65] explained in his interview why refugees and temporary protection seekers have still been working in the informal market despite the employment regulations. He gave two reasons: First, there is not enough information given to refugees about their rights. Second, refugees can only apply for work permission from satellite cities, where they are living. These satellite cities are generally located in the eastern part of Turkey where there is less employment opportunity than in the metropolitan cities. Thus many prefer to live in metropolitan cities even though they are not permitted officially to do so and risk their conditional refugee status or temporary protection status.

E1 also addressed the problems of refugees in accessing the labour market.[66] He highlighted that Turkey's unemployment rate is very high. The system is forcing Syrians and other refugees to work in exploitative conditions informally. He describes their destitute situation:

> They need money to buy food and pay their rent. They are working in very serious conditions for long hours but they are paid very little and sometimes no payment is made. This has led to the accumulation of anger and resentment on the part of Syrian and non-Syrian refugees that will definitely affect the future of Turkey.

The statements of the participants indicate that the barriers in accessing formal employment cannot be eliminated with the recent legislative changes. This has a negative impact on refugees' integration and their future plans. The recent fieldwork conducted in four provinces of Turkey in 2016 with 1,120 Syrians highlighted that 90 per cent would like to return to Syria when the war ends.[67] This research indicates that lack of legal status; limited opportunities in accessing education, accommodation and labour markets have made refugees more pessimistic about their future in Turkey. Also, contrary to the enormous anxiety of the European member states, only six per cent would like to go to

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65 This was taken from the interview with the participant who is the Lawyer at the UNHCR Turkey Office.

66 This was taken from the interview with the participant who is Vice Director of…University Migration and Politics Research Centre.

67 **Fabbe**, Kristen & **Hazlett**, Chad & **Sinmazdemir**, Tolga, What Do Syrians Want Their Future to be?, A Survey of Refugees in Turkey, 1 May 2017, https://www.foreignaffairs.com/articles/syria/2017-05-01/what-do-syrians-want-their-future-be; **The International Crisis Group**, Turkey's Refugee Crisis: The Politics of Permanence, Europe Report no: 241, 30 November 2016, pp. 4-5.

Europe.[68] The EU's deterrent policies, especially inhuman reception conditions in Greece, detainment of all asylum seekers arriving on the Greek islands for long periods and readmission of asylum seekers to Turkey without accessing refugee status and the determination procedures have broken the hopes of getting to the EU. They have no option left but to wait in legal limbo in Turkey until the conflict ends.

4. Conclusion

Turkey is providing humanitarian assistance to nearly 3,2 million Syrian and non-Syrian nationals. But it is now facing the challenge that the majority of them require dignified living conditions and socio-economic rights as a human being. What should be Turkey's responsibility towards temporary protection status holders? Is it fair to ask Turkey to provide long-term solutions, especially in upholding their socio-economic rights? The EU-Turkey Statement has been implemented for over 18 months but neither the EU nor Turkey has so far addressed those questions. The fieldwork findings show that the pressure of a vast number of refugees on Turkey's immature refugee protection system, and limited resources have put refugees in a precarious position. In contrast to the argument of the EU Commission, Turkey's asylum system lacks strong legal grounds to enable or empower refugees to integrate into Turkish communities and exercise their socio-economic rights. Asylum seeker and refugees are not seen as rights holders but as "passive beneficiary"[69] at the discretion of the Turkish government. As Arendt observed refugees are denied the right to establish a relatively durable life with their own work and they become dependent on humanitarian aid. This situation gives rise to the fundamental condition of rightlessness and reduces them to "*bare humanity*".[70]

My fieldwork findings indicate that many refugees and asylum seekers are staying in Turkey without accessing their basic daily needs such as housing, health, education and employment opportunities. The participants all agreed that there is no opportunity of state-funded accommodation in Turkey for refugees even those that are vulnerable, such as women and children. This has led to the impoverishment of thousands of refugees especially in the satellite cities and leaves them in destitution and unhealthy conditions. Even though the EU has financially supported Turkey to increase its reception capacity,

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68 **Fabbe** & **Hazlett** & **Sinmazdemir**, 2017; **The International Crisis Group**, 2016, pp. 4-5.

69 **Gündoğdu**, Ayten, Rightlessness in an Age of Rights, Oxford University Press: Oxford, 2014, p. 93.

70 **Arendt**, 2007, p. 264.

after the EU-Turkey Statement, these reception centres have been converted into removal centres. Refugees and asylum seekers have to self-finance their accommodation in the satellite cities but considering the presence of large populations of refugees in the southern cities, this has led to increasing rents, overcrowding and unhealthy conditions. They have to work in exploitative conditions for long hours to pay their rents.

The participants also highlighted that education is another right that is not being met and which is impeding integration. The Turkish government is not taking positive steps in this area in fear of facilitating the permanency of refugees in Turkey. The Government has established temporary education centres in the camps and satellite cities, which are teaching the Syrian curriculum in the Arabic language. Even though Syrian families have preferred these centres for teaching their own language, in the long term, these centres have become a barrier to the integration of young refugees into the Turkish community. Currently, a very small numbers of refugee children are going to Turkish state schools and nearly two-thirds of the children have been out of education for six years. This has led to child labour, child begging, early marriage and also creates the risk of marginalisation and radicalization. Furthermore, adult education has become important for the integration of refugees into the labour market. Many refugees suffer from the refusal to accept their qualifications or educational attainment. Loss of identity documentation and qualification certificates is often given as an excuse. There is an urgent need for some particular education programs, which are specifically designed for adult refugees to help their integration into the formal labour market.

The recent adoption of the new Regulation, which facilitates refugees' and asylum seekers' access to the labour market has not changed the real situation. As underlined by NGO3, the legislative change without taking into account sociological and economic dimension of the problem have done nothing to change actual practice. Informal refugee employment remains the main characteristic of the Turkish labour market. This situation exposes the vulnerability of low skilled Turkish workers who are disproportionately bearing the cost. This has led to tension between local communities and the refugee population. If the Turkish government does not handle this situation delicately, it may trigger many hostile events towards refugees. It is clear that policy makers must better regulate and facilitate refugees' access to the formal labour market by lifting restrictions on the issuing of work permits, recognizing their qualifications acquired abroad or allocating incentives to employers to increase formal employment of refugees.

To prevent the marginalization of refugees, the Turkish policy makers must ensure that both Turkish citizens and refugees enjoy dignified living conditions. To reach this aim, refugees should be given similar rights to those enjoyed by citizens, such as housing, educational and healthcare services and access to the formal labour market. There should not be a trade-off between the human rights for refugees and the social justice concerns for Turkish citizens. Turkey also needs solidarity and cooperation with other states, intergovernmental and non-governmental organizations to provide resources and services for a better social and economic inclusion of refugees and migrants.

CHAPTER VIII: Conclusions

1. Reflections

The thesis set out to evaluate how the implementation of the EU-Turkey Agreement on the refugee issue was affecting the rights of refugees and in particular the principle of *non-refoulement*. This concluding chapter begins with a summary of the study followed by a discussion of my research findings. The challenges of the study are identified and recommendations are made for further research. Finally, there are suggestions for any future readmission agreements.

The researcher initially set out to analyse the EU-Turkey RA and its human rights impact on refugees but the Syrian refugee crisis added a different dimension to it. After the entrance of 850.000 irregular migrants and refugees into Greece transiting through Turkey, the EU desperately needed Turkey to stem the refugee flow and started negotiations with Turkey in 2015. The head of member states of the European Union and the Turkish government agreed on a Joint Action Plan[1] to stem refugee flows into the EU territory and they signed the Statement on 18^{h} of March 2016. This new refugee "deal" became an integral part of the EU-Turkey RA and changed the scope of the research project significantly. The Statement was included in the research plan and the main question of the thesis was amended to include both the EU-Turkey Readmission Agreement and the Statement.

The thesis aimed then to find out how the EU-Turkey Agreement on the refugee issue affects the rights of refugees. An examination of the literature revealed that it is a very controversial and disputed issue. There are two different approaches to the human rights impact of the issue. In the first approach,[2] the readmission agreement is viewed as merely a tool for the effective removal of irregular migrants and is neutral in relation to all human rights concerns. It claims that the EU's common asylum policy determines the criteria for rejection of asylum applications and the removal of irregular migrants to a third country.

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1 The EU-Turkey Joint Action Plan, 15 October 2015, http://europa.eu/rapid/press-release_MEMO-15-5860_en.htm.

2 **Coleman**, Nils, European Readmission Policy: Third Country Interests and Refugee Rights, Martinus Nijhoff Publishers: Leiden & Boston 2009, pp. 315-316; **Giuffré**, Mariagiulia, Readmission Agreements and Refugee Rights: From A Critique to a Proposal, *Refugee Survey Quarterly*, 32(3), pp. 80-81.

On the other hand, the second approach[3] focuses on the risks that readmission agreements create for refugees and asylum seekers. Although there is no special reference to asylum seekers and refugees in the provision of readmission agreements, states may use readmission agreements as an instrument to readmit both. It may, therefore, lead to *refoulement* of asylum seekers and refugees without accessing refugee status procedures. So, it is not possible to ignore the effects of the readmission agreement on the human rights of refugees and the different links in the chain, which lead to the return of irregular migrants and refugees.[4] The researcher embraced the second approach and started the research by asking three simple questions.

The first question was why do refugees and asylum seekers have such difficulties in accessing their human rights and does the implementation of the EU-Turkey RA guarantee "a right to have rights". The first part of that question was addressed in chapter II, which constructs the theoretical basis of the thesis. Adopting Arendt's political theory, the researcher argued that the main reason for the rightless situation of refugees is mainly related to the international state system. Refugees and asylum seekers are always struggling to access their fundamental human rights due to the lack of enforceability of human rights and refugee law. Despite the claimed universality of human rights, any refugee protection regime is still bound up with nation states and this inherent link between human rights and state sovereignty is problematic when individuals lose their citizenship status. In this international state system, nation states are normally very keen to develop different mechanisms to obstruct the arrival of asylum seekers in their territory. Outsourcing the refugee responsibility through readmission agreements has become the main strategy of the Western states in recent years. The EU-Turkey RA is a symbolic case for understanding nation states' restrictive and exclusionary approaches towards refugees. The EU-Turkey Agreement is only part of a wider refugee protection problem in the contemporary world. Given the contradictory responses of states towards refugees,

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3 **The Human Cost of Fortress Europe**, Human Rights Violations Against Migrants and Refugees at Europe's Borders, Amnesty International, 2014, p. 20; **Euro-Mediterranean Human Rights Network**, An EU-Turkey Readmission Agreement Undermining the Rights of Migrants, Refugees and Asylum Seekers? **European Parliament**: Do not Vote in Favour of a EU/Turkey Readmission Agreement, Press Release; **International Strategic Research Organization**, Regarding the EU and Turkey Relations, What Conditions Apply the EU and Turkey Readmission Agreement?, (Türkiye-EU İlişkilerinde Geri Kabul Hangi Şartlarda, USAK Raporları) No. 10(2) , 2010, p. 16.

4 **Strik**, Tineke, Readmission Agreements: A Mechanism for Return Irregular Migrants, Council of Europe Parliamentary Assembly, Doc. 12168, 17 March 2010, p. 7.

it is very difficult to claim universality, equality and inalienability of human rights. It is empirically evident that when human rights come into conflict with the sovereign power of nation states, international human rights acquire a "mythical status". The approach of the European member states towards refugees during the Syrian refugee crisis can only be explainable in terms of this conflict between human rights and state sovereignty.

When we look at the implementation of the EU-Turkey RA, it is evident that there is a shortfall in guaranteeing "a right to have rights". Two main problem areas are identified in chapter III. First, readmission agreements do not provide any safeguards or independent monitoring systems during the implementation of the readmission agreements. This gap in the readmission agreement poses a threat to the principle of *non-refoulement* and the right to seek asylum. States may reject asylum seekers and send them back to third countries without examining their asylum applications on the basis of the "safe third country concept," "accelerated border procedures" or interception operations on the sea. Second, it was not difficult to predict that the increasing burden on third transit countries would lead to a downgrading of the refugee protection standards because of the financial, economic and institutional deficiencies of these countries. Effective protection encompasses both protections from *refoulement* and access to basic living standards with opportunities for longer-term integration. But the readmission agreement only aimed to contain refugees in the region of origin in neighbour countries, which have no capacity to provide even basic living standards. The deficiencies in the refugee protection system in transit countries leave refugees in a "rightless" situation without any durable solutions.

The second question asked what kind of responsibilities did the EU-Turkey Agreement on the refugee issue bring for Turkey? This question was addressed in chapter IV. The detailed examination of the legal basis of the EU-Turkey RA revealed that Turkey has two main responsibilities. First, Turkey has to readmit Turkish nationals and third country nationals including asylum seekers and refugees if they have transited through Turkey before entering the European territory. It means that Turkey has become the first country of asylum or safe third country of asylum in accordance with the Asylum Procedures Directive. This requires Turkey to provide fair and effective asylum procedures, an effective remedy against unlawful deportations and other human rights infringements. Second, Turkey has to prevent the arrival of Syrian refugees and other irregular migrants into Europe through strengthening its border controls and continue to provide temporary protection to Syrian refugees on its own territory. The most significant consequence of

the EU-Turkey Statement is that Turkey has turned into a buffer zone for refugees and asylum seekers.

The last question addressed whether Turkey provides efficient protection to asylum seekers and refugees in accessing their fundamental human rights. This question was addressed in chapter V with a critical analysis of Turkish asylum law and the jurisprudence of the ECtHR and the TCC. This chapter focused on the civil and political rights of refugees in Turkey. After a detailed analysis of the legal and institutional capacity of Turkey's refugee protection regime, the fieldwork findings, which were based on interviews with 18 professionals working with refugees and asylum seekers in Turkey, threw light on the lived experiences of refugees and asylum seekers corroborating and supporting the findings of other researchers exposed in the literature. These findings were categorised under two main headings: civil-political rights and socio-economic rights and analysed respectively in chapters VI and VII. The first category, civil and political rights, were analysed to find out whether readmitted asylum seekers and refugees can access fair and efficient asylum procedures. This requires translators and transparent administrative procedures at removal centres, borders and international zones. This chapter also assessed the physical condition of administrative detention and the availability of effective remedies and procedural safeguards against inhuman and prolonged detention and unlawful deportation decisions. The second category, socio-economic, analysed in chapter VII addressed the difficulties of refugees in accessing their basic living needs, such as housing, health, education services and employment opportunities. The fieldwork findings reaffirmed that refugees and asylum seekers are struggling to access all of these.

To aid in answering the main research questions and other sub-questions given above, the researcher developed two main hypotheses. The first hypothesis was that the EU-Turkey Agreement on the refugee issue falls short of guaranteeing refugees “a right to have right” and the second hypothesis was that Turkey is not a safe country for refugees. The right to have rights of refugees is defined as the right to seek asylum, respect for the principle of *non-refoulement* and access to dignified living conditions as envisioned in the 1951 Refugee Convention and other human rights instruments.

In light of the analyses carried out in this thesis, the first hypothesis has been confirmed and validated. There are many pieces of evidence that the EU-Turkey Agreement on the refugee issue fails to guarantee the fundamental rights of refugees. If we look at the implementation of the Statement in Greece, it can be seen that Greece fails to take return

decisions in accordance with the international refugee law and repeatedly violates the right to seek asylum while the principle of *non-refoulement* is not upheld. If we look at the accessibility to fair and effective asylum procedures, the recent practice of the Greek authorities reveals that Greece does not comply with its international responsibilities when examining asylum applications. During the implementation of the EU-Turkey Statement since March 2016, the increasing refugee burden on Greek authorities has made it difficult to assess all asylum applications individually and has led to *refoulement* of asylum seekers without accessing asylum procedure. Since the date of the EU-Turkey Statement, around 2,000 persons, who have not applied for asylum or whose application has been assessed as unfounded or inadmissible in accordance with the Asylum Procedures Directive, have been returned from Greece to Turkey[5] but there is no satisfactory answer whether all these readmitted migrants were given the chance to apply for asylum and benefitted from legal assistance before returning to Turkey. Human rights organisations and NGOs and scholars have heavily criticised these returns for breaching the fundamental principle of *non-refoulement* and the prohibition of collective expulsion.[6] These allegations of the NGOs were reaffirmed by many unlawful returns of genuine asylum seekers to Turkey. The director of UNHCR's Europe Bureau, *Cochetel*, confirmed these allegations saying that 13 Afghan and Congolese asylum seekers, who reached the Greek island after 20 March 2016, were deported back to Turkey and had not been allowed to apply for asylum due to administrative chaos on the Greek island.[7] It was reported that following their readmission to Turkey, all 13 asylum seekers were placed in detention and the Turkish Government refused to allow the UNHCR Commissioner to

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5 Report from The Commission to the European Parliament, the European Council and the Council, Seventh Report on the Progress Made in the Implementation of the EU-turkey Statement, COM (2017) 470 final, 6 September 2017, p. 5.

6 **Amnesty International**, Turkey: Illegal Mass Return of Syrian Refuges Expose Fatal Flaws in the EU-Turkey Deal, 1 April 2016; **Human Rights Watch**, Turkey: Syrians Pushed Back at the Border, 23 November 2015; **Marx**, Reinhard, Legal Opinion on the Admissibility under Union Law of the European Council's Plan to Treat Turkey like a "Safe Third Country" Commissioned by Pro Asyl, 14 March 2016, p. 10; **Mülteci-Der** and **Pro-Asyl**, Observation on the Situation of Refugees in Turkey, 22 April 2016, p. 6; **Labayle**, Henri & **de Bruyker**, Philippe, The EU-Turkey Agreement on Migration and Asylum: False Pretences or a Fool's Bargain?, 1 April 2016, EU Immigration and Asylum Law and Policy. http://eumigrationlawblog.eu/the-eu-turkey-agreement-on-migration-and-asylum-false-pretences-or-a-fools-bargain/.

7 **Guardian**, Greece May Have Deported Asylum Seekers by Mistake, Says UN, 5 April 2016, http://www.theguardian.com/world/2016/apr/05/greece-deport-migrants-turkey-united-nations-european-union.

visit them.[8]

In addition to poor Greek asylum practice, Greece adopted fast-track border procedures in April 2016[9] and set a very short time limit for asylum applications and appeals against administrative removal decisions. This new Law has made it extremely difficult for asylum seekers to access asylum determination procedure and it triggers deportation of genuine asylum seekers.[10] Article 60(4) of the LFIP gives asylum seekers only one day for preparation for their interview.[11] The fast-track border procedures have also reduced appeal procedures against removal decisions. According to the new Law, there are only three days in which to appeal. Furthermore, there is no automatic suspension effect in appeals against a removal decision, which means that the applicants must apply to a judge in order to remain in Greece during their appeal.[12] The new law's provisions are not compatible with Article 46 of the Asylum Procedures Directive, which requires an automatic suspensive effect on appeals against inadmissibility decisions based on the "safe third country" concept. This means that if Greece decides to deport refugees and asylum seekers to Turkey on the basis of safe third country concept, Greece should give refugees the right to seek remedy with automatic suspensive effect in accordance with Article 46 of the Asylum Procedures Directive but in practice, it does not.

Furthermore, research into the implementation of the Statement revealed that nearly 60,000 asylum seekers who reached Greece after the EU-Turkey Statement, have been stranded in Greece, including children and vulnerable persons. The relocation scheme between the EU Member States does not work very well because some of the member

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8 **Guardian**, Refuges in Greece Warn of Suicides Over EU-Turkey Deal, 7 April 2016, http://www.theguardian.com/world/2016/apr/07/refugees-in-greece-warn-of-suicides-over-eu-turkey-deal; **Letter from the UNHCR**, Response to query related to UNHCR's observation of Syrians readmitted in Turkey', 23/12/2016, http://www.statewatch.org/news/2017/jan/unhcr-letter-access-syrians-returned-turkey-to-greece-23-12-16.pdf.

9 Law 4375/2016 on the Transposition of the Recast Asylum Procedures Directive, OG. A'51/03.04.2016.

10 **Strik**, Tineke, The Situation of Refugees and Migrants under the EU-Turkey Agreement of 18 March 2016, Parliamentary Assembly, Doc, 14028, 19 April 2016, p. 8; **Greek Council for Refugees**, Fast-Track Border Procedure (Eastern Aegean Islands), Available at Asylum Information Database (AIDA) http://www.asylumineurope.org/reports/country/greece/asylum-procedure/procedures/fast-track-border-procedure-eastern-aegean.

11 **Asylum Information Database** (AIDA), Greece: Asylum Reform in the Wake of the EU-Turkey Deal, 4 April 2016, http://www.asylumineurope.org/news/04-04-2016/greece-asylum-reform-wake-eu-turkey-deal.

12 **ECRE**, Greece Urgently Adopts Controversial Law to Implement EU-Turkey Deal, 8 April 2016, http://www.ecre.org/component/content/article/70-weekly-bulletin-articles/1439-greece-urgently-adopts-controversial-law-to-implement-eu-turkey-deal-.html.

states have refused to share the burden of Greece and Italy.[13] As of June 2017, less than 15,000 refugees have been relocated from Greece to other EU countries.[14] Poland, Hungary and the Czech Republic have sabotaged the refugee resettlement program of the European Council and refused to take any refugee from these two countries. Against this unlawful act of these countries, the European Commission launched a legal action.[15] In a response to the legal action, Slovakia and Hungary asked the CJEU to annul the decision of the European Council. It is very promising that the Court dismissed the argument put by Slovakia and Hungary and stated that

> The contested decision is not provisional since it will have long-term effects because many applicants for international protection will remain in the Member State of relocation well beyond the 24-month period of application of the contested decision.[16]

Given the lack of solidarity amongst European member states and very poor living condition on the Greek islands, it is hard to say that we are far from Arendt's interpretation on the rightlessness of refugees. Today refugees and asylum seekers cannot claim their fundamental human rights and are left to the generocity of nation states. Unfortunately, European member states use the dire reception conditions as a deterrent mechanism to prevent further arrivals of asylum seekers and irregular migrants from Turkey.[17] The poor protection system in Greece leaves asylum seekers vulnerable to human traffickers and has increased human suffering.[18]

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13 **Lovertt**, Asleigh & **Whelan**, Claire & **Rendón**, Renata, The Reality of the EU-Turkey Statement**:** How Greece has Become a Testing Ground for Policies that Erode Protection for Refugees, Publishers: International Rescue Committee & Norwegian Refugee Council and Oxfam Joint Agency, Briefing Note, 17 March 2017, p. 8; **Amnesty International**, A Blueprint for Despair: Human Rights Impact of the EU-Turkey Deal, January 2017, http://www.amnesty.eu/content/assets/Reports/EU Turkey Deal Briefing Formatted Final P4840-3.pdf

14 Member State's Support to Emergency Relocation Mechanism, 21 June 2017, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/press-material/docs/state_of_play_-_relocation_en.pdf.

15 **Khan**, Shehab, EU Launches Legal Proceedings Against Poland, Hungary and the Czech Republic Over Handling of the Refugee Crisis, Independent, 14 June 2017, http://www.independent.co.uk/news/world/europe/eu-poland-hungary-czech-republic-refugee-crisis-handle-legal-proceeding-lawsuit-european-commission-a7789161.html.

16 **Court of Justice of the European Union** (Grand Chamber), Judgment in Joined Cases C-643/15 and C-647/15, Slovak Republic and Hungary v Council, Luxemburg, 6 September 2017, para. 98.

17 **Christopoulos**, Dimitris, Refugees are the Bogeyman: the Real Threat is the Far Right, Open Democracy, 9 November 2016, https://www.opendemocracy.net/dimitris-christopoulos/refugees-are-bogeyman-real-threat-is-far-right.

18 **Guild**, Elspeth & **Costello**, Cathryn & **Moreno-Lax**, Violeta, Implementation of the 2015 Council Decisions Establishing Provisional Measures in the Area of International Protection for the Benefit

If we turn to Turkey, the evidence strongly suggests that the EU-Turkey RA has brought many challenges to Turkey's delivery of human rights. First, people who were readmitted to Turkey under the refugee deal cannot access asylum procedures due to lack of procedural safeguards and are subjected to fast-track removals.[19] Even though Turkey provided an assurance to the EU that readmitted refugees would not be sent back to their country of origin, the literature review, fieldwork findings and human rights organisations reports indicate that the actual practice contradicts Turkey's claims. Particularly, non-Syrians, who are forcibly returned to Turkey, are facing more risk of deportation than Syrians. Applying for asylum in the removal centres is practically impossible for non-Syrians. They are not being given the opportunity to ask for asylum in Turkey. They are not allowed to communicate with their family members, lawyers or the UNHCR representatives. Faced with a lack of legal information and translators they are in a very weak position.[20] This increasing risk of *refoulement* of non-Syrians is related to the discriminatory approach of the EU and Turkey. Although the EU asked Turkey for guarantees for Syrians after their readmission to Turkey, neither the EU nor Turkey considered non-Syrians and no guarantees were agreed for them.

Second, Turkey's increasing security concern after the failed coup attempt in 2016 has increased the risk of *refoulement* of asylum seekers and refugees. In accordance with a new amendment to the LFIP, made during the state of emergency, refugees and asylum seekers can be subjected to deportation if they are considered to be related to a terrorist organisation.[21] This increasing security-oriented approach has also increased the risk of deportation for asylum seekers and refugees on the grounds of public security and public order. Many deportation decisions are taken without any effective remedy against them.

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of Italy and of Greece, European Parliament Directorate-General for Internal Policies, Policy Department Cıtizens' Rights and Constitutional Affairs, 2017, pp. 40-41.

19 **Tunaboylu**, Sevda & **Alpes**, Jill, The EU-Turkey Deal: What Happens to People Who Return to Turkey? *Forced Migration Review*, 54, February 2017, http://www.fmreview.org/resettlement/tunaboylu-alpes.html.

20 **Report from GUE/NGL Delegation to Turkey**, What Merkel, Tusk and Timmermans Should Seen During Their Visit to Turkey, May 2-4 2016, http://www.statewatch.org/news/2016/may/ep-GUENGL-report-refugees-Turkey-deal.pdf.; **Ulusoy**, Orçun & **Battjes**, Hemme, Situation of Readmitted Migrants and Refugees from Greece to Turkey under the EU-Turkey Statement, Vrije University Migration Law Series, No. 15, 2017.

21 In accordance with Article 54(1)(b)(d) and new added paragraph (k) of the LFIP, foreigners who are "leaders, members or supporters of a terrorist organisation or a benefit-oriented criminal organization"; "pose a public order or public security or public health threat", and "are assessed by international institutions and organisation as being related to the terrorist organization" will be subjected to deportation.

Turkey's increasing security-oriented policies towards foreigners may trigger deportation of genuine asylum seekers back to their country of origin without balancing public security and the right to life of individuals. There are many examples where administrative authorities have failed to investigate the special situation of individuals and ordered the deportation of registered refugees for posing a threat to public order, public security or public health.[22]

Third, readmitted asylum seekers and refugees have been struggling to access durable solutions in Turkey. The LFIP does not provide permanent residence status to refugees while foreigners who have continuously resided in Turkey for at least eight years are eligible for permanent residence permits. Those with conditional refugee status and temporary protection holders cannot apply for Turkish citizenship even if they fulfil the eight-year residency requirement that applies to foreigners. This provision of Turkish law conflicts with Article 34 of the 1951 Refugee Convention, which requires States to facilitate the assimilation and naturalisation of refugees. This extreme uncertainty puts asylum seekers and refugees in a precarious situation, and it is seen as a major push-factor contributing to many of them making dangerous journeys to Europe.[23]

Fourth, Turkey has started to increasingly detain asylum seekers and irregular migrants on the grounds of loosely defined reasons such as "public order and public security" or "breaching the rules of entry into or exit from Turkey". Recent experiences in Turkey have also shown that almost all readmitted refugees and asylum seekers are subjected to administrative detention and sent to removal centres where living conditions do not meet international standards. Turkey has systematically violated Article 3, 5 and 13 of the ECHR due to prolonged detention in inhuman living conditions. Furthermore, the recent judgments of the ECtHR and TCC have underlined that there is still no effective administrative or judicial remedy against poor living conditions in the removal centres.

Lastly, interception operations with the help of NATO and Frontex in the Aegean Sea have caused *refoulement* of asylum seekers and refugees in the international sea or

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22 **Soykan**, Cavidan, The EU-Turkey Deal One Year On: The Rise of Walls of Shame, ECRE, 17 March 2017, https://www.ecre.org/op-ed-by-cavidan-soykan-the-eu-turkey-deal-one-year-on-the-rise-of-walls-of-shame/.

23 **Skribeland**, Özlem Gürakar, A Critical Review of Turkey's Asylum Laws and Practices, Seeking Asylum in Turkey, Norwegian Organization for Asylum Seekers, 2016, p. 21. http://www.asylumineurope.org/sites/default/files/resources/noas-rapport-tyrkia-april-2016_0.pdf.

Turkish waters without accessing asylum procedure.[24] As Moreno-Lax highlights although these interception operations have been presented as rescuing individuals from dying at sea they actually return all survivors to Turkey without considering the principle of *non-refoulement*.[25] The NATO Secretary-General, Jens Stoltenberg, affirmed this in his talk to the European Parliament stating that

> When we rescue those people, what we agreed with Turkey at a ministerial level, we agreed that if those people came from Turkey then we could return them to Turkey.[26]

This again constitutes a violation of the principle of *non-refoulement* and the prohibition of collective expulsion even if it takes place within the territorial water of Turkey. As explained in chapter III, Article 3 of the ECHR provides extraterritorial protection for refugees and asylum seekers in the lights of the developing jurisprudence of ECtHR. This means that while state power is basically bound to its territory, exercising its power outside national territory does not release the state from its commitment to human rights. Therefore, the place where the person is intercepted by state authorities is not decisive. *Non-refoulement* applies in a comprehensive manner, either within its territory or beyond it.[27]

Nevertheless, regardless of this increasing scope of the principle of *non-refoulement* and the jurisprudence of the ECtHR, the EU has developed a new mechanism to avoid taking responsibility in such kinds of interception operations. There is evidence that the EU financially supports Turkey to set up its own border security mechanism and interception operations alongside its own border. In this regard, Turkey has introduced penalties for irregular exit from its territory and established patrols to prevent exit. While the EU has been supporting Turkey's interception operations with donations of assets and financial support, it actually stays away itself from responsibility for intercepted refugees as demonstrated in *Hirsi Jamaa* case by the ECtHR. As Peers argues, the actions of Turkey using assets donated by the European Member States would not bring Member States'

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24 **Peers**, Steve, The Final EU/Turkey Refugee Deal: A Legal Assessment, 18 March 2016, http://eulawanalysis.blogspot.co.uk/2016/03/the-final-euturkey-refugee-deal-legal.html?m=1.

25 **Moreno-Lax**, Violeta, The Interdiction of Asylum Seekers at Sea: Law and (mal) practice in Europe and Australia, Kaldor Centre for International Refugee Law, Policy Brief 4, May 2017, p. 3.

26 **Rettman**, Andrew, NATO to Take Migrants Back to Turkey, If Rescued, 23 February 2016, https://euobserver.com/foreign/132418.

27 **Marx**, 2016, pp. 7-8.

responsibility within the scope of the ECHR.[28] So far, Turkey has blocked the exit of irregular migrants and asylum seekers since 18 March 2016 and this has resulted in a huge drop in daily crossings from 2,500 to just 43.[29]

The second hypothesis claims that Turkey is not a safe third country for refugees. In the light of the analysis of Turkish asylum law and the fieldwork findings, the second hypothesis has also been validated. Although the European Commission argues that Turkey offers equivalent protection to European and non-European refugees, the Commission's interpretation of "safe third country" concept regarding Turkey is not convincing on several counts. First, it is very difficult to demonstrate that Turkey provides effective protection to refugees. Asylum seekers and refugees are not allowed to access their socio-economic rights in law or practice. Nearly three million refugees are struggling to access housing, health, education services and access to employment opportunities. There is no opportunity to get state-funded accommodation for asylum seekers and refugees even though they are vulnerable, especially women and children. This has resulted in the impoverishment of thousands of refugees in the satellite cities and leaves them living in unhealthy conditions. In addition, even though the Turkish government took some positive steps, nearly two-thirds of the children have been out of education for six years and risk becoming a "lost generation". The continuation of low enrollment in schools has led to child labour, child begging, early marriage and also creates the risk of marginalisation and radicalization.

If we look at getting work, a recent adoption of new Regulations, which facilitate access of conditional refugees and temporary protection holders to the labour market, it has not changed the real situation. One participant, NGO3, pointed to the fact that the legislative change without taking into account sociological and economic dimensions of the problem have done nothing in actual practice. The quota system, bureaucratic procedures during requesting work permission and lack of recognition of academic or professional qualifications have led to an increase in informal employment. So far only 1% of registered refugees in Turkey have been granted work permits. Thus, a large number of refugees and asylum seekers, including children have been working in exploitative

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[28] **Peers**, Steve, The Future of the Schengen System, Swedish Institute for European Studies, report no. 6, November 2013, p. 106.

[29] **Moreno-Lax**, 2017, p. 3.

conditions.

As seen above, the EU-Turkey Statement has led to entrapment of asylum seekers and refugees without any prospects of durable solutions in Turkey. Without an effective protection mechanism, increasing numbers of deportees from Greece into Turkey are facing a "readmission trap" in the long term[30] and this constitutes a violation of Article 3 of the ECHR.[31] As seen in the case of *M.S.S. v. Belgium and Greece*,[32] Greece has failed to comply with its obligation to ensure that a return carries no risk of *refoulement* and returnees can activate their rights in Turkey as guaranteed by the 1951 Refugee Convention and international law. The fieldwork findings and human rights reports cited indicate that despite some positive steps taken by the Turkish government, Turkey cannot be considered a safe third country. Turkey's asylum system has flaws in its temporary protection structure due to the maintenance of a geographical limitation to the 1951 Refugee Convention. Further, the lack of a registration system; no procedural safeguards during the asylum procedures; denial of access to socio-economic and civil-political rights refute any claim to be a "safe third country".

2. Challenges

After discussing the findings of the study, it is important to acknowledge its challenges. There are four major challenges that affect the findings of the thesis. The first is related to the contested nature of my research. The context is constantly evolving as the legal status of the EU-Turkey Statement and RA are being challenged in the courts. So far, the legal grounds of the Statement and its compatibility with international and human rights law has been challenged before the CJEU[33], Greek Appeal Committees,[34] the Greek

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30 Return and Readmission to Albania, The Experience of Selected EU Member States, International Organization for Migration: Tirana, August 2006, p. 30.

31 **Carrera**, Sergio & **Guild**, Elspeth, EU-Turkey Plan for Handling Refugees is Fraught with Legal and Procedural Challenges, 10 March 2016, https://www.ceps.eu/publications/eu-turkey-plan-handling-refugees-fraught-legal-and-procedural-challenges.

32 See another example **M.S.S. v. Belgium and Greece**, Application no. 306960/9, 21 January 2011, paras. 161-162.

33 **Court of Justice of the European Union** (First Chamber, Extended Composition), Judgment in Case T-192/16, NF v European Council, 28 February 2017, paras. 26-32: **Court of Justice of the European Union** (First Chamber, Extended Composition), Judgment in Case T-193/16, NG v European Council 28 February 2017, paras. 70-75; **Court of Justice of the European Union** (First Chamber, Extended Composition), Judgment in Case T-257/16, NM v European Council 28 February 2017, paras. 68-73.

34 Report from The Commission to the European Parliament, the European Council and the Council, Fifth Report on the Progress Made in the Implementation of the EU-turkey Statement, COM (2017)

Council of State.[35] Even though the CJEU, Greek Appeal Committees and Greek Council of State have given decisions on the legal nature of the Statement, one appeal case before the CJEU[36] is still pending. This case may affect the implementation of the EU-Turkey Agreement and stop the removal of refugees and asylum seekers to Turkey on the ground of safe third country or first country of asylum concepts. So far, the living nature of the research subject has required the researcher to update her study continuously.

The second challenge is the changing political environment and tense relationship between the EU and Turkey. This increasing tension and deteriorating relations has put the Agreement in jeopardy on many occasions. For instance, the tension between the EU and Turkey led to the suspension of the EU-Turkey RA for third country nationals even though it was planned to come into force in June 2016. Now the EU-Turkey Statement has been in operation for over one and half years with the help of the Turkey and Greece Readmission Protocol. If the EU-Turkey RA had come into force on the planned date, every member state could have a chance to send irregular migrants and asylum seekers to Turkey on the basis of the safe third country or first country of asylum concepts but now it is only applicable between Turkey and Greece. This has affected the scope of the research project.

The third challenge is related to the difficulty of doing fieldwork in Turkey after the failed coup attempt in 2016. After this, the Turkish Government dismissed or arrested at least 100,000 public servants, judges and bureaucrats due to their alleged link with terrorist

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2014 final, 2 March 2017, p. 6. The Greek Appeal Committee has reversed 415 first-instance inadmissibility decisions, while it only confirmed 24 first instance inadmissibility decisions.

35 **Amnesty International**, Greece: Court Decisions Pave Way for First Forcible Returns of Asylum Seekers under EU-Turkey Deal, 22 September 2017, https://www.amnesty.org/en/latest/news/2017/09/greece-court-decisions-pave-way-for-first-forcible-returns-of-asylum-seekers-under-eu-turkey-deal/; **Refugee Law Clinics Abroad**, Greek Council of State Approves Forced Returns to Turkey-RLCA Fears Massive Removals to Turkey, 25 September 2017, https://refugeelawclinicsabroad.org/2017/09/25/rlca-fears-massive-removals-to-turkey/; **Asylum Information Database**, Greece: The Ruling of the Council of State on the Asylum Procedure Post EU-Turkey Deal, 4 October 2017, http://www.asylumineurope.org/news/04-10-2017/greece-ruling-council-state-asylum-procedure-post-eu-turkey-deal.

36 **Court of Justice of the European Union,** C-208/17 P, Appeal Brought on 21 April 2017 by NF against the Order of the General Court (First Chamber, Extended Composition) delivered on 28 February 2017 in Case T-192/16: NF v European Council; **Court of Justice of the European Union,** C-209/17 P, Appeal Brought on 21 April 2017 by NG against the Order of the General Court (First Chamber, Extended Composition) delivered on 28 February 2017 in Case T-193/16: NG v European Council; **Court of Justice of the European Union,** C-210/17 P, Appeal Brought on 21 April 2017 by NM against the Order of the General Court (First Chamber, Extended Composition) delivered on 28 February 2017 in Case T-257/16: NM v European Council.

activities. This large number of dismissals from the public services has increased the feeling of insecurity amongst public servants. Thus the researcher experienced great difficulty in accessing the participants. Due to the sensitivity of the subject and security concerns, two participants, one judge and one senior official, declined to participate even though they had agreed to meet the researcher before the coup attempt. This reduced the number of respondents from 20 to 18. This also affected the willingness of people to answer questions in the interviews or permit the interviews to be recorded.

Lastly, Turkish society is quite closed and individuals do not normally criticize the government's policies openly. Due to the cultural characteristics and the insecure environment, it was very difficult to get direct and honest answers from the interviewees, particularly judges and senior officials. They refused to answer some questions, which asked about the safety of Turkey from the perspective of refugees and whether refugees were afraid of detention and being deported back to their country if they complained.

3. Future Prospects

In spite of the challenges, the research has contributed to knowledge and produced some significant findings that harbor implications for future research projects. The EU-Turkey refugee deal in its implementation demonstrates that it does not provide protection in the region of origin and is not therefore a solution to the refugee protection crisis although it contributes to some burden sharing between states. There is a need for further research to determine how protection in the region of origin could be facilitated without infringing the rights of refugees. Considering the continuing conflict between state sovereignty and human rights and the reluctance of some countries to take responsibility for refugees, the protection in the region of origin may be the only solution to refugee protection crisis. What is needed is to decide how readmission agreements could facilitate protection in the region of origin complemented with further burden sharing instruments.

When we look at the rhetoric of the European institutions, they frequently underline the importance of protection in the region of origin and preventing asylum seekers from dying in the sea during their dangerous crossings. The European Commission in its last report defended the EU-Turkey Statement and insisted that the EU aimed to stop irregular migration and refugee flows from Turkey to the EU "replacing it with organised, safe,

legal channels to Europe".[37] When we look at the implementation of the EU-Turkey Agreement, we can see two important mechanisms for promoting protection in the region of origin: The first is resettlement, and the second is to provide financial assistance to Turkey.

Concerning the first mechanism, the EU established a very controversial resettlement scheme with Turkey. According to the EU-Turkey Statement,

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

As seen in the letter of the refuge deal, the exact scale of the resettlement would depend on how many Syrian refugees continued to reach the Greek islands. The swapping of irregular migrants and asylum seekers for resettlement of Syrian refugees was found "deeply 'inimical' to established European traditions"[38] and "morally dubious".[39] In fact, only 9,000 Syrian refugees have been resettled from Turkey to the European member states out of 3 million refugees hosted by Turkey, according to the 7th Report of the European Commission published in September of 2017.[40] The resettlement plan provides a very symbolic resettlement opportunity for Syrians under the one-to-one mechanism and fails to offer a sustainable solution to the ongoing refugee crisis. Due to very low resettlement numbers, restricted border controls and no available humanitarian visas, there is no safe passage for asylum seekers. Contrary to the claims of the EU institutions, the refugee deal fails to provide a significant alternative safe way for asylum seekers.[41] The deal ends up violating the principle of the right to leave in accordance with Article 2 of Protocol No. 4 to the ECHR. The restrictive border controls and limited opportunity to access asylum leaves asylum seekers with the option of starting a dangerous journey to access international protection or staying in legal limbo in refugee camps or satellite cities

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37 **European Commission**, EU-Turkey Statement One Year On, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/eu_turkey_statement_17032017_en.pdf.

38 **Carrera**, Sergio & **Guild**, Elspeth, EU-Turkey Plan for Handling Refugees is Fraught with Legal and Procedural Challenges, 10 March 2016, https://www.ceps.eu/publications/eu-turkey-plan-handling-refugees-fraught-legal-and-procedural-challenges.

39 **Peers**, Steve, The Final EU/Turkey Refugee Deal: A Legal Assessment, 18 March 2016, http://eulawanalysis.blogspot.co.uk/2016/03/the-final-euturkey-refugee-deal-legal.html?m=1.

40 Report from The Commission to the European Parliament, the European Council and the Council, Seventh Report on the Progress Made in the Implementation of the EU-Turkey Statement, COM (2017) 470 final, 6 September 2017, p. 2.

41 **Labayle** & **de Bruyker**, 2016.

indefinitely.[42]

The second mechanism for promoting protection in the region of origin is financial assistance. This is intended to provide humanitarian assistance to Syrian refugees, who are living in Turkey. However, the EU's financial assistance is conditional on reducing the number of arrivals on Greek territory. In accordance with the refugee deal, in return for Turkey's cooperation on the refugee issue, the EU decided to provide an initial 3 billion euros to improve the reception conditions of Syrians in Turkey under the Facility for Refugees until the end of 2018. The money would support refugees' access to education, health, food and accommodation but the total amount disbursed so far has only reached 838 million euros according to 7th Report of the European Commission in September 2017. This represents only 25% of the total amount for 2016-2017. This low level of financial assistance was condemned by Turkish President Erdoğan who accused the EU of being the untrusted partner.[43]

This low level of financial assistance has caused resentment both in the Turkish community and amongst refugees most of whom are largely living in a precarious economic condition. The increasing refugee burden on Turkish communities is quite alarming. As Chimni[44] foresaw if the EU fails to alleviate refugee protection responsibility of Turkey, it will end up downgrading the core principles of refugee protection, especially the principle of *non-refoulement*. There are evidences that Turkey has started to undermine its international refugee protection responsibility through closing its borders to newcomers from Syria and introducing a visa requirement for Syrians[45] and building a wall between Syria and Turkey.[46] The wall, which was recently

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42 **Frelick**, Bill & **Kysel**, Ian M. & **Podkul**, Jennifer, The Impact of Externalisation of Migration Controls on the Rights of Asylum Seekers and Other Migrants, Journal on Migration and Human Security, 4(4), 2016, p. 208.

43 **Daily Sabah Politics**, Germany Admits EU Falling Far Short on 3 Billion Euro Refugee Deal with Turkey, https://www.dailysabah.com/politics/2016/11/29/germany-admits-eu-falling-far-short-on-3-billion-euro-refugee-deal-with-turkey. : Daily Sabah, EU has not Kept Promises on Supporting Refugees, Erdoğan Says, 21 September 2017, https://www.dailysabah.com/eu-affairs/2017/09/21/eu-has-not-kept-promises-on-supporting-refugees-erdogan-says/amp.

44 **Chimni**, B.S. The Principle of Burden Sharing: Some Reflections, Presentation to the Summer School in Forced Migration, University of Oxford, July 1999, p. 7.

45 **Amnesty International**, Turkey: Illegal Mass Return of Syrian Refuges Expose Fatal Flaws in the EU-Turkey Deal, 1 April 2016: **Betts**, Alexander& **Ali,** Ali& **Memişoğlu**, Fulya, Local Politics and the Syrian Refugee Crisis: Exploring Responses in Turkey, Lebanon, and Jordan, Oxford Refugee Studies, 2017, p. 22.

46 **Soykan**, Cavidan, The EU-Turkey Deal One Year On: The Rise of Walls of Shame, ECRE, 17 March 2017, https://www.ecre.org/op-ed-by-cavidan-soykan-the-eu-turkey-deal-one-year-on-the-rise-of-

completed, is the most important evidence that Turkey is abstaining from taking further refugee protection responsibility. This is a result of the lack of burden sharing between the EU and Turkey and the ripple effect of the EU's restrictive and contradictory refugee protection policies on Turkey.

4. Suggestions

The EU-Turkey Agreement on the refugee issue is not a good example of the provision of effective refugee protection in the region of origin. As a transit country on the routes of irregular migration and asylum seekers, Turkey is left alone with millions of refugees and irregular migrants since the Syrian crisis. Without ending the war in Syria, there is no hope that refugees can access dignified living conditions in Turkey. Given the legal nature and the content of the EU-Turkey Statement, it only aims to hold refugees in Turkey but does not foresee any long-term solution to the refugee protection problem. Regarding increasing refugee protection responsibility on Turkey's social, economic and institutional capacities, it is not possible to ask Turkey to upgrade its refugee protection system and provide refugees with rights equal to its citizens, particularly in the area of socio-economic rights. Turkey only provides the minimum of humanitarian assistance to refugees to discourage more from coming. The implementation of the EU-Turkey Statement has not improved the situation of refugees in Turkey and has even made it worse because of the unbalanced weight of refugee protection responsibility.

Reform is therefore necessary. The researcher suggests three important amendments to the EU-Turkey Agreement to reduce human rights violations. The first and most important is that the EU should drop the conditionality element of its migration policy and direct its attention towards improving the actual conditions of refugees in Turkey. It is very clear that the readmission agreement cannot solve the refugee protection issue alone but it should be complemented with other burden sharing mechanisms to improve the condition of refugees and asylum seekers in Turkey. The Member States and Turkey should create long-term solutions for refugees and share the refugee protection responsibility according to their economic status, population and capacity, rather than laying the whole burden on Turkey.

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walls-of-shame/.

Second, the EU and Turkey have deliberately focused on providing humanitarian assistance and safety of refugees without a meaningful commitment to durable solutions. The fieldwork data revealed that socio-economic and civil-political rights are equally important for establishing a dignified life. It is time to move away from containment of refugees in Turkey in dire conditions. There is an urgent need to encourage self-reliance of refugees by creating more formal job opportunities. To do this, financial assistance should be given to Turkey to boost job opportunities. Also, education, housing and health services should be provided to refugees. These services need more investment and it cannot be handled without the cooperation of the international community.

Third, the lack of an independent monitoring system is putting the lives of vulnerable peoples at risk and exposing them to the arbitrary power of state agents. Independent monitoring bodies should be established to assess what happens to people who are subjected to forced and assisted returns. It is also very important to define whether forcible return policies are an effective mechanism for halting increasing irregular migration and refugee flow. An independent monitoring system with the participation of NGOs and Parliamentary delegations should be established to monitor human rights' impact of RA over readmitted refugees and asylum seekers. Also, contracting states' ombudsman officers should participate in the Committee of Monitoring experts.

In conclusion, my research strongly suggests that the EU is presenting the refugee deal as a humanitarian action and success story in reducing deadly journeys of refugees to the EU territory but the agreement forms an invisible violence on refugees. It means that even though asylum seekers have a right to seek asylum in any country, they have been forced to seek asylum in Turkey instead of Europe even though there is no available dignified living conditions and safeguards against unlawful deportation. The restriction on the right to seek asylum hinders the ability of refugees and asylum seekers to claim and exercise their rights. Contrary to the claim of the EU, Turkey is not a safe third country for refugees. The Turkish asylum system only provides humanitarian protection but it does not enable or empower refugees to integrate into Turkish society. As Arendt pointed out even though refugees are endowed with natural human rights, they have no means of using or enforcing their rights. This situation gives rise to the fundamental condition of

"rightlessness" and reduced them to "bare humanity."[47] Today we are experiencing once again what one famous, English philosopher observed many years ago: that human rights are "nonsense on stilts". The only rights we have are the ones we can claim and enforce[48] and this require citizenship of a sovereign state.

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APPENDIX I

List of the Interviewees and Codes

I. NGOs

1. NGO1 is the President of an NGO, which provides legal assistance to refugees and asylum seekers. NGO1 is also working as a lawyer.
2. NGO2 is the President of a Research Centre on Asylum and Migration, journalist and former spokesperson of the UNHCR.
3. NGO3 is the coordinator of an NGO.
4. NGO4 is a member of a Human Rights Association, a member of the Euro-Mediterranean Human Rights Network (EMHRN) and a research assistant at the University.
5. NGO5 is an expert at the International Organisation for Migration-Turkey Office.

II. Lawyers

1. L1 is a lawyer and Chairman of an NGO in Turkey.
2. L2 is a lawyer and Vice President of an NGO.
3. L3 is a lawyer and a member of Refugee Rights of Turkey.
4. L4 is a lawyer at the UNHCR Turkey Office.
5. L5 is a lawyer and an expert in Migration and Human rights Law and a former rapporteur of the National Human Rights Institution of Turkey.

III. Judges

1. J1 is a rapporteur Judge at the Turkish Constitutional Court
2. J2 is a head Judge of an Administrative Court.
3. J3 is a rapporteur Judge at the Turkish Council of State. (The Council of the State is the highest administrative court in Turkey)
4. J4 is a member of the Turkish Council of State.

IV. Senior Officials and Experts

1. E1 is a Vice Director of a Migration Research Centre of a prominent University.
2. E2 is a university lecturer who specializes in the EU-Turkey RA.
3. E3 is the General Director of Migration Management
4. E4 is a deputy governor in a city, which hosts more refugees than its population.