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TURKEY IN THE CONTEXT OF 'SAFE THIRD COUNTRY' NOTION

Master thesis

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LIST OF ABBREVIATIONS

ASAM	Association for Solidarity with Asylum Seekers and Migrants
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of December 10, 1984
CEAS	Common European Asylum System
CISA	Convention implementing the Schengen Agreement of June 14, 1985, between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders
CJEU	Court of Justice of the European Union
DGMM	Directorate General of Migration Management of the Ministry of Interior of the Republic of Turkey
Dublin Convention	Convention Determining the State Responsible for Examining Applications for Asylum lodged in one of the Member States of the European Communities of June 15, 1990
EASO	European Asylum Support Office
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms of November 4, 1950
ECRE	European Council on Refugees and Exiles
ECtHR	European Court of Human Rights
EU	European Union
ExCom	Executive Committee of the Programme of the United Nations High Commissioner for Refugees
ICCPR	International Covenant on Civil and Political Rights of December 19, 1966
LFAT	Law of the Republic of Turkey No. 3713 on Fight against Terrorism of April 12, 1991
LFIP	Law of the Republic of Turkey No. 6458 on Foreigners and International Protection of April 11,

	2013
New York Protocol	Protocol relating to the Status of Refugees of January 31, 1967
OHCHR	Office of the United Nations High Commissioner for Human Rights
pAPR	The proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU put forward by the European Commission on July 13, 2016
PDMM	Provincial Directorates for Migration Management of the Ministry of Interior of the Republic of Turkey
PKK	Kurdistan Workers' Party
rAPD	Directive 2013/32/EU of the European Parliament and of the Council of June 26, 2013, on common procedures for granting and withdrawing international protection (recast)
Refugee Convention	Convention Relating to the Status of Refugees of July 28, 1951
rQD	Directive 2011/95/EU of the European Parliament and of the Council of December 13, 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
STC	'Safe Third Country'
TPR	Temporary Protection Regulation of the Republic of Turkey No. 2014/6883 of October 22, 2014
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees

INTRODUCTION

Problem of research

The European Commission reported that since 2015 the European Union (EU) has been experiencing unprecedented influxes of migrants and refugees[1] mostly because of the large-scale hostilities having taken place in the Syrian Arab Republic. In order to reach the territory of the EU across the Aegean Sea persons seeking international protection mainly used the territory of Turkey as a transit point having 822 km of state border with the Syrian Arab Republic, 499 km with the Islamic Republic of Iran and 332 km with Iraq.[2] And the challenges having occurred with regard to the increasing influx of refugees and migrants concerned not only Greece, Italy and other Mediterranean countries but all States which have expressed their consents to be bound by the Convention implementing the Schengen Agreement of June 14, 1985, between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (CISA).

Consequently, Member States of the EU were forced by the circumstances to find a mutually acceptable way to stop the uncontrolled flow of alleged refugees and migrants from Turkey as the largest refugee hosting state worldwide to the EU, first and foremost, through Greece. As a result, the EU and the Republic of Turkey agreed on October 15, 2015, on the EU–Turkey Joint Action Plan designed to facilitate "a coordinated effort to address the crisis created by the situation in Syria."[3] Furthermore, on March 18, 2016, the European Council publicly announced a so-called "EU–Turkey statement" in the form of a Press Release No. 144/16 aimed at, *inter alia*, returning "[a]ll new irregular migrants crossing from Turkey into Greek islands as from 20 March 2016"[4] to Turkey as "a temporary and extraordinary measure."[5] In comparison with the provisions of the Agreement between the EU and the Republic of Turkey on the readmission of persons residing without authorization of December 16, 2013, the EU–Turkey statement sets forth an additional legal ground to return to Turkey not only illegal migrants but

[1] European Commission, *The EU and the Migration Crisis*, COM (2017) (July 2017), accessed May 1, 2019, https://publications.europa.eu/en/publication-detail/-/publication/e9465e4f-b2e4-11e7-837e-01aa75ed71a1/language-en.

[2] WorldAtlas, "Which Countries Border Turkey," accessed May 1, 2019, https://www.worldatlas.com/articles/what-countries-border-turkey.html.

[3] European Commission, *EU–Turkey Joint Action Plan*, MEMO/15/5860 (October 15, 2015), accessed May 1, 2019, http://europa.eu/rapid/press-release_MEMO-15-5860_en.htm.

[4] European Council, Press Release No. 144/16, *EU–Turkey statement* (March 18, 2016), accessed May 1, 2019, https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/.

[5] Ibid.

also persons in need of international protection provided that their applications are found inadmissible in accordance with the 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) (rAPD). The European Commission explicitly stated that inadmissibility of an asylum application could be declared in relation to Turkey only in case of Turkey's recognition either as a first country of asylum or as a safe third country (STC) in compliance with the criteria enumerated in Articles 35 and 38 of the rAPD respectively.[6]

Pursuant to the official statistics provided by the Greek Ministry of Citizen Protection, 38 Syrian asylum seekers have been returned to Turkey since March 20, 2016, on the basis of their asylum claims having been found inadmissible at second instance as of March 31, 2019.[7] These statistical figures substantiate the conclusion that the concept of STC has already been applied with respect to Turkey. However, neither the European Asylum Support Office (EASO) nor Greece and its determining authorities, including Greek Asylum Service and Independent Appeals Committees, evaluated Turkey by the application of the criteria of a STC, having used pre-defined templates of inadmissibility decisions. Consequently, the main problems of the present research are (1) an assessment of a possibility of Turkey's designation as a STC in accordance with each of the criteria enumerated in Article 38 of the rAPD and (2) an evaluation of the current implementation practice of the EU–Turkey statement for its compliance with international and EU law.

Relevance of the final thesis

Turkey has been recognized by the UNHCR as the largest refugee hosting state worldwide for the fourth consecutive year, having hosted 3.6 million of refugees at the middle of 2018.[8] Turkey is also annually considered as one of the largest recipients of new individual applications among the main countries of asylum because only in 2017 126,100 applications for

[6] European Commission, *EU–Turkey Statement: Questions and Answers*, MEMO/16/963 (March 19, 2016), accessed May 1, 2019, http://europa.eu/rapid/press-release_MEMO-16-963_en.htm.

[7] United Nations High Commissioner for Refugees [UNHCR], *Returns from Greece to Turkey in the Framework of the EU–TUR Statement* (March 31, 2019), accessed May 1, 2019, https://data2.unhcr.org/en/documents/download/68670 (hereafter cited as UNHCR Returns from Greece).

[8] United Nations High Commissioner for Refugees [UNHCR], *Mid–Year Trends 2018*, at 7 (February 21, 2019), accessed May 1, 2019, https://www.unhcr.org/statistics/unhcrstats/5c52ea084/mid-year-trends-2018.html (hereafter cited as UNHCR Mid–Year Trends 2018).

international protection were lodged in addition to 681,000 applications from Syrian nationals[9] who may receive in Turkey only temporary protection in accordance with the Temporary Protection Regulation of the Republic of Turkey No. 2014/6883 of October 22, 2014 (TPR). Moreover, there is a constant tendency of the increase of the hosted population of refugees in Turkey which amounted to 609,900 people in 2013,[10] 1.59 million in 2014[11] and 3.6 million in 2018.[12] And an existence of a considerable number of ongoing armed conflicts across Turkish state borders, namely, in the Syrian Arab Republic, Iraq, the Islamic Republic of Iran and Afghanistan, supports the conclusion that there are no prerequisites for inverse process with regard to the further magnification of persons arrived to Turkey, seeking international protection. Therefore, it is of a particular significance for the international community to ascertain whether Turkey fulfills the criteria of a STC, first and foremost, because of the necessity to ensure that every refugee out of 3.6 million hosted in Turkey is currently receiving effective protection in accordance with recognized international standards. Furthermore, adequate conclusions made as to Turkey's correspondence to the STC concept could confirm or confute not only the effectiveness of the protection granted but also the level of respect and protection of basic human rights, including right to life, liberty and security, freedom from torture, inhuman and degrading treatment and punishment, which are the issues of the highest public concern.

Scientific novelty and overview of the research on the selected topic

There are a number of researches by Violeta Moreno-Lax, Maria-Teresa Gil-Bazo, Alberto Achermann and Mario Gattiker devoted to the historical development of the STC concept and its application in different national legal systems, including Australia,[13] South

[9] United Nations High Commissioner for Refugees [UNHCR], *Global Trends: Forced Displacement in 2017*, at 3 (June 19, 2018), accessed May 1, 2019, https://www.unhcr.org/statistics/unhcrstats/5b27be547/unhcr-global-trends-2017.html.

[10] United Nations High Commissioner for Refugees [UNHCR], *Global Trends 2013*, at 2 (June 20, 2014), accessed May 1, 2019, https://www.unhcr.org/statistics/country/5399a14f9/unhcr-global-trends-2013.html.

[11] United Nations High Commissioner for Refugees [UNHCR], *Global Trends: Forced Displacement in 2014*, at 2 (June 19, 2015), accessed May 1, 2019, https://www.unhcr.org/statistics/country/556725e69/unhcr-global-trends-2014.html.

[12] UNHCR Mid–Year Trends 2018, at 7.

[13] Violeta Moreno-Lax, "The Legality of the "Safe Third Country" Notion Contested : Insights from the Law of Treaties," in *Protection des migrants et des réfugiées au XXIe siècle, aspects de droit international. Migration and Refugee Protection in the 21st Century, International Legal Aspects*, ed. Guy S. Goodwin-Gill and Philippe Weckel, vol. 36 (Leiden: Martinus Nijhoff Publishers, 2015), 682.

Africa, Spain, the United States of America,[14] Germany, France, Austria and Switzerland.[15] Stephen H. Legomsky[16] and Michelle Foster[17] conducted comprehensive analysis of the criteria to be evaluated in the course of a STC concept's application, having relied on the UNHCR conclusions and relevant case-law respectively. Nadine El-Enany[18] and Isaac A. Binkovitz[19] also partially assessed the criteria concerned from a theoretical perspective. However, none of the mentioned scholars did examine the issues of Turkey's admissibility to be designated as a STC.

Emanuela Roman, Theodore Baird, and Talia Radcliffe briefly analyzed Turkish situation through all of the criteria enshrined in Article 38(1) of rAPD and concluded that Turkey did not meet many of them for being designated as a STC.[20] However, this research was conducted prior to the announcement of the EU–Turkey statement which substantially influences relevance and validity of the mentioned assertion. Isabel Mota Borges,[21] Maybritt Jill Alpes, Sevda Tunaboylu, Orcun Ulusoy and Saima Hassan[22] who primarily focused on the protection of asylum seekers, refugees and readmitted migrants from direct and indirect *refoulement* in Turkey concisely addressed the issues of Turkey's recognition as a STC. But none of them made an affirmative conclusion on this matter, having relied on violations of the *non-refoulement* principle at the Turkey–Syria border multiply reported by Human Rights Watch and Amnesty

[14] Maria-Teresa Gil-Bazo, "The Safe Third Country Concept in International Agreements on Refugee Protection : Assessing State Practice," *Netherlands Quarterly of Human Rights* 33/1 (2015): 60.

[15] Alberto Achermann and Mario Gattiker, "Safe Third Countries: European Developments," *International Journal of Refugee Law* 7, no. 1 (1995): 28–34.

[16] Stephen H. Legomsky, "Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries : The Meaning of Effective Protection," *International Journal of Refugee Law* 15, no. 4 (2003): 569.

[17] Michelle Foster, "Responsibility Sharing or Shifting? "Safe" Third Countries and International Law," *Refuge* 25, no. 2 (2008), 73.

[18] Nadine El-Enany, "The Safe Country Concept in European Union Asylum Law: In Safe Hands?" *Cambridge Student Law Review* 2 (2006): 6–8.

[19] Isaac A. Binkovitz, "State Practice with Respect to the Safe Third Country Concept : Criteria for Determining that a State Offers Effective Protection for Asylum Seekers and Refugees," *George Washington International Law Review* 50, no. 3 (2018): 612.

[20] Emanuela Roman, Theodore Baird and Talia Radcliffe, "Why Turkey is Not a "Safe Country," *Statewatch Analysis* 3/16 (February 2016): 20–21.

[21] Isabel Mota Borges, "The EU–Turkey Agreement : Refugees, Rights and Public Policy," *Rutgers Race & the Law Review* 18, no. 2 (2017): 136–38.

[22] Maybritt Jill Alpes, Sevda Tunaboylu, Orcun Ulusoy and Saima Hassan, "Post-Deportation Risks Under the EU–Turkey Statement : What Happens After Readmission to Turkey?" *Robert Schuman Centre for Advanced Studies* 2017/30 (November 2017): 9.

International. Mariana Gkliati,[23] Elif Sari and Cemile Gizem Dinçer,[24] having analyzed current Turkish asylum legislation and asylum system, reported a considerable number of systematic deficiencies of the latter, including lack of comprehensive publicly available data as to the asylum system implementation and access to judicial decisions delivered by Turkish provincial courts on asylum issues. Moreover, there are a considerable number of researches carried out by Özlem Gürakar Skribeland,[25] Isabel Mota Borges,[26] Orçun Ulusoy and Hemme Battjes,[27] Maybritt Jill Alpes, Sevda Tunaboylu, Orcun Ulusoy and Saima Hassan[28] who denied the possibility of Turkey's recognition as a STC because of constant violations of human rights, including severe violations of asylum seekers' rights and guarantees. The same scale of human rights violations has been permanently reported by Human Rights Watch and Amnesty International. However, even the researches of fundamental nature devoted to the partial analysis of particular aspects of Turkish asylum system did not purposefully compare reached results with all of the STC criteria set forth either in Article 38 of rAPD or in any other legal instrument.

Therefore, the conclusions reached upon a comprehensively conducted analysis of existing asylum system of Turkey, its practical implementation, including refugee status determination procedure, respect for and guaranteeing of asylum seekers' human rights and their legal status after a determination procedure will be of significant scientific novelty because currently the problems of the present research were addressed only fragmentarily by few scholars and never analyzed in such a comprehensive manner in light of recent changes.

Significance of research

38 Syrian asylum seekers having been returned to Turkey since March 31, 2019,[29] because of the inadmissibility of their applications for international protection illustrate a current implicit recognition of Turkey as a STC at least by Greek determining authorities for those persons seeking international protection. However, Amnesty International, the United Nations

[23] Mariana Gkliati, "The Application of the EU–Turkey Agreement: a Critical Analysis of the Decisions of the Greek Appeals Committees," *European Journal of Legal Studies* 10, no. 1 (2017): 121–23.

[24] Elif Sari and Cemile Gizem Dinçer, "Toward a New Asylum Regime in Turkey?" *Movements Journal for Critical Migration and Border Regime Studies* 3, no. 2 (2017): 76–78.

[25] Özlem Gürakar Skribeland, "Seeking Asylum in Turkey : A Critical Review of Turkey's Asylum Laws and Practices," *Norwegian Organisation for Asylum Seekers* (December 2018): 5–7.

[26] Borges, "The EU–Turkey Agreement," 136–38.

[27] Orçun Ulusoy and Hemme Battjes, "Situation of Readmitted Migrants and Refugees from Greece to Turkey Under the EU–Turkey Statement," *VU Migration Law Working Paper Series* 15 (2017): 5–6.

[28] Alpes, Tunaboylu, Ulusoy and Hassan, "Post-Deportation Risks," 9.

[29] UNHCR Returns from Greece (see introduction, n. 7).

(UN) Special Rapporteur on the human rights of migrants and the European Council on Refugees and Exiles (ECRE), having analyzed the content and reasoning of decisions dismissing the applications of Syrian nationals as inadmissible on the basis of Turkey's identification as a STC, reported that both first and second instance decisions were based on pre-defined templates without any individualized assessment neither of the safety nor of the effectiveness of protection to be granted by Turkey. The conclusions regarding the criteria mentioned in the rAPD were made solely on the basis of the provisions of Turkish asylum legislation and undisclosed non-public correspondence between the European Commission and Turkish authorities, in which Turkey allegedly provided assurances of its commitment to all required standards of international protection. However, the European Court of Human Rights (ECtHR) unambiguously clarified that "the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection"[30] and emphasized that "[t]here is an obligation to examine whether assurances provide, in their practical application, a sufficient guarantee."[31]

Currently Greece dismisses the applications for international protection lodged by Syrian nationals as inadmissible without a necessary assessment of Turkey as a STC individually for each asylum seeker,[32] having tolerated all of the reported violations of human rights in Turkey allegedly under the pressure of the EASO opinions.[33] Therefore, the results of the present research could be used by the EU institutions, Greek Asylum Service and Independent Appeals Committees to change the existing pattern of their decisions and to stop current violations of their international obligations under both international refugee law and human rights law.

The aim of research

The present research is aimed at the ascertainment of a possibility of Turkey's designation as a STC on the basis of definitive and unambiguous conclusions regarding Turkey's compliance with each of the criteria exhaustively enumerated in Article 38(1) of the rAPD.

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[30] Saadi v. United Kingdom, App. No. 13229/03, Judgment, para. 147 (Eur. Ct. H.R. January 29, 2008).

[31] Othman v. United Kingdom, App. No. 8139/09, Judgment, para. 189 (Eur. Ct. H.R. January 17, 2012).

[32] European Council on Refugees and Exiles [ECRE], *Country Report: Turkey 2018 update*, at 104–5 (December 31, 2018), accessed May 1, 2019, http://www.asylumineurope.org/sites/default/files/report-download/aida_tr_2018update.pdf (hereafter cited as ECRE Turkey Report 2018).

[33] Amnesty International, *Greece: Lives on Hold – Update on Situation of Refugees and Migrants on the Greek Islands*, at 4, EUR25/6745/2017 (July 14, 2017), accessed May 1, 2019, https://www.amnesty.org/download/Documents/EUR2567452017ENGLISH.PDF.

The objectives of research

The present research is aimed at the achievement of the following objectives:

- to define the main reasons of the EU–Turkey enhanced cooperation in asylum issues resulting in a number of legal instruments and to clarify the legal nature of the announced EU–Turkey statement as to the character of imposed obligations;
- to evaluate the functioning of Turkish asylum system as to its compliance with generally recognized international standards enshrined in the Convention Relating to the Status of Refugees of July 28, 1951 (Refugee Convention), with regard to access to asylum system, refugee status determination procedure, guarantees available to asylum seekers and refugees' legal status in Turkey after the determination procedure;
- to determine whether a *non-refoulement* principle under international refugee law and human rights law is respected in Turkey and to ascertain the main reasons and frequency of its violations, if any;
- to identify the level of respect and guaranteeing the protection of fundamental human rights in Turkey, including rights to life, liberty and security, freedom from torture and cruel, inhuman or degrading treatment, and to ascertain the main reasons and frequency of their violations, if any, especially on account of race, religion, nationality, membership of a particular social group or political opinion;
- to assess results of the implementation of the EU–Turkey statement in terms of its compliance with international and EU law.

Research methodology

The following methods are used for the achievement of the aim and the objectives of the present research:

- **comparative historical method** used to identify the main achievements of a new Turkish asylum system introduced by the Law of the Republic of Turkey No. 6458 on Foreigners and International Protection of April 11, 2013 (LFIP);
- **comparative method** employed for the comparing of facts reported by different international organizations and bodies, for instance, regarding the scale of human rights violation in Turkey;
- **linguistic method** applied to define the differences between four different types of international protection available to asylum seekers arrived to Turkey and the scope of obligations imposed by the EU–Turkey statement;

- **statistical method** used for the determination of increasing tendencies of the number of refugees hosted by Turkey or Syrian nationals in need of international protection;
- **analytical method** employed for making conclusions after the analysis of different points of view.

Structure of research

The present research consists of the introduction, three chapters, conclusions, recommendations and a list of bibliography.

The historical background of the development of the STC concept is analyzed in Chapter 1 in order to identify the main reasons for this notion to have been codified in various bilateral and multilateral readmission agreements as well as in the legal instruments adopted at the EU level which will be also identified in this Chapter.

Chapter 2 provides a comprehensive assessment of the asylum system of Turkey in terms of a possibility of Turkey's designation as a STC in accordance the criteria enshrined in Article 38(1) of the rAPD with a particular attention being paid to the level of protection of fundamental human rights in subchapter 2.1, the absence of risk of "serious harm" in subchapter 2.2, a respect for the *non-refoulement* principle in subchapter 2.3 under international refugee and human rights law and the issues of effectiveness of currently functioning Turkish asylum system in subchapter 2.4.

Chapter 3 is devoted to the analysis of main reasons and primary incentives of both the EU and Turkey for the cooperation in asylum issues and the announcement of the EU–Turkey statement, whose legal nature and main provisions will be also evaluated in this Chapter. An assessment of currently reached results of the implementation of the EU–Turkey statement is also carried out in this Chapter, having regard to the responsibility of Greece and the EU institutions in accordance with international and EU law for the implementation concerned.

Defence statements

- The STC concept is not applicable with regard to Turkey as a ground to consider applications for international protection as inadmissible because of Turkey's incompliance with the criteria enumerated in Article 38(1) of the rAPD.
- Greece and the EU, currently implementing the EU–Turkey statement, violate their obligations imposed by international agreements, customary international law and EU law.

1. THE HISTORICAL DEVELOPMENT OF 'SAFE THIRD COUNTRY' NOTION AND ITS CURRENT LEGAL FRAMEWORK

STC as a concept originated at the national level after the conclusion of the Refugee Convention. The historical background of the STC concept's development will be thoroughly analyzed in this Chapter in order to identify the main reasons for this notion to have been incorporated into a considerable number of legal instruments at the international and the EU level.

Initially the concept of "country of first asylum" as a historical predecessor of the STC concept was developed in the legal system of Scandinavian countries.[34] For instance, in the Kingdom of Denmark the concept concerned was set forth in Article 48(3) of the Danish Aliens Act as amended in 1986.[35] Other European States, having faced rising numbers of lodged applications for international protection because of a drastic increase of migrants' attempts to reach welfare States through asylum channels of Europe, followed the developed tendency and incorporated the STC concept into their national legislation under different designations. Alberto Achermann and Mario Gattiker analyzed the historical experience of the Federal Republic of Germany, the French Republic, the Republic of Austria and the Swiss Confederation with regard to the application of the STC concept and exemplified the diversity of chosen legal consequences of the concept's application as follows:

> "[t]he third country concept takes various forms. The possibility of being accepted by a third country may be a reason for a *refusal of asylum* (for example, in Germany, Switzerland and Austria), and also the basis for *expulsion during the asylum procedure,* which is tantamount to *exclusion from the asylum procedure* (for example, in Germany or Switzerland). Previous residence in the third country also plays a role in *entry proceedings* at the border: persons arriving from a safe third country are in general refused entry (for example, in France, Austria, Germany and Switzerland) (italics in the original)."[36]

After rather successful application of the STC provisions within European States, the concept concerned was also implemented by a number of non-European States for dealing with the similar range of problems caused by rapidly growing flows of refugees. In order to illustrate a geographical scale of triggered modifications Violeta Moreno-Lax pointed out the following:

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[34] Moreno-Lax, "The Legality of the "Safe Third Country" Notion," 664 (see introduction, n. 14).

[35] Morten Kjaerum, "The Concept of Country of First Asylum," *International Journal of Refugee Law* 4, no. 4 (1992): 516.

[36] Achermann and Gattiker, "Safe Third Countries: European Developments," 19–20 (see introduction, n. 16).

> "[t]he United States adopted the notion [of STC] in s. 208(a)(2)(A) of its Immigration and Nationality Act, as amended in 1996. [. . .] Australia developed safe third country regulations for Indo-Chinese refugees covered by the Comprehensive Plan of Action in 1994 and generalized the application of the concept through the amendment of s. 36 of the 1958 Migration Act in 1999. [. . .] South Africa, Tanzania and Bostwana [*sic*] apparently apply the notion too."[37]

The issues related to the STC concept have started to be permanently included into the meetings' agenda of different international organizations since 1970s in line with "the legal developments of the international human rights and protection obligations."[38] International organizations devoted a significant number of recommendations to the standards of proper application of the STC concept. These instruments were primarily aimed at ensuring the fulfilment of existing international obligations by those States which tried to unilaterally use different restrictive measures regarding access to their asylum systems.

First and foremost, the UNHCR and the Executive Committee of the Programme of the UNHCR (ExCom) dedicated a number of guidelines and conclusions recognized to be important evidence of States' *opinio juris* to the appropriate application of the STC concept, namely, the Conclusion No. 15 (XXX) 'Refugees Without an Asylum Country'[39] and the Conclusion No. 58 (XL) 'Problem of Refugees and Asylum-Seekers Who Move in an Irregular Manner from a Country in Which They Had Already Found Protection.'[40] It is worth to underline that the ExCom as far back as in 1979 contributed to a development of the STC concept. The ExCom emphasized that "[a]n effort should be made to resolve the problem of identifying the country responsible for examining an asylum request by the adoption of common criteria"[41] because there should be a definite way to determine a particular State being responsible for an

[37] Moreno-Lax, "The Legality of the "Safe Third Country" Notion," 664n10.

[38] Charlotte Mysen, "The Concept of Safe Third Countries – Legislation and National Practices," *Norwegian Directorate of Immigration* (2017): 1, accessed May 1, 2019, https://www.udi.no/globalassets/global/forskning-fou_i/asyl/the-concept-of-safe-third-countries.pdf.

[39] Executive Committee of the Programme of the United Nations High Commissioner for Refugees [ExCom], *Conclusion No. 15 (XXX) 'Refugees Without an Asylum Country,'* A/34/12/Add.1 (October 16, 1979), accessed May 1, 2019, https://www.unhcr.org/excom/exconc/3ae68c960/refugees-asylum-country.html.

[40] Executive Committee of the Programme of the United Nations High Commissioner for Refugees [ExCom], *Conclusion No. 58 (XL) 'Problem of Refugees and Asylum-Seekers Who Move in an Irregular Manner from a Country in Which They Had Already Found Protection,'* A/44/12/Add.1 (October 13, 1989), accessed May 1, 2019, https://www.unhcr.org/excom/exconc/3ae68c4380/problem-refugees-asylum-seekers-move-irregular-manner-country-already-found.html.

[41] Executive Committee of the Programme of the United Nations High Commissioner for Refugees [ExCom], *Conclusion No. 15 (XXX)*, para. h.

examination of each lodged application for international protection. In 1995 the ECRE, having focused on controversial aspects of the STC concept's application, concluded that "[b]y introducing various and varying categories of 'second' and 'third' "responsible" host countries, States have actually increased, rather than reduced, the situations of 'refugee in orbit."[42] Moreover, the ECRE recommended States to discontinue the practice of returning applicants to allegedly safe host States in violation of their obligations under international human rights law and refugee law.[43] The Committee of Ministers of the Council of Europe in its 'Recommendation No. R (97) 22 [. . .] containing Guidelines on the Application of the Safe Third Country Concept' even formulated the criteria for a State's assessment as a STC which are similar to the ones currently enumerated in Article 38(1) of the rAPD, including, *inter alia*, "the possibility to seek and enjoy asylum"[44] and observance of international human rights standards and principles relating to the protection of refugees in accordance with the Refugee Convention and the Protocol relating to the Status of Refugees of January 31, 1967 (New York Protocol).[45] And despite the fact that none of the mentioned advisory instrument bounded States by international obligations, they facilitated the improvement of the manner in which the STC concept was applied in practice.

Whereas the Refugee Convention was silent with regard to the possible allocation of responsibility for ensuring international protection of refugees, European States having faced with a disproportionate number of applications for international protection were forced by circumstances to cooperate at the international level in order to collectively address the issues of secondary refugee movements within their borders. As a result, in 1985 the Kingdom of Belgium, the Federal Republic of Germany, the French Republic, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands concluded the CISA aimed at, *inter alia*, the allocation of responsibility for processing asylum applications.[46] Pursuant to Article 29(3) of the CISA, the mentioned States agreed that only one State determined on the basis of the hierarchical criteria

[42] European Council on Refugees and Exiles [ECRE], *"Safe Third Countries": Myths and Realities* (London: February 1995), para. 32, accessed May 1, 2019, https://www.refworld.org/docid/403b5cbf4.html.

[43] Ibid.

[44] Council of Europe, Committee of Ministers, *Recommendation of the Committee of Ministers to Member States containing Guidelines on the Application of the Safe Third Country Concept*, para. (c), Rec(97)22 (November 25, 1997), accessed May 1, 2019, https://www.refworld.org/docid/3ae6b39f10.html.

[45] Ibid., para (b).

[46] Convention implementing the Schengen Agreement of June 14, 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, art. 28–38, June 19, 1990, O. J. L 239, 22/09/2000 P. 0019–0062 (hereafter cited as CISA).

enumerated in Article 30 of the CISA would be responsible for processing "application for asylum lodged by an alien within any one of their territories."[47] Moreover, for the first time at the level of a multilateral international agreement the initial idea of the STC concept was set forth in Article 29(2) of the CISA in the following manner: "[e]very Contracting Party shall retain the right to refuse entry or to expel asylum seekers *to a third State on the basis of its national provisions* and in accordance with its international commitments (emphasis added)."[48]

In spite of the fact that all of the abovementioned Contracting Parties were Member States of the then European Economic Community, the treaty in question was concluded beyond the legal system of the latter. Consequently, twelve Members States of the European Economic Community concluded the Convention Determining the State Responsible for Examining Applications for Asylum lodged in one of the Member States of the European Communities of June 15, 1990 (Dublin Convention), in order to harmonize their existing asylum policies.[49] The provisions of the Dublin Convention as for the allocation of responsibility for an examination of applications for international protection were partially drafted on the basis of the respective provisions of the CISA. Hence, according to Article 3(5) of the Dublin Convention, "[a]ny Member State shall retain the right, *pursuant to its national laws*, to send an applicant for asylum to *a third State*, in compliance with the provisions of the Geneva Convention [Refugee Convention], as amended by the New York Protocol (emphasis added)."[50] However, neither the CISA nor the Dublin Convention specifically addressed the issues of "a third State" concept's application, having referred to national legislation of Member States.

For the first time at the EU level procedural and substantive aspects of the STC concept's application were comprehensively defined by the then Council of the EU in its Resolution on a Harmonized Approach to Questions Concerning Host Third Countries of November 30, 1992, referred to as 'London Resolution.' Having used the notion of "a host third country"[51] and emphasized the necessity to make an assessment in each individual case, the Ministers of the Member States of the European Communities determined the following criteria for a State to be defined as a host third country:

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[47] CISA, art. 29(1).

[48] Ibid., art. 29(2).

[49] Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities, June 15, 1990, 1990 O.J. (C 254) 1 (hereafter cited as Dublin Convention).

[50] Ibid., art. 3(5).

[51] "The term 'host third country' comprised both concept of 'first country of asylum' and 'safe third country." Mysen, "The Concept of Safe Third Countries," 3n4.

> "(a) In those third countries, the life or freedom of the asylum applicant must not be threatened, within the meaning of Article 33 of the Geneva Convention [Refugee Convention].
>
> (b) The asylum applicant must not be exposed to torture or inhuman or degrading treatment in the third country.
>
> (c) It must either be the case that the asylum applicant [. . .] *has had an opportunity*, at the border or within the territory of the third country, to make contact with that country's authorities in order *to seek their protection*, before approaching the Member State in which he is applying for asylum, or that there is clear evidence of his admissibility to a third country.
>
> (d) The asylum applicant must be afforded effective protection in the host third country against refoulement, within the meaning of the Geneva Convention [Refugee Convention] (emphasis added)."[52]

Therefore, as Violeta Moreno-Lax emphasized, "[t]he mere *possibility to obtain protection* elsewhere is enough to justify return to a third State in which some form of protection might potentially be available, [. . .]. The "host third country" is a State with which the refugee is believed to have some prior connection [. . .] and in which the removing country considers *he or she could have requested protection* (emphasis added)."

Further development of the STC concept at the EU level was taken place within the Common European Asylum System (CEAS) after the conclusion of the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts of October 2, 1997. The Treaty of Amsterdam obliged the then Council of the EU to draft and adopt the standards with respect to the qualification of third country nationals as refugees, the procedures for granting or withdrawing refugee status, the reception of asylum seekers and the criteria and mechanisms of determining responsible Member States for considering asylum applications.[53] Consequently, the following criteria for a designation of a

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[52] Council Resolution of 30 November 1992 on a Harmonized Approach to Questions Concerning Host Third Countries, para. 2, accessed May 1, 2019, https://www.refworld.org/docid/3f86c3094.html.

[53] "The Council, [. . .], shall, within a period of five years after the entry into force of the Treaty of Amsterdam, adopt: (1) measures on asylum, in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and other relevant treaties, within the following areas: (a) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum submitted by a national of a third country in one of the Member States, (b) minimum standards on the reception of asylum seekers in Member States, (c) minimum standards with respect to the qualification of nationals of third countries as refugees, (d) minimum standards on procedures in Member States for granting or withdrawing refugee status."

State as a STC and, as a result, for considering an application for asylum as inadmissible were set forth in Article 27(1) of the newly adopted Council Directive No. 2005/85/EC of December 1, 2005, on minimum standards on procedures in Member States for granting and withdrawing refugee status:

> "(a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;
>
> (b) the principle of non-refoulement in accordance with the Geneva Convention [Refugee Convention] is respected;
>
> (c) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected; and
>
> (d) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention [Refugee Convention]."[54]

Moreover, the Council Regulation No. 343/2003 of February 18, 2003, establishing the criteria and mechanism for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national defined all Member States of the European Community "as safe countries for third-country nationals."[55]

However, deficiencies which were revealed in the course of the implementation process of the mentioned first-phase instruments required making necessary changes into the CEAS through the adoption of new instruments which are currently valid and applicable. Hence, the Regulation No. 604/2013 of the European Parliament and of the Council of June 26, 2013, establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) was supplemented with the provision[56]

Treaty of Amsterdam amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, art. 73(k), October 2, 1997, 1997 O.J. (C 340) 1.

[54] Council Directive No. 2005/85/EC of December 1, 2005, on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, art. 27(1), 2005 O.J. (L 326) 13.

[55] Council Regulation No. 343/2003 of February 18, 2003, Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in one of the Member States by a Third-Country National, recital 2, 2003 O.J. (L 50) 1.

[56] "Where it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union, the determining Member State

precluding "the application of a conclusive presumption that the Member State which Article 3(1) of Regulation No. 343/2003 indicates as responsible observes the fundamental rights of the European Union"[57] and shall be automatically considered as a safe country for third-country nationals. This provision originated from the judgment of the Court of Justice of the EU (CJEU) delivered in joined cases of *N. S. v. Secretary of State for the Home Department* and *M. E. and Others v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*. As to the STC concept and its current legal framework at the EU level, all of the abovementioned principles of treatment of persons seeking asylum by a STC were transposed into Article 38(1) of the rAPD with no modifications. However, in line with the concept of subsidiary protection originated within the EU asylum *acquis* Article 38(1) of the rAPD was supplemented with a requirement of the absence of serious harm as defined in Article 15 of the Directive 2011/95/EU of the European Parliament and of the Council of December 13, 2011, on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) (rQD).[58]

Since Article 38(1) of the rAPD did not oblige Member States of the EU to transpose the STC concept into their national legislation,[59] current implementing practice of the concept concerned drastically differs. For instance, the STC concept is not applicable in the Republic of Ireland,[60] the French Republic,[61] the Republic of Poland[62] and the Italian Republic.[63] Moreover,

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shall continue to examine the criteria set out in Chapter III in order to establish whether another Member State can be designated as responsible." Regulation No. 604/2013 of the European Parliament and of the Council of June 26, 2013, Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in one of the Member States by a Third-Country National or a Stateless Person (recast), art. 3(2), 2013 O.J. (L 180) 31.

[57] Joined Cases C–411/10 & C–493/10, N. S. v. Secretary of State for the Home Department & M. E. and Others v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform, 2011 E.C.R. I–13905, para. 105.

[58] Directive 2013/32/EU of the European Parliament and of the Council of June 26, 2013, on Common Procedures for Granting and Withdrawing International Protection (recast), art. 38(1)(b), 2013 O.J. (L 180) 60 (hereafter cited as rAPD).

[59] "Member States *may apply* the safe third country concept [. . .] (emphasis added)." rAPD, art. 38(1).

[60] European Council on Refugees and Exiles [ECRE], *Country Report: Ireland 2018 update*, at 47 (December 31, 2018), accessed May 1, 2019, http://www.asylumineurope.org/sites/default/files/report-download/aida_ie_2018update.pdf.

[61] "The safe country concepts were heavily debated in the context of an impending reform of asylum law, to be presented in 2018. While the government had announced preliminary plans to codify the concept of "safe third country" in French law, this was later abandoned." European Council on Refugees and Exiles [ECRE], *Country*

a considerable number of the EU Member States, including the United Kingdom of Great Britain and Northern Ireland, [64] the Federal Republic of Germany, [65] Hungary, [66] the Republic of Slovenia, [67] the Republic of Bulgaria [68] and Romania, [69] have adopted the list of safe third countries or, at least, included the possibility of its adoption into their asylum laws. The European Association for the Defence of Human Rights, the Euro-Mediterranean Human Rights Network and the International Federation for Human Rights emphasized that no State was unanimously recognized to be a STC by all EU Member States having adopted the lists concerned.[70] For instance, pursuant to the amended Decree of the Hungarian Government No. 91/2015 on the National List of Safe Countries of Origin and Safe Third Countries, the following States are currently considered to be eligible for the STC concept's application in their respect by the competent Hungarian authority:

Report: France 2018 update, at 71 (December 31, 2018), accessed May 1, 2019, http://www.asylumineurope.org/sites/default/files/report-download/aida_fr_2018update.pdf.

[62] European Council on Refugees and Exiles [ECRE], *Country Report: Poland 2018 update*, at 37 (December 31, 2018), accessed May 1, 2019, http://www.asylumineurope.org/sites/default/files/report-download/aida_pl_2018update.pdf.

[63] European Council on Refugees and Exiles [ECRE], *Country Report: Italy 2018 update*, at 75 (December 31, 2018), accessed May 1, 2019, http://www.asylumineurope.org/sites/default/files/report-download/aida_it_2018update.pdf.

[64] European Council on Refugees and Exiles [ECRE], *Country Report: UK 2018 update*, at 56 (December 31, 2018), accessed May 1, 2019, http://www.asylumineurope.org/sites/default/files/report-download/aida_uk_2018update.pdf.

[65] European Council on Refugees and Exiles [ECRE], *Country Report: Germany 2018 update*, at 59 (December 31, 2018), accessed May 1, 2019, http://www.asylumineurope.org/sites/default/files/report-download/aida_de_2018update.pdf.

[66] European Council on Refugees and Exiles [ECRE], *Country Report: Hungary 2018 update*, at 57 (December 31, 2018), accessed May 1, 2019, http://www.asylumineurope.org/sites/default/files/report-download/aida_hu_2018update.pdf.

[67] European Council on Refugees and Exiles [ECRE], *Country Report: Slovenia 2018 update*, at 42 (December 31, 2018), accessed May 1, 2019, http://www.asylumineurope.org/sites/default/files/report-download/aida_si_2018update.pdf.

[68] European Council on Refugees and Exiles [ECRE], *Country Report: Bulgaria 2018 update*, at 57 (December 31, 2018), accessed May 1, 2019, http://www.asylumineurope.org/sites/default/files/report-download/aida_bg_2018update.pdf.

[69] European Council on Refugees and Exiles [ECRE], *Country Report: Romania 2018 update*, at 57 (December 31, 2018), accessed May 1, 2019, http://www.asylumineurope.org/sites/default/files/report-download/aida_ro_2018update.pdf.

[70] European Association for the Defence of Human Rights, Euro-Mediterranean Human Rights Network and International Federation for Human Rights, *"Safe" Countries: A denial of the Right of Asylum*, at 6 (May 2016), accessed May 1, 2019, https://www.ohchr.org/Documents/Issues/MHR/ReportLargeMovements/FIDH2%20.pdf.

> "EU Member States, EU candidate countries [the Republic of Albania, the Republic of North Macedonia, Montenegro, the Republic of Serbia and Turkey], Member States of the European Economic Area [Iceland, the Principality of Liechtenstein and the Kingdom of Norway in addition to the Member States of the EU], US States that do not have the death penalty [currently there are 20 States and the District of Columbia],[71] Switzerland, Bosnia and Herzegovina, Kosovo, Canada, Australia and New Zealand."[72]

The proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU (pAPR) put forward by the European Commission on July 13, 2016, heralded a substantially new stage of the STC concept's development within the CEAS. Firstly, the European Commission proposed to replace the discretionary elements of Article 38(1) of the rAPD[73] with obligations to apply the STC concept by the Member States of the EU within their asylum systems.[74] Secondly, the standards for a designation of a State as a STC and, as a result, for considering an application for asylum as inadmissible were lowered by the following modifications set forth in Article 45(1)(e) of the pAPR: "the possibility exists to receive protection in accordance with *the substantive standards* of the Geneva Convention *or sufficient protection as referred to in Article 44(2), as appropriate* (emphasis added)."[75] The ECRE commented on the proposed provision in question as follows:

> "introducing sufficient protection as a standard to underpin the presumption of the country as a safe third country in the same way as for the application of the first country of asylum concept ignores the fact that they relate to fundamentally different situations. Whereas the first country of asylum concept strictly applies to applicants who already received a protection status in a third country and can access the same level of protection upon their return, the safe third country

[71] ProCon.org, "30 States with Death Penalty and 20 States with Death Penalty Bans," October 16, 2018, accessed May 1, 2019, https://deathpenalty.procon.org/view.resource.php?resourceID=001172.

[72] Hungary, Decree of the Hungarian Government No. 91/2015 on the National List of Safe Countries of Origin and Safe Third Countries, cited from European Council on Refugees and Exiles, Country Report: Hungary, ECRE-AIDA Asylum Database Information, 2017 update, p. 58.

[73] "Member States *may apply* the safe third country concept [. . .] (emphasis added)." rAPD, art. 38(1).

[74] "A third country *shall be* designated as a safe third country provided that [. . .] (emphasis added)." Proposal of the European Commission for a Regulation of the European Parliament and of the Council Establishing a Common Procedure for International Protection in the Union and Repealing Directive 2013/32/EU on July 13, 2016, art. 45(1), COM/2016/0467 final (July 13, 2016) (hereafter cited as pAPR).

[75] Ibid., art. 45(1)(e).

concept is applied with respect to applicants who could have had such protection in the third country but who have not received any status at any stage."[76]

Thirdly, the European Commission proposed to consider a mere transit through the territory of a third country "which is geographically close to the country of origin of the applicant"[77] as a sufficient proof of existing reasonable connection between the applicant and the third country concerned. It should be pointed out that this provision was included into the pAPR in spite of the fact that the UNHCR continually emphasized in its conclusions and recommendations recognized to be important evidence of States' *opinio juris* that "transit alone is not a 'sufficient' connection or meaningful link, unless there is a formal agreement for the allocation of responsibility for determining refugee status between countries with comparable asylum systems and standards. Transit is often the result of fortuitous circumstances and does not necessarily imply the existence of any meaningful link or connection."[78] Moreover, as the ECRE reported, "[i]n Sweden, Austria, Bulgaria, the Netherlands and Greece, the existence of a sufficient connection is interpreted as requiring more than mere transit through the third country concerned, such as for instance the presence of family members."[79] Finally, the pAPR was supplemented with a new provision regarding a designation of third countries as safe third countries. Whereas currently a majority of the EU Member States refused to adopt a pre-defined list of safe third countries, Article 45(2)(b) of the pAPR obliged Member States to apply the STC concept "where a third country is designated as a safe third country at Union level."[80] Moreover, all of the abovementioned changes were proposed to be adopted in the form of Regulation which would be directly applicable in all EU Member States. As of May 1, 2019, the pAPR is still being discussed by the European Parliament and the Council of the EU. And despite the fact that the European Economic and Social Committee,[81] the European Committee of the Regions[82] and the

[76] European Council on Refugees and Exiles [ECRE], *Comments on the Commission Proposal for an Asylum Procedures Regulation*, at 56, COM(2016) 467 (November 2016), accessed May 1, 2019, https://www.ecre.org/wp-content/uploads/2016/11/ECRE-Comments-APR_-November-2016-final.pdf.

[77] pAPR, art. 45(3)(a).

[78] United Nations High Commissioner for Refugees [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*, at 6 (March 23, 2016), accessed May 1, 2019, https://www.unhcr.org/jp/wp-content/uploads/sites/34/protect/Legal_considerations_on_return_of_Asylum_seekers_and_refugees.pdf.

[79] European Council on Refugees and Exiles [ECRE], *Comments on the Commission Proposal for an Asylum Procedures Regulation*, at 57.

[80] pAPR, art. 45(2)(b).

[81] Opinion of the European Economic and Social Committee on the 'Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection

European Parliament[83] do not support all of the abovementioned controversial changes, the adoption of the Asylum Procedures Regulation will entail significant modifications of the standards being currently applicable to States' eligibility for a STC status.

Summarizing all the abovementioned, it should be concluded that the STC as a concept of significant international concern originated due in large part to the unprecedented mass influx of refugees and migrants having escaped either from miscellaneous international and non-international armed conflicts or from political and economical instability existing in their native countries. And whereas the STC concept has proved to be rather successful in the achievement of its initial tasks, the manner of the concept's application is highly criticized by international organizations and scholars. But if conditions of the STC concept's implementation exhaustively enumerated in respective legal instruments were fulfilled at the level required by the international community in accordance with recognized standards of human rights and international protection, the concept concerned would be invaluable tool for dealing with overburdened functioning of States' asylum systems.

(recast)' (COM(2016) 465 final) and on the 'Proposal for a Regulation of the European Parliament and of the Council 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 and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents' (COM(2016) 466 final) and on the 'Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU' (COM(2016) 467 final), para 1.3.2, 2017 O.J. (C 75) 97, accessed May 1, 2019, https://www.eesc.europa.eu/our-work/opinions-information-reports/opinions/ceas-reform-ii.

[82] Opinion of the European Committee of the Regions on Reform of the Common European Asylum System Package II and a Union Resettlement Framework, 2017 O.J. (C 207) 67, accessed May 1, 2019, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52016AR5807.

[83] Draft European Parliament Legislative Resolution on the Proposal for a Regulation of the European Parliament and of the Council Establishing a Common Procedure for International Protection in the Union and Repealing Directive 2013/32/EU, (COM(2016)0467 – C8-0321/2016 – 2016/0224(COD)), accessed May 1, 2019, http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A8-2018-0171+0+DOC+XML+V0//EN&language=EN.

2. ASYLUM SYSTEM OF TURKEY AND THE ANALYSIS OF ITS FUNCTIONING FOR COMPLIANCE WITH THE CRITERIA OF 'SAFE THIRD COUNTRY'

As of March 31, 2019, 38 Syrian asylum seekers have already been returned to Turkey on the basis of inadmissibility of their asylum claims since March 20, 2016.[84] These official statistical figures give substantial grounds to conclude that the STC concept has already been applied with respect to Turkey by Greek determining authorities. Hungary as a Member State of the EU even explicitly included Turkey into its national list of safe third countries.[85] Moreover, taking into consideration the announced EU–Turkey statement, it could be assumed that Turkey will be designated as a STC at the EU level if Article 46(1) of the pAPR[86] proposed by the European Commission on July 13, 2016, is approved in its initial version by the European Parliament and the Council of the EU. Therefore, the primary objective of this Chapter is to justify or rebut a current recognition of Turkey as a STC on the basis of a detailed analysis of Turkey's compliance with each of the five criteria exhaustively enumerated in Article 38(1) of the rAPD.

It should be emphasized that pursuant to Article 1(A)(2) of the Refugee Convention,

> "the term "refugee" shall apply to any person who: [a]s a result of *events occurring before 1 January 1951* and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it (emphasis added)."[87]

Article 1(B)(1) of the Refugee Convention proposed two alternative interpretations for the expression "events occurring before 1 January 1951" to be particularly chosen by each Contracting State for defining *ratione materiae* of the refugee protection to be provided by the State concerned. Turkey having been among the original signatory States to the Refugee Convention exercised its right to apply a limitation on the geography of origin of asylum seekers

[84] UNHCR Returns from Greece (see introduction, n. 7).

[85] Decree of the Hungarian Government No. 91/2015 on the National List of Safe Countries of Origin and Safe Third Countries, cited from European Council on Refugees and Exiles [ECRE], *Country Report: Hungary 2018 update*, at 57 (December 31, 2018), accessed May 1, 2019, http://www.asylumineurope.org/sites/default/files/report-download/aida_hu_2018update.pdf.

[86] pAPR, art. 46(1) (see chap. 1, n. 7).

[87] Convention Relating to the Status of Refugees, art. 1(A)(2), July 28, 1951, 189 U.N.T.S. 137.

eligible for a refugee status, having specified that the abovementioned expression should be interpreted as "events occurring *in Europe* before 1 January 1951 (emphasis added)"[88] for the purpose of the fulfillment of Turkey's obligations under the Refugee Convention.

However, as soon as it became apparent that constantly emerging influxes of refugees in need of international protection were not temporary phenomena, international community started a negotiating process afresh for addressing these issues. Signed New York Protocol of January 31, 1967, was aimed at, first and foremost, eliminating temporal and geographical limitations from the definition of a refugee for universal applicability of the Refugee Convention with regard to their international protection. Turkey also expressed its consent to be bound by the provisions of the New York Protocol but, having used the provision of its Article 1(3), established a following reservation:

> "[t]he instrument of accession stipulates that the Government of Turkey maintains the provisions of the declaration made under section B of article 1 of the Convention relating to the Status of Refugees, done at Geneva on 28 July 1951, according to which it applies the Convention *only to persons who have become refugees as a result of events occurring in Europe*, and also the reservation clause made upon ratification of the Convention to the effect that no provision of this Convention may be interpreted as granting to refugees greater rights than those accorded to Turkish citizens in Turkey (emphasis added)."[89]

Consequently, only Turkey, Congo, Monaco and Madagascar[90] out of 146 States having ratified the Refugee Convention as of February 25, 2019,[91] continue to maintain the geographical limitation, granting the refugee protection at the level required by the Refugee Convention only to asylum seekers from Europe.

The ExCom continually recommended States Parties to the Refugee Convention and/or the New York Protocol "consideration of *the withdrawal of the geographical limitation* by those States which still maintain it,"[92] namely, in its General Conclusions on International Protection

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[88] Convention Relating to the Status of Refugees, art. 1(B)(1)(a).

[89] U.N. Treaty Collection, "Declarations and Reservations to the Protocol relating to the Status of Refugees," accessed May 1, 2019, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-5&chapter=5&clang=_en#EndDec.

[90] U.N. Treaty Collection, "Declarations and Reservations to the Convention relating to the Status of Refugees," accessed May 1, 2019, https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&clang=_en.

[91] Ibid.

[92] Executive Committee of the Programme of the United Nations High Commissioner for Refugees [ExCom], *Conclusion No. 36 (XXXVI) 'General Conclusion on International Protection,'* para. e, A/40/12/Add.1 (October 18,

No. 36 (XXXVI)[93] and No. 81 (XLVIII)[94] recognized to be important evidence of States' *opinio juris*. At the EU level the European Parliament even proposed to replace the principle of treatment of persons seeking asylum by a STC which is currently set forth in Article 38(1)(e) of the rAPD[95] with the following criterion in Article 45 of the pAPR:

> "Where a determining authority applies the admissibility procedure in accordance with point (b) of Article 36(1), that determining authority my apply the safe third country concept only where it is satisfied that an applicant will be treated according to the following criteria:
>
> [. . .]
>
> (eg) it is possible to request refugee status and, if found to be a refugee, to receive protection *in accordance with the Geneva Convention, ratified and applied without any geographical limitations*, or to request and receive effective protection within the meaning of points (a) to (g) (emphasis added)."[96]

Since the commencement of the accession negotiations between Turkey and the EU, the maintenance by Turkey of the geographical limitation with regard to the access to refugee protection has started to be a matter of particular concern on the part of the EU institutions. However, it should be outlined that the European Commission as far back as in 1999 defined the maintained geographical reservation to the Refugee Convention as "rendering the asylum machinery [of Turkey] ineffective."[97] Human Rights Watch, having determining key areas of the

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1985), accessed May 1, 2019, https://www.unhcr.org/excom/exconc/3ae68c4394/general-conclusion-international-protection.html.

[93] Ibid.

[94] Executive Committee of the Programme of the United Nations High Commissioner for Refugees [ExCom], *Conclusion No. 81 (XLVIII) 'General Conclusion on International Protection,'* para. n, A/52/12/Add.1 (October 17, 1997), accessed May 1, 2019, https://www.unhcr.org/excom/exconc/3ae68c690/general-conclusion-international-protection.html.

[95] "Member States may apply the safe third country concept only where the competent authorities are satisfied that a person seeking international protection will be treated in accordance with the following principles in the third country concerned: e) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention." rAPD, art. 38(1)(e) (see chap. 1, n. 60).

[96] Draft European Parliament Legislative Resolution on the Proposal for a Regulation of the European Parliament and of the Council Establishing a Common Procedure for International Protection in the Union and Repealing Directive 2013/32/EU, (COM(2016)0467 – C8-0321/2016 – 2016/0224(COD)), accessed May 1, 2019, http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A8-2018-0171+0+DOC+XML+V0//EN&language=EN.

[97] European Commission, *Regular Report from the Commission on Turkey's Progress Towards Accession*, at 36, October 13, 1999, accessed May 1, 2019, https://www.avrupa.info.tr/sites/default/files/2016-11/1999.pdf.

needed reforms to be carried out in Turkey for the successful accession of the latter to the EU, emphasized that "[b]y maintaining this anachronistic geographical limitation [to the Refugee Convention], Turkey puts itself at odds with the contemporary norm of refugee protection"[98] and recommended to remove the geographical restriction on the application of the Refugee Convention.[99] The European Commission even explicitly requested Turkey to "[a]dopt and effectively implement legislation and implementing provisions, in compliance with the EU acquis and with the standards set by the Geneva Convention of 1951 on refugees [the Refugee Convention] and its 1967 Protocol [the New York Protocol], thus *excluding any geographical limitation* (emphasis added)."[100] Natalie A. Cartwright reasonably concluded that "[t]he main reason the EU insists on Turkey eliminating the Geographical Limitation ties back to the EU's obligatory observance of the highest standards provided for in its law as well as international law."[101] However, Turkey defined "[h]armonization of the Turkish legislation on Asylum, Immigration and Foreigners with the EU legislation *while maintaining the existing geographical restrictions* (emphasis added)"[102] as one of the objectives to be achieved in its 'National Programme for the Adoption of the EU Acquis.' And despite the fact that the European Commission assured that Turkish asylum legislation afforded to conditional refugees protection "broadly equivalent to the Geneva Convention,"[103] existing differences in treatment, if any, will be thoroughly analyzed in subchapter 2.5 of the present research.

It should be emphasized that despite the fact that it is not possible to make an individualized assessment of the functioning of Turkish asylum system, this Chapter aims at, first and foremost, analyzing Turkey's compliance with each of the following criteria

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[98] Human Rights Watch [HRW], *Turkey: Human Rights and the European Union Accession Partnership*, D1210 (September 1, 2000), accessed May 1, 2019, https://www.refworld.org/docid/3ae6a87d0.html.

[99] Ibid.

[100] European Commission Staff Working Document Accompanying Report from the Commission to the European Parliament and the Council, *Third Report on Progress by Turkey in Fulfilling the Requirements of its Visa Liberalisation Roadmap*, para. 3.2.4, at 14, COM(2016) 278 final (May 4, 2016), accessed May 1, 2019, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160504/third_progress_report_on_turkey_visa_liberalisation_roadmap_swd_en.pdf (hereafter cited as *Third Report on Progress by Turkey*).

[101] Natalie Ann Cartwright, "The Effect of UNHCR Operations in the Development of Turkey's Asylum Framework" (master thesis, University of Illinois, 2013), 10, accessed May 1, 2019, https://www.ideals.illinois.edu/bitstream/handle/2142/44408/Natalie_Cartwright.pdf?sequence=1.

[102] Turkey, "National Programme of Turkey for the Adoption of the EU Acquis," Table 24.2.1, at 259, accessed May 1, 2019, https://www.ab.gov.tr/files/UlusalProgram/UlusalProgram_2008/En/pdf/iv_24_justicefreedomandsecurity.pdf.

[103] *Third Report on Progress by Turkey*, at 15.

enumerated in Article 38(1) of the rAPD, regardless individual circumstances of particular applicants for international protection:

> "a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;
> (b) there is no risk of serious harm as defined in Directive 2011/95/EU;
> (c) the principle of non-refoulement in accordance with the Geneva Convention is respected;
> (d) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected; and
> (e) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention."[104]

2.1. Absence of Threats to life and Liberty on Account of race, Religion, Nationality, Membership of a Particular Social Group or Political Opinion

Pursuant to the criterion enshrined in Article 38(1)(a) of the rAPD, life and liberty of particular applicants for international protection shall not be threatened on account of race, religion, nationality, membership of a particular social group or political opinion in Turkey in order for the latter to be considered as a STC for the applicants concerned. This requirement derived from the definition of a refugee set forth in Article 1(A)(2) of the Refugee Convention and Article 2(d) of the rQD because only persons who have well-founded fear of being persecuted for the abovementioned 'refugee reasons' are eligible for a refugee status and respective international protection. The UNHCR, having analyzed reasons for persecution, concluded that "[i]t is immaterial whether the persecution arises from any single one of these reasons or from a combination of two or more of them."[105] The CJEU in *Aydin Salahadin Abdulla and Others v. Bundesrepublik Deutschland* case even emphasized as follows:

> "refugee status ceases to exist when, [. . .], the circumstances which justified the person's fear of persecution for one of the reasons referred to in Article 2(c) of

[104] rAPD, art. 38(1) (see chap. 1, n. 60).

[105] United Nations High Commissioner for Refugees [UNHCR], *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (Geneva: Ferbuary 2019), para. 66, accessed May 1, 2019, https://www.unhcr.org/publications/legal/3d58e13b4/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html.

> Directive 2004/83 [Article 2(d) of the rQD], on the basis of which refugee status was granted, no longer exist and that *person has no other reason to fear being 'persecuted' within the meaning of Article 2(c) of Directive 2004/83 [Article 2(d) of the rQD]* (emphasis added)."[106]

Consequently, initially responsible State shall be satisfied that a particular applicant for international protection shall not face another persecution on account of any of the mentioned 'refugee reasons' in the STC concerned.

Despite the fact that Turkey has ratified majority of international human rights treaties of fundamental importance as of March 10, 2019,[107] a considerable number of international organizations, including Human Rights Watch,[108] Amnesty International,[109] the International Observatory of Human Rights,[110] the ECRE[111] and the Human Rights Association,[112] annually reported large-scale violations of basic human rights taken place in Turkey. The scale of human rights' infringements in question could be illustrated by the fact that only in 2017, 25,978 applications were lodged with the ECtHR against Turkey as the main respondent State in the ECtHR's cases since 1959,[113] in comparison with 7,957 lodged applications against the Russian Federation which was at the second place under this criterion.[114] The Freedom House in its annual report on civil and political rights downgraded Turkey in 2018 from a 'Partly Free' category to a 'Not Free' one due to "an escalating series of assaults on the press, social media users, protesters, political parties, the judiciary, and the electoral system, as President Recep

[106] Joined Cases C–175/08, C–176/08, C–178/08 & C–179/08, Aydin Salahadin Abdulla, Kamil Hasan, Ahmed Adem, Hamrin Mosa Rashi and Dler Jamal v. Bundesrepublik Deutschland, 2010 E.C.R. I–01493, para. 76.

[107] U.N. Turkey, "Ratification Status of Human Rights Treaties," accessed May 1, 2019, http://www.un.org.tr/humanrights/en/ratification-status.

[108] Human Rights Watch [HRW], *World Report 2019: Turkey*, accessed May 1, 2019, https://www.hrw.org/world-report/2019/country-chapters/turkey (hereafter cited as HRW Turkey Report 2019).

[109] Amnesty International, *Turkey 2017/2018*, accessed May 1, 2019, https://www.amnesty.org/en/countries/europe-and-central-asia/turkey/report-turkey/ (hereafter cited as AI Turkey Report 2018).

[110] International Observatory of Human Rights [IOHR], *2018 in Review: Human Rights Violations in Turkey*, accessed May 1, 2019, https://observatoryihr.org/2018-in-review-human-rights-violations-in-turkey/ (hereafter cited as IOHR Turkey Report 2018).

[111] ECRE Turkey Report 2018 (see introduction, n. 32).

[112] Human Rights Association, *Balance Sheet of Violations of Rights Occurred during 15 July Coup Attempt and State of Emergency* (October 27, 2016), accessed May 1, 2019, http://ihd.org.tr/en/index.php/2016/10/27/balance-sheet-of-violations-of-rights-occurred-during-15-july-coup-attempt-and-state-ofemergency/.

[113] European Court of Human Rights [ECtHR], *Overview 1959–2017*, at 3 (March 2018), accessed May 1, 2019, https://www.echr.coe.int/Documents/Overview_19592017_ENG.pdf.

[114] European Court of Human Rights [ECtHR], *Analysis of Statistics 2018*, at 11 (January 2019), accessed May 1, 2019, https://www.echr.coe.int/Documents/Stats_analysis_2018_ENG.pdf.

Tayyip Erdoğan fights to impose personalized control over the state and society in a deteriorating domestic and regional security environment."[115] Moreover, Turkey was ranked 157th among 180 countries by Reporters Without Borders in its *World Press Freedom Index 2018*[116] and 109th among 126 countries indexed in *Rule of Law Index 2019* by the World Justice Project.[117] In order to emphasize the gravity of basic human rights violations currently reported in Turkey it should be mentioned that despite the end of two-year state of emergency declared in Turkey after the failed *coup d'état*, the European Parliament recommended the European Commission and the Council of the EU to "formally suspend the accession negotiations with Turkey; remains, however, committed to democratic and political dialogue with Turkey,"[118] having pointed out that "since the introduction of the state of emergency [in July 20, 2016] the number of asylum applications [lodged] by Turkish citizens has risen dramatically, [. . .] [and] Turkey now occupies fifth place in terms of numbers of asylum applications submitted in EU Member States."[119] The EASO reported that "[f]or the second consecutive year Turkish nationals continued to lodge more applications for asylum (approximately 24,500), up by 48% from 2017. [. . .] Of all first instance decisions issued to Turkish applicants [approximately 15,300] 46% were positive, *mostly granting refugee status* (emphasis added)."[120] It should be also pointed out that before the attempted *coup d'état* only 4,180 applications for international protection were lodged with Member States of the EU by Turkish citizens in 2015.[121] For the purposes of further research this subchapter is dedicated to violations of the rights to life, liberty and security, if any, which have been committed on account of race, religion, nationality, membership of a particular social group or political opinion.

The analysis of the abovementioned international organizations' reports and of judgments delivered by the ECtHR against Turkey gives substantial grounds to conclude that the

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[115] Freedom House, *Freedom in the World 2018*, at 7, accessed May 1, 2019, https://freedomhouse.org/sites/default/files/FH_FITW_Report_2018_Final_SinglePage.pdf.

[116] Reporters Without Borders, *2018 World Press Freedom Index*, accessed May 1, 2019, https://rsf.org/en/ranking.

[117] World Justice Project [WJP], *Rule of Law Index 2019*, at 17, accessed May 1, 2019, https://worldjusticeproject.org/sites/default/files/documents/WJP_RuleofLawIndex_2019_Website_reduced_0.pdf.

[118] Motion for a European Parliament Resolution on the 2018 Commission Report on Turkey, para. 21, 2018/2150(INI) (February 26, 2019), accessed May 1, 2019, http://www.europarl.europa.eu/doceo/document/A-8-2019-0091_EN.html?redirect.

[119] Ibid., para. 7.

[120] European Asylum Support Office [EASO], *EU+ Asylum Trends – 2018 overview*, at 8 (February 13, 2019), accessed May 1, 2019, https://www.easo.europa.eu/sites/default/files/EASO-2018-EU-Asylum-Trends-Overview.pdf.

[121] TurkeyPurge, "14,640 Turkish citizens claimed asylum in EU in 2017: Eurostat," April 4, 2018, accessed May 1, 2019, https://turkeypurge.com/14630-turkish-citizens-claimed-asylum-eu-2017-eurostat.

scale of human rights violations has drastically increased due to the hostile reaction of the Turkish Government and the President to the *coup d'état* attempt made on July 15–16, 2016. Following the unsuccessful attempted coup carried out by a part of Turkish armed forces allegedly under the auspices of the Gülen movement with the aim of overthrowing the President Recep Tayyip Erdoğan, the Turkish Government declared a state of emergency on July 20, 2016. The European Commission of Democracy through Law explained the motives of Turkish state officials' hostile attitude towards the Gülen movement as follows: "[a]ccording to Turkish official sources, there is strong evidence that the conspiracy has been organised by the supporters of Mr Fethullah Gülen, an Islamic cleric living in the US [the United States of America]. In the Turkish official documents the Gülenist network is denoted as "FETÖ/PDY" ("Fethullah Terror Organization/Parallel State Structures")."[122] As a result of the declared state of emergency, the Permanent Representative of Turkey to the Council of Europe sent to the Secretary General of the Council of Europe the notice of possible derogation from certain of its obligations imposed by the Convention for the Protection of Human Rights and Fundamental Freedoms of November 4, 1950 (ECHR).[123] Because pursuant to Article 15(1) of the ECHR, "[i]n time of war or *other public emergency threatening the life of the nation* any High Contracting Party may take measures derogating from its obligations under Convention [ECHR] to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law (emphasis added)."[124] The ECtHR in *Şahin Alpay v. Turkey* case recognized the declaration of the state of emergency in Turkey as a sufficient precondition to resort to a provision of Article 15 of the ECHR, based on the findings of the Turkish Constitutional Court in line with a wide margin of appreciation left to the national authorities in this matter.[125] The notification of derogation from certain obligations under the International Covenant on Civil and Political Rights of December 19, 1966 (ICCPR), was also

[122] Council of Europe, European Commission of Democracy through Law, *Opinion on Emergency Decree Laws Nos. 667–676 Adopted Following Attempted Coup of 15 July 2016*, para. 10, CDL-AD(2016)037 (December 9–10, 2016), accessed May 1, 2019, https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)037-e.

[123] "[T]he State of Emergency takes effect as from this date. In this process, measures taken may involve derogation from the obligations under the Convention for the Protection of Human Rights and Fundamental Freedoms, permissible in Article 15 of the Convention." Şahin Alpay v. Turkey, App. No. 16538/17, para. 65 (Eur. Ct. H.R. March 20, 2018).

[124] Convention for the Protection of Human Rights and Fundamental Freedoms, art. 14, November 4, 1950, 213 U.N.T.S. 221 (hereafter cited as ECHR).

[125] Şahin Alpay v. Turkey, App. No. 16538/17, paras. 75, 77 (Eur. Ct. H.R. March 20, 2018).

sent to the UN Secretary–General with explicitly enumerated provisions of the ICCPR to be derogated from.[126]

However, despite the fact that the derogation from particular human rights obligations is permissible under the abovementioned international treaties, this possibility has been apparently abused by Turkey, taking into account the scale of human rights violations committed by Turkish state authorities mainly because of political motives. First and foremost, the Turkish Government under the chairmanship of the President was entrusted with legislative powers to adopt 'Emergency Decree Laws,' bypassing prescribed legislative and judicial procedures because of the declared state of emergency, pursuant to Article 121 of the Turkish Constitution and Article 4 of the Law of the Republic of Turkey No. 2935 on State of Emergency of October 25, 1983.[127] This extraordinary legislative tool provided the Government with open-ended opportunities to lawfully suppress Erdoğan's political opponents, irrespective of their genuine participation in the failed *coup d'état* or the Gülen movement. Moreover, according to Article 1 of the Law of the Republic of Turkey No. 3713 on Fight against Terrorism of April 12, 1991 (LFAT),

> "[a]ny criminal action conducted by one or more persons belonging to an organisation with the aim of changing the attributes of the Republic as specified in the Constitution, the political, legal, social, secular or economic system, damaging the indivisible unity of the State with its territory and nation, jeopardizing the existence of the Turkish State and the Republic, enfeebling, destroying or seizing the State authority, eliminating basic rights and freedoms, damaging the internal and external security of the State, the public order or general health, is defined as terrorism."[128]

[126] "On 21 July 2016, the Turkish Government notified the UN Secretary-General of its invocation of [A]rticle 4 of the ICCPR [International Covenant on Civil and Political Rights of December 19, 1966], and that the derogation involved obligations under Articles 2/3 [Discrimination and Remedy/Equality], 9 [Liberty and security], 10 [Liberty], 12, 13, 14, 17, 19, 21, 22, 25, 26 [Equality before the law] and 27 [Minorities] of the ICCPR [International Covenant on Civil and Political Rights]." UN Human Rights Office of the High Commissioner, "UN experts urge Turkey to adhere to its human rights obligations even in time of declared emergency," August 19, 2016, accessed May 1, 2019, https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20394.

[127] Law of the Republic of Turkey No. 2935 on State of Emergency of October 25, 1983, art. 4, Official Gazette No. 18204 on 27 October 1983, accessed May 1, 2019, https://www.legislationline.org/documents/id/6974.

[128] Law of the Republic of Turkey on Fight against Terrorism of April 12, 1991, art. 1, Official Gazette No. 20843 on 12 April 1991, accessed May 1, 2019, https://www.legislationline.org/documents/id/16875 (hereafter cited as LFAT).

Therefore, by means of a considerable number of adopted emergency decrees and extremely vague but frequently applicable definition of 'terrorism' the Turkish Government and the President Recep Tayyip Erdoğan gradually established a variety of legal grounds to prosecute and subsequently punish almost any private individual or legal entity being deemed "a threat to national security." Human Rights Watch, having analyzed the text of adopted emergence decree laws, concluded that the wording of the latter was "vague and open-ended, permitting the firing of any public official conveniently alleged to be 'in contact' with members of 'terrorist organizations' but with no need for an investigation to offer any evidence in support of it"[129] because of the simplified procedure of investigation and trial applicable to the 'terrorist offences' enumerated in Article 4 of the LFAT.

In order to illustrate the scale of politically motivated terrorism charges and respective violations of the right to liberty and security committed by Turkish state authorities it should be mentioned that since the failed coup attempt 85,998 persons were arrested out of approximately 500,650 detained as of March 4, 2019,[130] because of the alleged connections with the Gülen movement on the basis of the mentioned decrees and the amended LFAT. According to the same official statistical figures provided by the Turkish Justice Minister, "30,947 people are currently in prison on terror and coup linked charges. Arrest warrants for another 22,000 suspects at large have been issued,"[131] despite of the overloaded capacity of Turkish prisons.[132] The International Observatory of Human Rights reported that "[p]rosecutors found that subscription to a newspaper published by the Gulenists, having a bank account with their bank [. . .] enough evidence for proof of being a Gulenist."[133] Secret witness statements were recognized as sufficient evidence to link terrorism 'suspects' to the Gülen Movement, whereas two nephews and brother of Fethullah Gülen were sentenced to 12 years, 7.5 years and 10.5 years of imprisonment respectively for their alleged membership in the terrorist Gulenist Organization which has been proven exclusively on the basis of their family ties with Mr. Gülen.[134] Moreover, the Office of the UN High Commissioner for Human Rights (OHCHR) estimated that "approximately 600 women with young children *were being held in detention* in Turkey as of December 2017. In almost all cases, they were arrested as "associates" of their husbands – who

[129] Human Rights Watch [HRW], *Turkey: Rights Protections Missing From Emergency Decree" Orders to Purge Civil Servants, Judges; Close Groups Down*, July 26, 2016, accessed May 1, 2019, https://www.hrw.org/news/2016/07/26/turkey-rights-protections-missing-emergency-decree.

[130] TurkeyPurge, "Turkey's Post-Coup Crackdown," accessed May 1, 2019, https://turkeypurge.com/.

[131] Ibid.

[132] IOHR Turkey Report 2018 (see chap. 2, n. 110).

[133] Ibid.

[134] Ibid.

were the Government's primary suspects for connection to terrorist organizations – *without separate evidence supporting charges against them* (emphasis added)."[135] Moreover, 80,000 investigations and 3,500 prison sentences on charges of insulting the President Recep Tayyip Erdoğan,[136] 319 arrested journalists and 150,348 dismissed public servants[137] because of the alleged connections with the Gülen movement should also be mentioned in this context for more accurate conclusions as for the situation with human rights in Turkey. Consequently, it should be concluded that in the course of criminal proceedings initiated upon charges with terrorism, Turkish law enforcement bodies disregarded the majority of criminal procedural safeguards with no attention being paid to the presumption of innocence and the necessity to prove defendants' guilt beyond reasonable doubts.

One of the most prominent and currently discussible cases of imposed political charges and respective violations of the right to liberty and security in Turkey is the one of Selahattin Demirtaş who, having been the co-chair of the pro-Kurdish political party and a candidate in the course of the presidential elections held in Turkey in June 2018, was detained and charged with dozens of terrorist offences, including "dissemination of propaganda in favour of the PKK [Kurdistan Workers' Party] terrorist organization."[138] His conviction for the charges at issue could be resulted in up to 142 years' imprisonment.[139] The ECtHR in *Selahattin Demirtaş v. Turkey* case concluded that "the extensions of the applicant's detention, especially during two crucial campaigns, namely the referendum and the presidential election, *pursued the predominant ulterior purpose of stifling pluralism and limiting freedom of political debate*, which is at the very core of the concept of a democratic society (emphasis added)."[140] As a result of found violations of the ECHR the ECtHR unanimously held that Turkey as the respondent State had to "take all necessary measures to put an end to the applicant's pre-trial detention."[141] However, Turkey disregarded its obligations under Article 46(1) of the ECHR and refused to implement the judgment of November 20, 2018, having sentenced Mr. Demirtaş to 4 years and 8

[135] Office of the U.N. High Commissioner for Human Rights [OHCHR], *Report on the Impact of the State of Emergency on Human Rights in Turkey, Including an Update on the South-East: January – December 2017*, para. 12, March 2018, accessed May 1, 2019, https://www.ohchr.org/Documents/Countries/TR/2018-03-19_Second_OHCHR_Turkey_Report.pdf (hereafter cited as OHCHR Turkey Report 2018).

[136] IOHR Turkey Report 2018.

[137] Turkey Purge, "Turkey's Post-Coup Crackdown," accessed May 1, 2019, https://turkeypurge.com/.

[138] Selahattin Demirtaş v. Turkey, App. No. 14305/17, Judgment, para. 57(i) (Eur. Ct. H.R. November 20, 2018).

[139] Ibid., paras. 11–12, 56.

[140] Ibid., para. 273.

[141] Ibid.

months in prison on December 4, 2018.[142] Furthermore, the President Recep Tayyip Erdoğan publicly stated that judgments delivered by the ECtHR had no binding force for Turkey[143] in violations of its international obligation "to abide by the final judgment of the Court [ECtHR] in any case to which they [High Contracting Parties to the ECHR] are parties."[144]

The outlined pattern of the protection of basic human rights in Turkey which existed in the course of two-year state of emergency prolonged for seven times since its declaration has been a matter of significant international concern. Experts of the UN stated that "the [Turkish] Government's steps to limit a broad range of human rights guarantees go beyond what can be justified in light of the current situation."[145] The European Parliament in reaction to the abovementioned human rights' infringements "strongly condemned the disproportionate (to say the least) measures taken by Ankara following the attempted coup on 15 July 2016,"[146] having voted for the freezing of accession negotiations between the EU and Turkey. The European Commission, having condemned the attempted *coup d'état,* however, concluded that "the broad scale and collective nature, and the disproportionality of measures taken since the attempted coup under the state of emergency, such as widespread dismissals, arrests, and detentions, continue to raise serious concerns"[147] and required Turkey to lift the state of emergency. And despite the fact that the latter was eliminated on July 18, 2018, constitutional amendments approved in the referendum which led to the maintenance of comprehensive Presidency power with almost no checks and balances supports the conclusion that there are no prerequisites for the decrease of the scale of human rights violations on account of political opinion in Turkey.

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[142] "Jailed Kurdish Politician Demirtaş Nominated for 2019 Nobel Peace Prize," February 2, 2019, accessed May 1, 2019, https://www.turkishminute.com/2019/02/02/jailed-kurdish-politician-demirtas-nominated-for-2019-nobel-peace-prize/.

[143] Stockholm Centre for Freedom, "Erdoğan says Turkey not Bound by European Court's Ruling to Release Demirtaş," November 20, 2018, accessed May 1, 2019, https://stockholmcf.org/erdogan-says-turkey-not-bound-by-european-courts-ruling-to-release-demirtas/.

[144] ECHR, art. 46(1).

[145] Office of the U.N. High Commissioner for Human Rights [OHCHR], *UN Experts Urge Turkey to Adhere to its Human Rights Obligations Even in Time of Declared Emergency*, August 19, 2016, accessed May 1, 2019, https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20394.

[146] European Parliament, *Freezing the negotiations on Turkey's accession to the European Union*, November 30, 2016, accessed May 1, 2019, http://www.europarl.europa.eu/doceo/document/E-8-2016-009001_EN.html.

[147] European Commission Staff Working Document Accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions '2018 Communication on EU Enlargement Policy,' para. 1.2, at 3, SWD(2018) 153 final (April 17, 2018), accessed May 1, 2019, https://www.avrupa.info.tr/sites/default/files/2018-06/20180417-turkey-report.pdf (hereafter cited as *Turkey 2018 Report*).

It should be pointed out that in addition to the abovementioned large-scale human rights violations committed because of political motives, a number of international organizations, including the ECRE, the Human Right Watch and the Syrian Observatory for Human Rights, reported violations of the rights to life, liberty and security taken place in Turkey on account of nationality. Turkey recognized by the UNHCR as the largest refugee hosting state worldwide hosted 3,621,330 registered Syrian nationals as of April 11, 2019, [148] who have already received in Turkey temporary protection in accordance with the TPR. However, the ECRE, having analyzed existing Turkey's border practices, reported "incidents of ill-treatment at the Turkey–Syria border including [. . .] shootings by border guards near Cilvegözü in Hatay."[149] Moreover, violations of Syrian nationals' rights to life have been committed not only by Turkish state officials at the border but also by ordinary Turkish citizens. As the International Crisis Group reported on this matter, "[a]n international organisation that tracks *refugee-related social tension* and criminal incidents recorded 181 cases in 2017 [. . .], which resulted in 35 deaths (24 of them Syrian). Violence peaked in July 2017 and increased nearly three-fold over the second half of 2017 compared to the same period in 2016 (emphasis added)."[150] It should also be mentioned that a considerable number of persons have been persecuted by Turkish state authorities on account of their ethnic affiliation to Kurds and alleged connections with the Kurdistan Workers' Party (PKK). According to Article 10(1)(c) of the rQD, "the concept of nationality shall not be confined to citizenship or lack thereof but shall, in particular, include membership of a group determined by its cultural, ethnic, or linguistic identity, common geographical or political origins or its relationship with the population of another State."[151] Representatives of Kurdish ethnic group are counted for 19% of Turkey's population as of July 2018.[152] The OHCHR, having based on the comprehensive analysis of a number of credible international organizations' reports,

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[148] United Nations High Commissioner for Refugees [UNHCR], "Syrian Refugee Regional Response," accessed May 1, 2019, https://data2.unhcr.org/en/situations/syria/location/113.

[149] European Council on Refugees and Exiles [ECRE], *Country Report: Turkey 2017 update*, at 23, accessed May 1, 2019, http://www.asylumineurope.org/sites/default/files/report-download/aida_tr_2017update.pdf.

[150] International Crisis Group, *Turkey's Syrian Refugees: Defusing Metropolitan Tensions*, at 3, Europe Report No. 248 (January 29, 2018), accessed May 1, 2019, https://d2071andvip0wj.cloudfront.net/248-turkey-s-syrian-refugees.pdf.

[151] Directive 2011/95/EU of the European Parliament and of the Council of December 13, 2011, on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), art. 10(1)(c), 2011 O.J. (L 337) 9 (hereafter cited as rQD).

[152] The United States of America, Central Intelligence Agency, *The World Factbook: Middle East, Turkey as of April 30, 2019*, accessed May 1, 2019, https://www.cia.gov/library/publications/the-world-factbook/geos/tu.html.

illustrated a treatment constantly faced by a significant number of Turkish Kurds after the failed *coup d'état* and subsequently declared state of emergency as follows:

> "[i]n February 2017, [. . .] security operations took place in areas home to, in large part, to Kurdish residents and targeted citizens of Kurdish origin of all ages for their perceived affiliation to the PKK. During the operations conducted in these nine villages, *security forces reportedly killed at least three individuals, sexually assaulted women, and committed other acts of torture*. *They beat, threatened at gunpoint, and fired at several civilians,* blocked the transfer of several wounded to the hospital, deprived residents of food, safe drinking water and sanitation, raided and burned houses (emphasis added)."[153]

Moreover, a significant number of the mentioned 85,998 arrested persons on the basis of the emergency decree laws and the amended LFAT were Kurdish political activists. As the Australian Department of Foreign Affairs and Trade emphasized, "[d]iscrimination against Kurds on the basis of their ethnicity as opposed to their political opinions (actual or imputed) is often difficult to distinguish."[154]

Consequently, taking into consideration the ongoing armed conflict in the Syrian Arab Republic and renewed armed conflict between Turkey and the PKK, it should be concluded that there are no preconditions for the inverse process with regard to the further increase of social tensions currently existing in Turkish society regarding Syrian nationals and the scale of human rights violations being perpetrated with respect to Syrians and Kurds residing in Turkey.

Based on a variety of the analyzed international organizations' reports, it should also be concluded that the scale of gender-based violence and respective violations of the right to life in Turkey is drastically large to be tolerated because of the permitted derogation from particular human rights obligations. The We Will Stop Femicide Platform established to strive for stopping femicides and "all types [of] women's rights violations, starting with the violation [of the] right to life,"[155] reported the murders of 440 women and sexual violence suffered by 317 women in 2018 with 85% of all murders committed by husbands and victims' partners, whereas 45% of

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[153] OHCHR Turkey Report 2018, para. 111 (i) (see chap. 2, n. 135).

[154] The Commonwealth of Australia, Department of Foreign Affairs and Trade, *DFAT Country Information Report: Turkey*, para. 4.7 (September 5, 2016), accessed May 1, 2019, https://www.ecoi.net/en/file/local/1419338/4792_1512564235_country-information-report-turkey.pdf (hereafter cited as *DFAT Report: Turkey*).

[155] We Will Stop Femicide Platform, accessed May 1, 2019, http://www.kadincinayetlerinidurduracagiz.net/for-english.

women suffered from sexual violence were subjected to abuse by unknown men.[156] Moreover, there is a constant tendency of the increase of the femicide cases which amounted to 237 ones in 2013, 328 in 2016, 409 in 2017 and 440 in 2018.[157] On the basis of the conclusions of the Committee on the Elimination of Discrimination against Women, a number of the mentioned femicides could be related to a stable practice of 'honour' killings which is still widespread in Turkey, irrespective of its prohibition in the Penal Code of the Republic of Turkey.[158] All of the mentioned femicides and acts of sexual violence could be equated with the acts of persecution for reason of a membership of a particular social group because, according to Article 9(3) of the rQD, "there must be *a connection between the reasons mentioned in Article 10* and the acts of persecution as qualified in paragraph 1 of this Article or *the absence of protection against such acts* (emphasis added)."[159] The International Observatory of Human Rights reported that "the police were reportedly indifferent to the demands of the women for protection,"[160] whereas Hurriet Daily News emphasized that 67% of murders were perpetrated in 2017 "despite the victimized women having applied to the state for protection."[161] The Turkish Justice Minister even publicly defined domestic violence as "an internal family matter," having questioned a necessity of State's interference in disagreements arisen between husbands and wives.[162] Moreover, as the Australian Department of Foreign Affairs and Trade reported, reduction of sentences for perpetrators of acts of sexual violence, including rape of minor girls, has been a common practice applicable by Turkish courts, provided that the accused has demonstrated "good and regretful conduct,"[163] for instance, by wearing a tie in the course of a trial process.[164] However, the ECtHR in a number of judgments delivered against Turkey, including *Civek v. Turkey*, *Kılıç v. Turkey* and *Halime Kılıç v. Turkey* cases, found violations of the right to life mainly because

[156] Daily Sabah, "Number of Femicide Victims in Turkey Rises to 440 in 2018," January 2, 2019, accessed May 1, 2019, https://www.dailysabah.com/turkey/2019/01/02/number-of-femicide-victims-in-turkey-rises-to-440-in-2018.

[157] Ibid.

[158] U.N. Committee on the Elimination of Discrimination against Women [CEDAW], *Concluding Observations on the Seventh Periodic Report of Turkey*, para. 34, CEDAW/C/TUR/CO/7 (July 25, 2016), accessed May 1, 2019, https://www.ecoi.net/en/file/local/1193790/1930_1484750203_n1623344.pdf.

[159] rQD, art. 9(3).

[160] IOHR Turkey Report 2018 (see chap. 2, n. 110).

[161] Hurriet Daily News, "Nearly 2,000 women killed in eight years in Turkey," November 26, 2017, accessed May 1, 2019, http://www.hurriyetdailynews.com/nearly-2-000-women-killed-in-eight-years-in-turkey-123079.

[162] *DFAT Report: Turkey*, para 3.79.

[163] Ibid.

[164] Hurriet Daily News, "Nearly 2,000 women killed in eight years in Turkey," November 26, 2017, accessed May 1, 2019, http://www.hurriyetdailynews.com/nearly-2-000-women-killed-in-eight-years-in-turkey-123079.

> "[a] wide range of preventive measures were available which would have assisted in minimising the risk to [. . .] life and which would not have involved an impractical diversion of resources. On the contrary however, the authorities denied that there was any risk. There is no evidence that they took any steps in response to [. . .] request for protection either by applying reasonable measures of protection or by investigating the extent of the alleged risk [. . .] with a view to taking appropriate measures of prevention."[165]

It should be mentioned that LGBT individuals are also persecuted by Turkey as an actor of persecution in the form of "legal [. . .] and [. . .] judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner"[166] for the reason of a membership of a particular social group. According to Article 29 of the Penal Code of the Republic of Turkey, "[a] person committing an offense with affect of anger or asperity *caused by the unjust act* is sentenced to imprisonment from eighteen years to twenty-four years instead of heavy life imprisonment, and to imprisonment from twelve years to eighteen years instead of life imprisonment (emphasis added)."[167] However, as the Kaos Gay and Lesbian Cultural Research and Solidarity Association, LGBTI News Turkey and the International Gay and Lesbian Human Rights Commission reported in their joint submission to the UN Human Rights Council, "[t]he Code [the Penal Code of the Republic of Turkey] does not define or set criteria for what constitutes an "unjust act," leaving it up to the sentencing judge to determine whether an assault or murder was the result of "unjust provocation." As a result, judges have routinely used Article 29 [of the Penal Code of the Republic of Turkey] *to reduce the sentences of those who have killed LGBT individuals* (emphasis added)."[168] For instance, the Bakırköy Fourth Criminal Court for Aggravated Crimes reduced a sentence of Mr. Soybozkurt for the killing of B.Ü. who was a trans woman from life imprisonment to 15 years in prison, having recognized the victim's transgender status as the "unjust act" for the purposes of the application of Article 29 of the Penal Code of the Republic of Turkey.[169] And as the CJEU in *X and Y and Z v. Minister voor Immigratie en Asiel* case emphasized, "the existence of criminal laws, [. . .], which specifically

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[165] Kılıç v. Turkey, App. No. 22492/93, Judgment, para. 76 (Eur. Ct. H.R. March 28, 2000).

[166] rQD, art. 9(2)(b).

[167] Penal Code of the Republic of Turkey No. 5237 of September 26, 2004, art. 29, Official Gazette No. 25611 of October 12, 2004, accessed May 1, 2019, https://www.wipo.int/edocs/lexdocs/laws/en/tr/tr171en.pdf.

[168] Kaos Gay and Lesbian Cultural Research and Solidarity Association, LGBTI News Turkey and International Gay and Lesbian Human Rights Commission, *Human Rights Violations of LGBT Individuals in Turkey*, at 2 (January–February 2015), accessed May 1, 2019, https://ilga.org/wp-content/uploads/2016/02/Shadow-report-16.pdf.

[169] LGBTI News Turkey, "Killing a Trans is Reason for Reduced Sentences," June 3, 2014, accessed May 1, 2019, https://lgbtinewsturkey.com/2014/06/05/killing-a-trans-is-reason-for-reduced-sentences/.

target homosexuals, supports the finding that those persons must be regarded as forming a particular social group."[170]

Summarizing all of the abovementioned, it should be outlined that the analyzed large-scale violations of the rights to life, liberty and security, committed primarily by Turkish state authorities on account of persons' political opinions, nationalities and membership of particular social groups support the conclusion that Turkey shall not be automatically considered as a STC for any applicant for international protection without properly conducted individualized assessment of their particular individual circumstances.

2.2. Absence of risk of Serious harm

In line with the concept of subsidiary protection originated within the EU asylum *acquis* as "an additional form of international protection that is complementary to refugee status,"[171] an application for international protection shall not be considered as inadmissible on the basis of the applicable STC concept if the applicant having lodged the application concerned may face a real risk of suffering "serious harm" in Turkey. Pursuant to the provision of Article 15 of the rQD, the notion of "serious harm" for the purposes of this form of protection could be alternatively interpreted as "(a) the death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict."[172]

The Penal Code of the Republic of Turkey in full compliance with the Turkish Constitution prescribed the possibility of a death penalty to be applied as a mandatory form of punishment for the commission of gravest crimes,[173] in spite of the non-application of the capital

[170] Joined Cases C–199/12, C–200/12 & C–201/12, X, Y and Z v. Minister voor Immigratie en Asiel, 2013 EU:C:2013:720, para. 49.

[171] European Asylum Support Office [EASO], *Practical Guide: Qualification for International Protection*, at 27 (April 2018), accessed May 1, 2019, https://www.easo.europa.eu/sites/default/files/easo-practical-guide-qualification-for-international-protection-2018.pdf.

[172] rQD, art. 15.

[173] "Twenty-four articles of the 1926 Turkish Penal Code provided for a mandatory death penalty, 16 of them for crimes against the state, the government and the Constitution, and a further eight for criminal offenses like murder . These 24 articles define a total of 29 offenses." Amnesty International, *Injustice Leads to the Gallows*, at 4 (February 1990), accessed May 1, 2019, http://ob.nubati.net/w/images/3/3e/Dp199002.png.

punishment in Turkey since October 1984.[174] However, in August 2002 predominantly under the influence of a candidate status for the membership of the EU and pressure on the part of Member States of the Council of Europe necessary constitutional and legislative amendments were ultimately made to exclude the application of death penalty for the commission of peacetime offences and demonstrate Turkey's commitment to promote democratic values of the EU referred to in Article 2 of the Treaty on European Union of February 7, 1992. All references to the death penalty were excluded from the provisions of the Turkish Constitution in May 2004, whereas in August 2004 a possibility to apply the capital punishment was abolished in all circumstances, including times of war.[175] Turkey even ratified Protocol No. 6 to the ECHR concerning the Abolition of the Death Penalty of April 28, 1983, and Protocol No. 13 to the ECHR, concerning the abolition of the death penalty in all circumstances of May 3, 2002, in 2003 and 2006 respectively.[176]

However, since the unsuccessful *coup d'état* attempt made in Turkey on July 15–16, 2016, the reinstatement of the death penalty at least for the commission of 'terrorist offences' enumerated in Article 4 of the LFAT has started to be an issue of significant public concern. Taking into account the simplified procedure of investigation and extremely reduced standard of proof applicable to 'terrorist offences' with almost no necessity to prove defendants' guilt beyond reasonable doubts, the application of death penalty for the commission of such offences doubtfully could be justified by any severity of the actions concerned. However, the President Recep Tayyip Erdoğan publicly asserted on numerous occasions that he would approve any constitutional amendment regarding the restoration of death penalty provided that the amendment in question was approved by an absolute majority of votes in the Grand National Assembly of Turkey or in the nationwide constitutional referendum.[177] The European Commission President Jean-Claude Juncker, having confirmed the continuation of the accession negotiations between the EU and Turkey, warned that "a reintroduction of the death penalty would clearly put an end to the process […] [and] would be a red line in accession talks."[178] The European Parliament also reiterated that "reintroduction of capital punishment by the Turkish

[174] Hands Off Cain, "Country Profile on Turkey 2019," accessed May 1, 2019, http://www.handsoffcain.info/bancadati/europe/turkey-50000476.

[175] Ibid.

[176] Council of Europe [COE], "Treaty List for a Specific State: Turkey," accessed May 1, 2019, https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/country/TUR?p_auth=FhvQhcHz.

[177] Selin Girit, "Will Turkey's Failed Coup Mean a Return to a Death Penalty?" July 19, 2016, accessed May 1, 2019, https://www.bbc.com/news/world-europe-36829284.

[178] Michael Nienaber, "Death penalty in Turkey Would Mean End to EU Accession Talks: Juncker," May 31, 2017, accessed May 1, 2019, https://www.reuters.com/article/us-eu-turkey-juncker-idUSKBN18R330.

Government would have to lead to a formal suspension of the accession process"[179] because "the unequivocal rejection of the death penalty is an essential element of the Union [EU] acquis."[180] However, the European Commission abstained from any official comments with regard to the death penalty reintroduction supported by highest Turkish state officials in its 2018 Regular Report on Turkey, having just mentioned that "[s]tatements on the possibility of reinstating the death penalty have been made by public officials, including by the President in early 2017."[181]

It should also be pointed out that a draft legislation proposal to reintroduce death penalty for "the murder of children and women through sexual means and for killings carried out as part of individual or organised acts of terrorism"[182] was submitted to the Parliament on October 1, 2018. And despite the fact that no constitutional amendments have been made as of April 2, 2019, the reinstatement of the death penalty would definitely constitute a material breach of Turkey's international obligations imposed by the abovementioned treaties. But the sentence of Selahattin Demirtaş in violation of Turkey's obligations under Article 46(1) of the ECHR, the comprehensive power of Recep Tayyip Erdoğan and the prevailed tendency of public approval of the death penalty for the alleged *coup d'état* plotters support the conclusion that the inclusion of the issues of the capital punishment restoration into the Parliament's agenda will not be long in coming.

Turkey, having been a Contracting Party to the ECHR and the ICCPR, also expressed its consent to be bound by the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of December 10, 1984 (CAT),[183] and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of November 26, 1987.[184] However, because of the declared state of emergency on July 20, 2016, UN Secretary–General was notified of Turkey's derogation from explicitly enumerated

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[179] European Parliament Resolution on EU–Turkey Relations, para. 3, 2016/2993(RSP) (November 24, 2016), accessed May 1, 2019, http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2016-0450+0+DOC+XML+V0//EN.

[180] Ibid., para. D.

[181] *Turkey 2018 Report*, para. 1.2, at 3 (see chap. 2, n. 151).

[182] Başak Çalı, "The Spectre of Trexit: Proposal to Reintroduce the Death Penalty in Turkey" (October 10, 2018), accessed May 1, 2019, https://www.ejiltalk.org/the-spectre-of-trexit-proposal-to-reintroduce-the-death-penalty-in-turkey.

[183] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, December 10, 1984, 1465 U.N.T.S. 85 (hereafter cited as CAT).

[184] Council of Europe [COE], "Chart of Signatures and Ratifications of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of November 26, 1987," accessed May 1, 2019, https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/126/signatures?p_auth=QEzkyaWv.

obligations under the ICCPR,[185] including the one set forth in Article 10(1) of the ICCPR, pursuant to which "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."[186] Therefore, a permissible derogation from certain human rights obligations resulted in a substantial number of instances of torture and other ill-treatment of detainees and prisoners in Turkey annually reported by international organizations and bodies. For instance, Amnesty International reported that "detainees in Turkey are being subjected to beatings and torture, including rape, in official and unofficial detention centres."[187] John Dalhuisen, a former director of Amnesty International's Europe and Central Asia Programme, specifically paid attention to the unacceptable silence and subsequent inactivity of Turkish Government with regard to the grave violations in question, in spite of their wide broadcasting, and concluded that "[f]ailing to condemn ill-treatment or torture in these circumstances is tantamount to condoning it."[188] Human Rights Watch also informed of "[c]ontinued allegations of torture, ill-treatment, and cruel and inhuman or degrading treatment in police custody and prison and the lack of any meaningful investigation into them."[189] The European Parliament, having analyzed the human rights situation in Turkey as of February 8, 2018, relied upon the following statistical figures provided by the Human Rights Association regarding the allegations of torture or other degrading treatment: "in the first 11 months of 2017 a total of 2,278 people encountered torture and ill-treatment [in Turkey]."[190] More detailed conclusions have been reached by specialized international bodies on the basis of evidence

[185] "On 21 July 2016, the Turkish Government notified the UN Secretary-General of its invocation of [A]rticle 4 of the ICCPR [International Covenant on Civil and Political Rights of December 19, 1966], and that the derogation involved obligations under Articles 2/3 [Discrimination and Remedy/Equality], 9 [Liberty and security], 10 [Liberty], 12, 13, 14, 17, 19, 21, 22, 25, 26 [Equality before the law] and 27 [Minorities] of the ICCPR [International Covenant on Civil and Political Rights]." Office of the U.N. High Commissioner for Human Rights [OHCHR], *UN Experts Urge Turkey to Adhere to its Human Rights Obligations Even in Time of Declared Emergency*, August 19, 2016, accessed May 1, 2019, https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20394.

[186] International Covenant on Civil and Political Rights, art. 10, December 19, 1966, 999 U.N.T.S. 171 (hereafter cited as ICCPR).

[187] Amnesty International, *Turkey: Independent monitors must be allowed to access detainees amid torture allegations*, July 24, 2016, accessed May 1, 2019, https://www.amnesty.org/en/latest/news/2016/07/turkey-independent-monitors-must-be-allowed-to-access-detainees-amid-torture-allegations/.

[188] Ibid.

[189] HRW Turkey Report 2019 (see chap. 2, n. 108).

[190] European Parliament Resolution on the Current Human Rights Situation in Turkey, para. G, 2018/2527(RSP) (February 8, 2018), accessed May 1, 2019, http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2018-0040+0+DOC+PDF+V0//EN.

gathered directly from detainees, prisoners and other eyewitnesses of the ill-treatment concerned, including legal advisers, medical personnel and persons on duty in Turkish detention facilities. The OHCHR documented "the use of different forms of torture and ill-treatment in custody, including severe beatings, threats of sexual assault and actual sexual assault, electric shocks and waterboarding,"[191] and found that "perpetrators of ill-treatment and torture included members of the police, gendarmerie, military police and security forces."[192] The UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment informed of the following after the official visit to Turkey:

> "he was alarmed by allegations that large numbers of individuals suspected of links to the Gülenist Movement or the armed Kurdistan Workers' Party were exposed to brutal interrogation techniques aimed at extracting forced confessions or coercing detainees to incriminate others. […] [C]omplaints asserting torture were allegedly dismissed by the prosecutor citing a 'state of emergency decree (Article 9 of Decree no. 667)' which reportedly exempts public officials from criminal responsibility for acts undertaken in the context of the state of emergency."[193]

The European Commission in its annual report dedicated to Turkey's progress on implementing the EU *acquis* in its membership preparation also expressed serious concerns with regard to the prevention of torture and ill-treatment, having stated that "the removal of crucial safeguards by emergency decrees has augmented the risk of impunity for perpetrators of such crimes and has led to an increase in the number of cases of torture and ill-treatment in custody."[194]

It should also be mentioned that pursuant to Article 11(1) of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of November 26, 1987, "[t]he information gathered by the Committee [European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment] in relation to a visit, its report and its consultations with the Party concerned shall be confidential."[195] The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment has visited Turkey three times since the declared state of emergency to examine the treatment

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[191] OHCHR Turkey Report 2018, para. 77 (see chap. 2, n. 135).

[192] Ibid., para. 79.

[193] U.N. Special Rapporteur on Torture, *Turkey: UN expert says deeply concerned by rise in torture allegations*, February 27, 2018, accessed May 1, 2019, https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22718&LangID=E.

[194] *Turkey 2018 Report*, at 32–33.

[195] European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, art. 11(1), November 26, 1987, 1561 U.N.T.S. 363.

of detainees and prisoners. But the Turkish Government, having previously requested the publication of all Committee's reports in accordance with Article 11(2) of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of November 26, 1987, has authorized the publication of none of the submitted reports on the results of the mentioned visits. And despite the fact that the European Commission constantly urged Turkey to authorize "the publication of all pending CPT [European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment] reports, including the one on its ad hoc visit in summer 2016, following the attempted coup,"[196] Turkey has not complied with this request as of April 3, 2019, allegedly because of the reported grave violations of the absolute prohibition of torture and ill-treatment.

Consequently, having regard to 500,650 persons detained since the failed attempted coup in addition to 30,947 persons imprisoned for politically motivated terrorism charges, [197] any of those persons as well as any other person easily suspected for the commission of 'terrorist offence' is at unjustified high risk of their absolute right to freedom from torture and other cruel, inhuman and degrading treatment to be violated by Turkish law enforcement bodies.

It should be also outlined that since the resumption of violence between Turkish armed forces and armed groups of the PKK on July 20, 2015, after more than two years of ceasefire applicants for international protection could face a real risk of suffering serious harm by reason of indiscriminate violence in the situation of internal armed conflict in Turkey. The CJEU in *Aboubacar Diakité v. Commissaire général aux réfugiés et aux apatrides* case recognized the following with regard to the criterion of an internal armed conflict required to be established for the application of Article 15(c) of the rQD:

> "an internal armed conflict exists, for the purposes of applying that provision [of Article 15(c) of the rQD], *if a State's armed forces confront one or more armed groups* or if two or more armed groups confront each other. It is not necessary for that conflict to be categorised as 'armed conflict not of an international character' under international humanitarian law; nor is it necessary to carry out, in addition to an appraisal of the level of violence present in the territory concerned, a separate assessment of the intensity of the armed confrontations, the level of organisation of the armed forces involved or the duration of the conflict (emphasis added)."[198]

[196] *Turkey 2018 Report*, at 33.

[197] Turkey Purge, "Turkey's Post-Coup Crackdown," accessed May 1, 2019, https://turkeypurge.com/.

[198] Case C–285/12, Aboubacar Diakité v. Commissaire général aux réfugiés et aux apatrides, 2014 ECLI:EU:C:2014:39, para. 35.

Therefore, the notion of "an internal armed conflict" for the purposes of Article 15(c) of the rQD shall be interpreted as a confrontation between two or more armed groups, irrespective of their subordination, degree of violence intensity, duration of the confrontation concerned or the level of organization of non-governmental armed groups involved. However, for the proper application of the provision in question as a legal ground for subsidiary protection status to be granted the confrontation between armed groups shall lead to a particular level of indiscriminate violence posing serious threats to applicants' lives. Eric C. Husby unequivocally underlined that "[a]cts of violence" refer to uses of physical force"[199] Consequently, the confrontation concerned shall be inherently associated with the use of physical force against adversaries. Moreover, as the CJEU emphasized in *Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie* case, "the degree of indiscriminate violence [. . .] [must reach] such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, *solely on account of his presence on the territory of that country or region*, face a real risk of being subject to the serious threat (emphasis added)."[200]

Taking into consideration assessment factors proposed by the EASO for the determination of the presence of indiscriminate violence attributable to a particular confrontation,[201] it should be mentioned that the International Crisis Group, having gathered the most detailed data as for the conflict in question on the basis of various reports, reported 4,333 persons killed in clashes and attacks between Turkish armed forces and the PKK since July 20, 2015, as of April 5, 2019, including 464 civilians and 223 "individuals of unknown affiliation" defined as "[i]ndividuals aged 16-35 killed in areas of clashes, overwhelmingly in urban curfew zones who cannot be confirmed as either civilians or combatants."[202] A significant number of civilian casualties have been caused by indiscriminate use of improvised explosive devices by

[199] Eric C. Husby, "A Balancing Act: In Pursuit of Proportionality in Self-Defense for On-Scene Commanders," *Army Lawyer* 2012, no. 5 (May 2012): 11.

[200] Case C–465/07, Meki Elgafaji and Noor Elgafaji v. Staatssecretaris van Justitie, 2009 E.C.R. I–00921, para. 35.

[201] "Different indicators may be taken into account when determining whether indiscriminate violence is taking place within (a part of) the territory: number of incidents, including their frequency and density in relation to local population; nature of methods and tactics, including targets; number of civilian casualties (including those who have been injured); presence and capacity of different actors in the conflict; geographical scope of violence; conflict-induced displacement." European Asylum Support Office [EASO], *Practical Guide: Qualification for International Protection*, at 32 (April 2018), accessed May 1, 2019, https://www.easo.europa.eu/sites/default/files/easo-practical-guide-qualification-for-international-protection-2018.pdf.

[202] International Crisis Group, "Turkey's PKK Conflict: A Visual Explainer," accessed May 1, 2019, https://www.crisisgroup.org/content/turkeys-pkk-conflict-visual-explainer.

the PKK and its offshoots.[203] Moreover, the OHCHR emphasized that Turkey refused to implement its recommendations to carry out credible criminal investigations into the civilian deaths occurred in the course of the analyzed confrontation.[204] The geographical scope of violence covers but does not limited to Şırnak, Diyarbakır, Mardin and Hakkari provinces in Southeast regions of Turkey which are directly neighboring with Kurdish-inhabited areas of the Syrian Arab Republic and Iraq.[205] Moreover, Amnesty International estimated that "at least half a million people have been forcibly displaced by the violence, large-scale destruction of property and by ongoing curfews in areas across the south-east [of Turkey]."[206] As the European Commission mentioned, "curfews disrupted the daily lives of the 1.8 million inhabitants of the affected areas, affecting their access to healthcare and education."[207]

Consequently, it should be concluded that there is a confrontation between Turkish armed and security forces, the PKK designated as a terrorist organization, *inter alia*, at the EU level, and offshoots and affiliates of the PKK, including the Defence Forces Hêzên Parastina Gel and Civil Protection Units. And despite the fact that the civilian casualty ratio has been reduced in 2019, the involvement of the Syrian Arab Republic, Iraq and the Islamic State of Iraq and the Levant into the existing confrontation as well as geographical dislocation of violence into the territories of neighboring States supports the conclusion that there are no preconditions to exclude the possibility of a refusal to consider an application for international protection as inadmissible with respect to Turkey on the basis of Article 38(1)(b) of the rAPD.

Summarizing all of the abovementioned, it should be concluded that the death penalty reintroduction supported by highest Turkish state officials, the scale of reported grave violations of the absolute right to freedom from torture and other cruel, inhuman and degrading treatment as well as ongoing armed conflict between Turkish armed forces and armed groups of the PKK shall be taken into consideration in the course of individualized assessment of applicants' individual circumstances in order to apply the STC concept.

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[203] International Crisis Group, "Turkey's PKK Conflict: The Death Toll," accessed May 1, 2019, https://www.crisisgroup.org/europe-central-asia/western-europemediterranean/turkey/turkey-s-pkk-conflict-death-toll.

[204] OHCHR Turkey Report 2018, para. 15, 113 (see chap. 2, n. 135).

[205] International Crisis Group, "Turkey's PKK Conflict: The Death Toll," accessed May 1, 2019, https://www.crisisgroup.org/europe-central-asia/western-europemediterranean/turkey/turkey-s-pkk-conflict-death-toll.

[206] Amnesty International, *Turkey: Displaced and Dispossessed: Sur Residents' Right to Return Home*, at 5 (December 6, 2016), accessed May 1, 2019, https://www.amnesty.org/download/Documents/EUR4452132016ENGLISH.PDF.

[207] *Turkey 2018 Report*, at 17.

2.3. Respect for the Principle of Non-Refoulement in Accordance with the Refugee Convention and for the Prohibition of Removal, in Violation of the Right to Freedom from Torture and Cruel, Inhuman or Degrading Treatment as laid down in International law

The STC concept could be applied with respect to Turkey as a ground to consider lodged applications for international protection as inadmissible only if, *inter alia*, the principle of *non-refoulement* as the most deeply rooted principle within the context of international refugee law is respected by Turkey in full compliance with the Refugee Convention. In spite of the fact that the *non-refoulement* principle was developed in the case law of the ECtHR,[208] currently the principle concerned is explicitly set forth in a number of international treaties, including the Refugee Convention,[209] the CAT[210] and through interpretation in the ECHR[211] and the ICCPR.[212] It should be also emphasized that the principle of *non-refoulement* has been recognized as a principle of customary international law because of its fundamental importance for the achievement of aims and objectives of international protection of refugees. The ExCom confirmed the non-derogable character of the prohibition on refoulement[213] and concluded that "the principle of *non-refoulement* [. . .] was progressively acquiring the character of a peremptory rule of international law (italics in the original)."[214] Elihu Lauterpacht and Daniel Bethlehem also substantiated customary character of *non-refoulement*, having resorted to the Conclusions of the ExCom as the body composed of representatives of States having "a

[208] Soering v. United Kingdom, App. No. 14038/88, Judgment, para. 88 (Eur. Ct. H.R. July 7, 1989).

[209] Refugee Convention, art. 33(1) (see chap. 2, n. 91).

[210] CAT, art. 3 (see chap. 2, n. 187).

[211] Soering v. United Kingdom, App. No. 14038/88, Judgment, para. 88 (Eur. Ct. H.R. July 7, 1989); Cruz Varas and Others v. Sweden, App. No. 15576/89, Judgment, para. 69 (Eur. Ct. H.R. March 20, 1991); Vilvarajah and Others v. United Kingdom, App. No. 13163/87, Judgment, paras. 73–74, 79–81 (Eur. Ct. H.R. October 30, 1991); Chahal v. United Kingdom, App. No. 22414/93, Judgment, para. 75 (Eur. Ct. H.R. November 15, 1996); Ahmed v. Austria, Judgment, App. No. 25964/94, Judgment, paras. 39–40 (Eur. Ct. H.R. December 17, 1996).

[212] ICCPR, art. 7 (see chap. 2, n. 190).

[213] Executive Committee of the Programme of the United Nations High Commissioner for Refugees [ExCom], *Conclusion on International Protection No. 79 (XLVII)*, para. (i), A/51/12/Add.1 (October 11, 1996), accessed May 1, 2019, https://www.unhcr.org/excom/exconc/3ae68c430/general-conclusion-international-protection.html.

[214] Executive Committee of the Programme of the United Nations High Commissioner for Refugees [ExCom], *Conclusion on International Protection No. 25 (XXXIII)*, para. (b), A/37/12/Add.1 (October 20, 1982), accessed May 1, 2019, https://www.unhcr.org/excom/exconc/3ae68c434c/general-conclusion-international-protection.html.

demonstrated interest in, and devotion to, the solution of the refugee problem."[215] Consequently, the Conclusions in question could be considered as "expressions of opinion, which are broadly representative of the views of the international community. [. . .] [I]n view also of the evident lack of expressed objection by any State to the normative character of the principle of *non-refoulement*, [. . .] *non-refoulement* must be regarded as a principle of customary international law (italics in the original)."[216] Customary character of the *non-refoulement* principle means that even those States which have not expressed their consents to be bound by abovementioned international treaties are bound by respective customary rule of *non-refoulement* of the scope reflected in Article 33(1) of the Refugee Convention. The same standards are applicable to those States which have expressed their consents to be bound by the treaties in question but established reservations modifying the legal effect of respective provisions.

The principle of *non-refoulement* is formulated in Article 33(1) of the Refugee Convention in the following terms: "[n]o Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontier 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." Despite the fact that *ratione personae* of the *non-refoulement* principle is unambiguously defined with the notion of "a refugee," formal recognition of applicant's status by respective authorities which triggers the mechanism of their international protection is not *per se* considered to be an entitling act for person's treatment as a refugee. This position has been reiterated by the UNHCR in the following manner:

> "[a] person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognised because he is a refugee."[217]

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[215] U.N. General Assembly, *International Assistance to Refugees Within the Mandate of the United Nations High Commissioner for Refugees*, para. 5, A/RES/1166 (XII) (November 26, 1957), accessed May 1, 2019, https://undocs.org/pdf?symbol=en/A/RES/1166(XII).

[216] Elihu Lauterpacht and Daniel Bethlehem, "The Scope and Content of the Principle of Non-Refoulement: Opinion," June 20, 2001, paras. 214, 216, accessed May 1, 2019, https://www.refworld.org/docid/3b3702b15.html.

[217] United Nations High Commissioner for Refugees [UNHCR], *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (Geneva: Ferbuary 2019), para. 28, accessed May 1, 2019, https://www.unhcr.org/publications/legal/3d58e13b4/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html.

The same approach has been consistently applied by the ExCom which recognized "the fundamental importance of the observance of the principle of *non-refoulement* – both at the border and within the territory of a State – of persons who may be subjected to persecution if returned to their country of origin irrespective of whether or not they have been formally recognised as refugees (italics in the original)."[218] The ECtHR extended the personal scope of the *non-refoulement* principle even further and pointed out in *Hirsi Jamaa and Others v. Italy* case the following: "[t]he fact that the parties concerned had failed to expressly request asylum did not exempt Italy from fulfilling its obligations arising out of international refugee law, including the *non-refoulement* principle (italics in the original)."[219] Judge Pinto de Albuquerque in his concurring opinion also emphasized that

> "as the determination of refugee status is merely declaratory, the principle of *non-refoulement* applies to those who have not yet had their status declared (asylum seekers) and even to those who have not expressed their wish to be protected. Consequently, neither the absence of an explicit request for asylum nor the lack of substantiation of the asylum application with sufficient evidence may absolve the State concerned of the *non-refoulement* obligation in regard to any alien in need of international protection (italics in the original)."[220]

Turkey has ratified all of the abovementioned international treaties and, therefore, it is required to act in full compliance with its international obligations. And in spite of the fact that Turkey continues to maintain the geographical limitation, granting refugee protection only to asylum seekers from Member States of the Council of Europe, the principle of *non-refoulement* as a rule of customary international law entitles any asylum seeker, irrespective of their countries of origin, to receive respective protection at the level required by the Refugee Convention. However, a considerable number of international organizations, including the ECRE, Amnesty International, Human Rights Watch and the Syrian Observatory for Human Rights, expressed serious concerns regarding Turkey's designation as a STC mostly because of constantly repeated violations of the prohibition on refoulement. Even the European Commission confirmed in its 2018 Regular Report on Turkey that "[t]here have been reports of alleged expulsions, returns and deportations of Syrian nationals, *in contradiction of the non-refoulement principle* (emphasis

[218] Executive Committee of the Programme of the United Nations High Commissioner for Refugees [ExCom], *Conclusion on International Protection No. 6 (XXVIII)*, para. (c).

[219] Hirsi Jamaa and Others v. Italy, App. No. 27765/09, Judgement, paras. 133–34 (Eur. Ct. H.R. February 23, 2012).

[220] Hirsi Jamaa and Others v. Italy, App. No. 27765/09, Judgement (Concurring opinion of Judge Pinto de Albuquerque), paras. 63–64 (Eur. Ct. H.R. February 23, 2012).

added),"[221] having, however, abstained from any comments or evaluations of the allegations concerned. Amnesty International annually informed of hundreds of refugees and persons seeking international protection who have been forcibly returned into the Syrian Arab Republic, Iraq and Afghanistan after long-standing detention with no effective access to the legal assistance and Turkish asylum procedure.[222] Taking into consideration the fact that the total refugee population hosted in Turkey comprised Syrians (3,642,738), along with Iraqis (38,700), Iranians (8,800), and Afghans (6,400),[223] the abovementioned tendency has started to be a matter of particular concern on the part of international organizations and bodies. Amnesty International even unequivocally underlined that Turkey was not a safe country for refugees and asylum seekers, having exemplified this conclusion by an existing pattern of using coercion by Turkish state authorities in order to force refugees having resided in Turkey to sign papers confirmed their consents to be allegedly "voluntarily" returned to their countries of origin under the threat to be kept in detention for months if they refused to act in the required manner.[224] Due to the mentioned practice amounting to *de facto* collective forced expulsions, only in May–June 2018 approximately 300 Syrian and 200 Iraqi refugees and asylum seekers were forcibly returned from Turkey to their respective countries of origin.[225]

Moreover, the ECRE, having annually analyzed applicable patterns of cross-border practices regarding access to Turkish territory, stated that "push backs and violence at the Turkish–Syrian border have continued"[226] in 2018, in spite of being strongly condemned by international community. Human Rights Watch also confirmed an existence of violations committed against Syrian nationals seeking international protection in Turkey, having reported 10 incidents of shooting at Syrians having tried to cross Turkey–Syria border by Turkish border

[221] *Turkey 2018 Report*, at 48 (see chap. 2, n. 151).

[222] Amnesty International, *Europe's Gatekeeper: Unlawful Detention and Deportation of Refugees from Turkey*, EUR 44/3022/2015 (December 2015), accessed May 1, 2019, https://www.amnesty.org/download/Documents/EUR4430222015ENGLISH.pdf; Amnesty International, *Turkey 'Safe Country' Sham Revealed as Dozens of Afghans Forcibly Returned Hours after EU Refugee Deal*, March 23, 2016, accessed May 1, 2019, https://www.amnesty.org/en/latest/news/2016/03/turkey-safe-country-sham-revealed-dozens-of-afghans-returned/.

[223] UNHCR Mid–Year Trends 2018, at 7–8 (see introduction, n. 8).

[224] Amnesty International, *Refugees at Heightened Risk of Refoulement Under Turkey's State of Emergency*, at 2–3, EUR 44/7157/2017 (September 22, 2017), accessed May 1, 2019, https://www.amnesty.org/download/Documents/EUR4471572017ENGLISH.PDF.

[225] AI Turkey Report 2018 (see chap. 2, n. 109).

[226] ECRE Turkey Report 2018, at 118 (see introduction, n. 32).

guards which resulted in killings of 14 persons, including 5 children, and injuring 18 persons.[227] Lama Fakih, deputy director of the Middle East and North Africa division of Human Rights Watch, specifically paid attention to the fact that "Syrians fleeing to the Turkish border seeking safety and asylum are being forced back with bullets and abuse."[228] The death toll documented by the Syrian Observatory for Human Rights was at least 407 persons, including 75 children and 37 women, killed "in the continued targeting by the Turkish border guards [at] the Syrian citizens who escaped the military operations in their areas."[229] It should be emphasized that all of the abovementioned incidents constitute grave violations of the principle of *non-refoulement* because, as the ECtHR underlined in *Kebe and Others v. Ukraine* case, "information demonstrating [. . .] at the material time [. . .] that the [. . .] applicant was an asylum seeker who might have needed international protection"[230] shall be considered sufficient enough for border guards to treat respective persons in compliance with the *non-refoulement* principle and provide relevant information about applicable asylum procedures in the State in question. It could be reasonably presumed that at the time of the abovementioned infringements Turkish border guards have been definitely aware of the situation of ongoing armed conflicts in the Syrian Arab Republic, in addition to the UNHCR called upon States "not to forcibly return Syrian nationals"[231] as "all parts of Syria are reported to have been affected, directly or indirectly, by one or multiple conflicts."[232] The Independent International Commission of Inquiry on the Syrian Arab Republic also emphasized that

> "on-going hostilities and attendant violations *negatively affect the safe and sustainable return of millions of* internally displaced persons and *refugees* [because] [t]he situation [in the Syrian Arab Republic] was marked by war crimes and crimes against humanity, including launching indiscriminate attacks,

[227] Human Rights Watch [HRW], *Turkey: Mass Deportation of Syrians*, March 22, 2018, accessed May 1, 2019, https://www.hrw.org/news/2018/03/22/turkey-mass-deportations-syrians.

[228] Human Rights Watch [HRW], *Turkey/Syria: Border Guards Shoot, Block Fleeing Syrians: Exposes Asylum Seekers to Further Risk, Abuse*, February 3, 2018, accessed May 1, 2019, https://www.hrw.org/news/2018/02/03/turkey/syria-border-guards-shoot-block-fleeing-syrians.

[229] Syrian Observatory for Human Rights, *The Turkish Border Guard Forces Continue to Target the Syrians at the Border Strip and Kill a Citizen of Deir Ezzor Displaced People*, September 6, 2018, accessed May 1, 2019, http://www.syriahr.com/en/?p=101923.

[230] Kebe and Others v. Ukraine, App. No. 12552/12, Judgement, para. 104 (Eur. Ct. H.R. January 12, 2017).

[231] United Nations High Commissioner for Refugees [UNHCR], *International Protection Considerations with Regard to People Fleeing the Syrian Arab Republic: Update V*, HCR/PC/SYR/17/01 (November 2017), accessed May 1, 2019, https://www.refworld.org/pdfid/59f365034.pdf.

[232] Ibid.

deliberately attacking protected objects, pillaging, and *persecution*, including by armed groups (emphasis added)."[233]

Article 6(1) of the TPR even explicitly prohibits to refouler Syrian nationals to a place where their lives or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion.[234] Consequently, as Human Rights Watch concluded, "Turkey's generous hosting of large numbers of Syrians [3,621,330 registered Syrians as of April 11, 2019] does not absolve it of its responsibility to help those seeking protection at its borders"[235] in fulfilment of its obligations imposed by the abovementioned international treaties, customary international law and its national legislation.

It should also be mentioned that *non-refoulement* obligations shall be fulfilled by States throughout the territories under their sovereignty and with regard to every refugee and person seeking international protection within their jurisdictions. The ECtHR in *Amuur v. France* case clarified that "the international zone of Paris–Orly Airport made them [the applicants] subject to French law. Despite its name, *the international zone does not have extraterritorial status* (emphasis added)," [236] whereas in *D. v. the United Kingdom* case the ECtHR specifically mentioned that "[r]egardless of whether or not he [the applicant] ever entered the United Kingdom in the technical sense, [. . .] he has been physically present there and thus within the jurisdiction of the respondent State within the meaning of Article 1 of the Convention [ECHR]."[237] Although the ECtHR did not directly address the issues of the scope of the *non-refoulement* principle, the abovementioned conclusions could be interpreted to mean that the principle of *non-refoulement* shall be respected by States' authorities, *inter alia*, in international transit zones at airports. However, the ECRE reported "a continued practice of persons in need of international protection in airport transit areas being returned to their country of origin or transit

[233] Independent International Commission of Inquiry on the Syrian Arab Republic, *Continued hostilities and lawlessness countrywide render safe and sustainable returns impossible*, February 28, 2018, accessed May 1, 2019, https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=24229&LangID=E.

[234] Temporary Protection Regulation of the Republic of Turkey No. 2014/6883 of October 22, 2014, art. 6(1), Official Gazette No. 29153, accessed May 1, 2019, https://www.refworld.org/docid/56572fd74.html (hereafter cited as TPR).

[235] Human Rights Watch [HRW], *Turkey/Syria: Border Guards Shoot, Block Fleeing Syrians: Exposes Asylum Seekers to Further Risk, Abuse*, February 3, 2018, accessed May 1, 2019, https://www.hrw.org/news/2018/02/03/turkey/syria-border-guards-shoot-block-fleeing-syrians.

[236] Amuur v. France, App. No. 19776/92, Judgment, para. 52 (Eur. Ct. H.R. June 25, 1996).

[237] D. v. the United Kingdom, App. No. 30240/96, Judgment, para. 48 (Eur. Ct. H.R. May 2, 1997).

without having had an effective opportunity to access the international protection procedure in Turkey or get effective access to UNHCR or legal assistance."[238]

Protection in compliance with the *non-refoulement* principle under international refugee law has two exceptions exhaustively enumerated in Article 33(2) of the Refugee Convention in the following terms: "[t]he 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."[239] In case of an application of the provision concerned recognized refugees, continuing to enjoy the international protection inherent to the refugee status, ceases to be protected against refoulement to the frontier of territories where their lives or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion. A standard of proof applicable to both exceptions is defined with the expression "reasonable grounds" which means that "[t]he relevant authorities must specifically address the question of whether there is a future risk; and their conclusion on the matter must be supported by evidence."[240] As it has already been mentioned, following the unsuccessful *coup d'état* attempt and subsequently declared state of emergency, the Turkish Government was entrusted with legislative powers to adopt 'Emergency Decree Laws.' Consequently, the LFIP was amended by Emergency Decree No. 676 of October 29, 2016, and a possibility was set forth in Article 54(1) of the LFIP to issue a removal decision, *inter alia*, in the following cases to third country nationals who: "b) are leaders, members or supporters of a terrorist organisation or a benefit oriented criminal organisation; [. . .] k) are evaluated as being associated with terrorist organizations which have been defined by international institutions and organizations."[241] It should be also underlined that a directly executable administrative removal decision could be issued to applicants for and beneficiaries of international protection in Turkey at any time during the international protection proceedings on the basis of the abovementioned grounds[242] amounting to *de facto* additional

[238] Dutch Council for Refugees and European Council on Refugees and Exiles, *The DCR/ECRE Desk Research on Application of a Safe Third Country and a First Country of Asylum Concepts to Turkey*, para. 15, May 2016, accessed May 1, 2019, https://www.ecre.org/wp-content/uploads/2016/07/DCR-and-ECRE-Desk-Research-on-application-of-a-safe-third-country-and-a-first-country-of-asylum-concepts-to-Turkey_May-2016.pdf.

[239] Refugee Convention, art. 33(2) (see chap. 2, n. 91).

[240] Lauterpacht and Bethlehem, "The Scope of the Principle of Non-Refoulement," June 20, 2001, para. 168.

[241] Law of the Republic of Turkey No. 6458 on Foreigners and International Protection of April 11, 2013, art. 54(1), Official Gazette No. 28615, accessed May 1, 2019, http://www.goc.gov.tr/files/files/eng_minikanun_5_son.pdf (hereafter cited as LFIP).

[242] Ibid., art. 54(2).

exceptions to the prohibition on refoulement in violation of Article 33(2) of the Refugee Convention and Turkey's respective international obligation. Moreover, the UN General Assembly and Security Council constantly emphasized that "States must ensure that *any measures taken to combat terrorism comply with their obligations under* international law, in particular *human rights law*, *refugee law* and international humanitarian law (emphasis added)."[243] Taking into consideration extremely vague definition of 'terrorism' set forth in Article 1 of the LFAT, reduced standard of proof and simplified procedure of investigation and trial applicable to 'terrorist offences,' any refugee or person seeking international protection in Turkey is at unjustified high risk of their right to protection against refoulement to be violated.

Even if there are no obstacles to refouler a refugee or an applicant for international protection to a particular State in compliance with the analyzed rules of international refugee law, an initially responsible State is obliged to ensure their protection against refoulement in any manner whatsoever to the frontier of territories where they could face a real risk of being subjected to treatment contrary to Article 3 of the ECHR, Article 3 of the CAT, and Article 7 of the ICCPR, namely, to torture, cruel, inhuman or degrading treatment or punishment, or to the death penalty. Pursuant to the criterion enshrined in Article 38(1)(d) of the rAPD, Turkey shall respect the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law in order to be considered as a STC for particular applicants for international protection. The fulfilment of *non-refoulement* obligations under international human rights law is explicitly ensured by the LFIP in the following manner: "[n]o one within the scope of this Law [LFIP] shall be returned to a place where he or she may be subjected to torture, inhuman or degrading punishment or treatment."[244] Moreover, pursuant to Article 55(1)(a) of the LFIP, "[r]emoval decision shall not be issued in respect of those foreigners listed below [. . .]: a) when there are serious indications to believe that they shall be subjected to the death penalty, torture, inhuman or degrading treatment or punishment in the country to which they shall be returned to."[245]

In spite of the fact that the scope of the prohibition on refoulement in accordance with Turkish asylum legislation is the broadest one, in comparison with respective provisions of the abovementioned international treaties, Amnesty International annually reported on hundreds of

[243] U.N. General Assembly, *Annex to the Resolution on the United Nations Global Counter–Terrorism Strategy*, para. IV.2, A/60/288 (September 6, 2006), accessed May 1, 2019, https://www.un.org/counterterrorism/ctitf/en/un-global-counter-terrorism-strategy; U.N. Security Council, *Resolution*, para. 2, S/RES/1624 (September 14, 2005), accessed May 1, 2019, https://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1624%20%282005%29.

[244] LFIP, art. 4(1).

[245] LFIP, art. 55(1)(a).

refugees and asylum seekers forcibly returned into ongoing armed conflicts, widespread practice of torture and other ill-treatment in the Syrian Arab Republic, Iraq and Afghanistan.[246] Instances of torture and other mistreatment of prisoners and detainees reported by various international human rights organizations have been systematically committed mostly by law enforcement bodies and intelligence agencies of the Syrian Arab Republic,[247] whereas the Norwegian Refugee Council, Save the Children, Action Against Hunger, CARE International, the International Rescue Committee and the Danish Refugee Council informed that only between January and October 2017 "Turkish authorities apprehended and returned to Syria approximately 250,000 Syrians at their border."[248] Persons easily suspected in their membership of the Islamic State of Iraq and the Levant have been routinely tortured, including "beatings on the head and body with metal rods and cables, suspension in stress positions by the arms or legs, electric shocks,"[249] by Iraqi security forces and subsequently detained in inhumane conditions,[250] whereas at least 200 Iraqi refugees and asylum seekers were forcibly returned from Turkey to their country of origin only in May–June 2018.[251] Afghans have been also reported to remain at high risk of torture and

[246] Amnesty International, *Europe's Gatekeeper: Unlawful Detention and Deportation of Refugees from Turkey*, EUR 44/3022/2015 (December 2015), accessed May 1, 2019, https://www.amnesty.org/download/Documents/EUR4430222015ENGLISH.pdf; Amnesty International, *Turkey 'Safe Country' Sham Revealed as Dozens of Afghans Forcibly Returned Hours after EU Refugee Deal*, March 23, 2016, accessed May 1, 2019, https://www.amnesty.org/en/latest/news/2016/03/turkey-safe-country-sham-revealed-dozens-of-afghans-returned/.

[247] Amnesty International, *Syria 2017/2018*, accessed May 1, 2019, https://www.amnesty.org/en/countries/middle-east-and-north-africa/syria/report-syria/; Syrian Observatory for Human Rights, *Residents of Afrin Under Pressure of Continuous Violations for the Second Consecutive Year: Arrests, Thousands of Dollars in Royalties, and Torture on Various Charges amid International Silence*," January 28, 2019, accessed May 1, 2019, http://www.syriahr.com/en/?p=114318.

[248] The Norwegian Refugee Council, Save the Children, Action Against Hunger, CARE International, the International Rescue Committee and the Danish Refugee Council, *Dangerous Ground: Syria's Refugees Face an Uncertain Future*, at 9 (January 2018), accessed May 1, 2019, https://www.nrc.no/globalassets/pdf/reports/dangerous-ground---syrias-refugees-face-an-uncertain-future/dangerous-ground---syrian-refugees-face-an-uncertain-future.pdf.

[249] Amnesty International, *Iraq 2017/2018*, accessed May 1, 2019, https://www.amnesty.org/en/countries/middle-east-and-north-africa/iraq/report-iraq/.

[250] Human Rights Watch [HRW], *World Report 2019: Iraq*, accessed May 1, 2019, https://www.hrw.org/world-report/2019/country-chapters/iraq.

[251] Amnesty International, *Turkey 2017/2018*, accessed May 1, 2019, https://www.amnesty.org/en/countries/europe-and-central-asia/turkey/report-turkey/.

other ill-treatment systematically committed by various armed groups, including the Taliban,[252] police officers and National Directorate of Security personnel with totally acceptable impunity,[253] whereas Turkey expelled 17,000 Afghan nationals seeking international protection to their country of origin between January–June 2018 after signing papers that confirmed their consents to be "voluntarily" returned to Afghanistan.[254] Furthermore, the Syrian Arab Republic, Iraq and Afghanistan have expressed their consents to be bound by both the ICCPR and the CAT, continuing to violate the absolute prohibition of torture and other cruel, inhuman and degrading treatment. It should also be emphasized that the death penalty as a form of punishment is currently valid and widely applicable in the abovementioned States. Iraq even remains "one of the world's most prolific users of the death penalty," applying a practice of mass executions as a tool of retribution.[255] And despite the fact that Article 55(1)(a) of the LFIP prohibits to issue removal decisions in respect of those third country nationals who could face a real risk of being subjected to the death penalty,[256] a considerable number of refugees and asylum seekers are being expelled to the States concerned.

In addition to the abovementioned infringements of the principle of *non-refoulement*, Emergency Decrees No. 668 of July 25, 2016, and No. 676 of October 29, 2016, eliminated the suspensive effect of appeals lodged against any administrative or judicial decision adopted during the declared state of emergency, including the ones against any removal decision issued on the basis of Article 54(1) of the LFIP or in alleged violation of Article 55(1) of the LFIP.[257] The mentioned amendments violate Turkey's obligations under Article 13 of the ECHR *ab initio* because, as the ECtHR in *Jabari v. Turkey* case underlined, "the notion of an effective remedy under Article 13 [of the ECHR] requires independent and rigorous scrutiny of a claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 and *the*

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[252] Amnesty International, *Afghanistan 2017/2018*, accessed May 1, 2019, https://www.amnesty.org/en/countries/asia-and-the-pacific/afghanistan/report-afghanistan/.

[253] Human Rights Watch [HRW], *World Report 2019: Afghanistan*, accessed May 1, 2019, https://www.hrw.org/world-report/2019/country-chapters/afghanistan.

[254] Mujib Mashal, "Their Road to Turkey Was Long and Grueling, but the Short Flight Home Was Crueler" (June 16, 2018), accessed May 1, 2019, https://www.nytimes.com/2018/06/16/world/asia/afghan-migrants-deported-turkey.html.

[255] Amnesty International, *Iraq 2017/2018*, accessed May 1, 2019, https://www.amnesty.org/en/countries/middle-east-and-north-africa/iraq/report-iraq/.

[256] LFIP, art. 55(1)(a).

[257] Margarite Zoeteweij, "The State of Emergency, Non-Refoulement and the Turkish Constitutional Court" (May 9, 2018), accessed May 1, 2019, https://verfassungsblog.de/the-state-of-emergency-non-refoulement-and-the-turkish-constitutional-court.

possibility of suspending the implementation of the measure impugned (emphasis added)."[258] Moreover, the ECtHR specifically concluded the following in *M. and Others v. Bulgaria* case regarding the suspensive effect of appeals against removal decisions:

> "*[i]n the context of deportation, the domestic remedy* for examination of allegations about serious risks of ill-treatment contrary to Article 3 [of the ECHR] in the destination country *must have automatic suspensive effect* [. . .]. As the prohibition provided by Article 3 [of the ECHR] against torture and inhuman or degrading treatment is of an absolute character, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration with the consequence that the protection afforded by Article 3 is broader than that provided for in Articles 32 and 33 of the 1951 United Nations Convention relating to the Status of Refugees [. . .]. *By choosing to rely on national security in a deportation order the authorities cannot do away with effective remedies* (emphasis added)."[259]

Summarizing all of the abovementioned, it should be underlined that systematically repeated expulsions of refugees and persons seeking international protection, *inter alia*, to the Syrian Arab Republic, Iraq and Afganistan, with no effective access to asylum procedure, legal assistance and even the possibility to appeal against a removal decision with the guaranteed right to remain in the Turkish territory in violation of the prohibition on refoulement and Turkey's obligations under a considerable number of ratified international treaties, customary international law and its national legislation substantiate the following unambiguous conclusion: Turkey shall not be considered as a STC for any applicant for international protection because of unjustified high risk of their right to protection against refoulement to be violated with no access to an effective remedy.

2.4. Possibility to Request Refugee Status and, if Found to be a Refugee, to Receive Protection in Accordance with the Refugee Convention

An application for international protection may be considered as inadmissible on the basis of the applied STC concept with respect to Turkey only if, *inter alia*, the possibility exists for an applicant having lodged the application concerned to request refugee status in Turkey and to subsequently receive protection "in accordance with the Geneva Convention [Refugee

[258] Jabari v. Turkey, App. No. 40035/98, Judgement, para. 50 (Eur. Ct. H.R. October 11, 2000).

[259] M. and Others v. Bulgaria, App. No. 41416/08, Judgement, para. 129 (Eur. Ct. H.R. October 26, 2011).

Convention]."[260] Therefore, it is necessary to evaluate the functioning of Turkish asylum system as to its compliance with the obligations imposed by the Refugee Convention, namely, with regard to the access to asylum system, refugee status determination procedure and refugees' legal status in Turkey after the procedure. It is worth to underline that the expression 'Geneva Convention' shall be interpreted for the purposes of the rAPD as "the Convention of 28 July 1951 Relating to the Status of Refugees, *as amended by the New York Protocol of 31 January 1967* (emphasis added)"[261] in order to ensure a uniform application of the expression concerned frequently used in the provisions of the rAPD. It means that pursuant to the criterion set forth in Article 38(1)(e) of the rAPD, recognized refugees shall be entitled to receive respective international protection in the STC in accordance with the Refugee Convention with no geographical or temporal limitations eliminated from the definition of a refugee by the New York Protocol. The fulfilment of this requirement by Turkey has raised reasonable doubts on the part of international organizations and scholars dedicated their researches to the analyzed issues [262] because, as it has already been reiterated, Turkey continues to maintain the geographical limitation, granting a refugee status only to asylum seekers from Member States of the Council of Europe.[263] And in spite of the fact that the European Commission assured that Turkish asylum legislation afforded to conditional refugees protection "*broadly equivalent* to the Geneva Convention [Refugee Convention] (emphasis added),"[264] definitive conclusions on this matter could be made only after the analysis of existing differences, if any, in the legal statuses of refugees, conditional refugees and beneficiaries of temporary protection in Turkey.

The maintenance of the geographical limitation with regard to the access to refugee protection resulted in the co-existence of the following statuses available to persons arrived to Turkey in need of international protection: (1) refugee status, (2) conditional refugee status, (3) beneficiary of subsidiary protection and (4) beneficiary of temporary protection. All of the mentioned types of protection are comprehensively regulated by the LFIP adopted on April 11, 2013, as "EU-inspired law [. . .] which establishes a dedicated legal framework for asylum in Turkey and affirms Turkey's obligations towards all persons in need of international protection, regardless of country of origin."[265]

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[260] rAPD, art. 38(1)(e) (see chap. 2, n. 60).

[261] rAPD, art. 2(a).

[262] Roman, Baird and Radcliffe, "Why Turkey is Not "Safe Country," 20; Gkliati, "Application of EU–Turkey Agreement," 90–91; Sari and Dinçer, "Toward a New Asylum Regime in Turkey?" 76–78.

[263] ECRE Turkey Report 2018, 99n520 (see introduction, n. 32).

[264] *Third Report on Progress by Turkey,* at 15 (see chap. 2, n. 104).

[265] ECRE Turkey Report 2018, at 17.

The definition of "refugees" enshrined in Article 61 of the LFIP is identical to the one set forth in Article 1(A)(2) of the Refugee Convention with an existing geographical limitation expressed by the phrase "as a result of events occurring *in European countries* (emphasis added)."[266] Consequently, only asylum seekers who have allegedly faced persecution for refugee reasons in European States are entitled to lodge applications for international protection in order to be subsequently granted refugee status in full compliance with Turkey's obligations under the Refugee Convention. It is worth to mention that all Member States of the Council of Europe are currently treated by Turkey as 'European countries of origin' for the purpose of the application of Article 61 of the LFIP.[267] However, taking into consideration the fact that "[b]y mid-2018, in addition to the nearly 3.6 million from Syria, there were also 38,700 refugees from Iraq, 8,800 from Iran and 6,400 from Afghanistan"[268] none of remaining 46 Member States of the Council of Europe could be assumed to be major source countries of refugees for Turkey. Moreover, it should be emphasized that out of 3.6 million of persons having already received respective types of protection in Turkey by the middle of 2018,[269] "[o]nly three persons had been recognised as refugees as of January 2018, although a March 2018 report of the Grand National Assembly [of Turkey] referred to 70 persons with refugee status."[270]

Pursuant to Article 62 of the LFIP, conditional refugee is defined as

> "[a] person who as a result of events occurring *outside European countries* and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country; or who, not having a nationality and being outside the country of former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it, shall be granted conditional refugee status upon completion of the refugee status determination process (emphasis added)."[271]

The comparison of the provisions of Article 61 and 62 of the LFIP substantiates the conclusion that, apart from the geographical limitation as to asylum seekers' countries of origin, there are no substantive differences between the definitions of a refugee and a conditional refugee in terms of

[266] LFIP, art. 61.

[267] ECRE Turkey Report 2018, 99n520.

[268] UNHCR Mid–Year Trends 2018, at 7–8 (see introduction, n. 8).

[269] Ibid., at 6.

[270] ECRE Turkey Report 2018, at 99.

[271] LFIP, art. 62.

inclusion clauses to be fulfilled for the granting of a respective status within the Turkish asylum system. Furthermore, inclusion clauses set forth in both of the abovementioned definitions are *verbatim* identical to the criteria of Article 1(A)(2) of the Refugee Convention, except for the country's membership of the Council of Europe as a prerequisite for asylum seekers' entitlement to a refugee status in Turkey.

The definition of "subsidiary protection" in accordance with Article 63 of the LFIP corresponds to the criteria of eligibility for subsidiary protection initially originated within the EU asylum *acquis* and currently set forth in Article 2(f) and 15 of the rQD.

Temporary protection originated within the Turkish asylum system alongside with the abovementioned types of international protection as a temporary regime which "may be provided for foreigners who have been forced to leave their country, cannot return to the country that they have left, and have arrived at or crossed the borders of Turkey *in a mass influx situation* seeking immediate and temporary protection (emphasis added)."[272] A regime of temporary protection is comprehensively regulated by the TPR adopted on October 22, 2014, on the basis of Article 91 of the LFIP. Provisional Article 1(1) of the TPR defines *ratione personae* of possible beneficiaries of temporary protection as the one covering "[t]he citizens of the Syrian Arab Republic, stateless persons and refugees who have arrived at or crossed our borders coming from Syrian Arab Republic as part of a mass influx or individually for temporary protection purposes due to the events that have taken place in Syrian Arab Republic since 28 April 2011."[273] The ECRE, having interpreted the provision concerned, identified that "in addition to Syrian nationals, also stateless persons originating from Syria, including members of the substantial stateless Palestinian population who were resident in Syria at the time of the beginning of the conflict in 2011, are [also] covered by the TPR."[274] Hence, Syrian nationals seeking international protection as well as stateless Palestinians from the Syrian Arab Republic are entitled neither to a refugee status nor to a conditional refugee status in Turkey, having been granted instead the possibility to receive temporary protection which "amounts to a mass, non-individualized, revocable at any time status."[275] Currently Turkey hosted 3,621,330 registered Syrian nationals as of April 11, 2019.[276] It should be also underlined that even Syrian nationals who have a well-

[272] Ibid., art. 91(1).

[273] TPR, provisional art. 1(1) (see chap. 2, n. 238).

[274] ECRE Turkey Report 2018, at 112.

[275] Group of Lawyers for the Rights of Migrants and Refugees, *Jura novit curiae? A critical review of the judgments 2347/2017 and 2348/2017 by the plenary of the Council of State*, October 25, 2017, accessed May 1, 2019, http://omadadikigorwnenglish.blogspot.com/2017/10/jura-novit-curiae.html.

[276] United Nations High Commissioner for Refugees [UNHCR], "Syrian Refugee Regional Response," accessed May 1, 2019, https://data2.unhcr.org/en/situations/syria/location/113.

founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion in the Syrian Arab Republic "shall be covered under temporary protection, even if they have filed an application for international protection. *Individual applications for international protection shall not be processed during the [undefined period of] implementation of temporary protection* (emphasis added)."[277] Moreover, the regime of temporary protection is automatically applicable to any applicant falling within the scope of beneficiaries of temporary protection in compliance with Provisional Article 1(1) of the TPR "without any personalised assessment of [applicant's] international protection needs."[278] Article 1 of the TPR also reiterated that applications for international protection lodged by alleged beneficiaries of temporary protection cannot be taken under individual assessment.[279]

The refugee status determination procedure applicable by Turkish determining authorities has been significantly modified since September 10, 2018, because the UNCHR announced the termination of registering and processing applications for international protection lodged with Turkey and the final transfer of the obligations concerned to the Directorate General of Migration Management of the Ministry of Interior of the Republic of Turkey (DGMM)[280] as "the main authority charged with implementing the asylum law, registering refugees, and evaluating their asylum claims." [281] Before the mentioned termination of the UNHCR's functions within Turkish asylum system there was a dual approach to refugee status determination procedure which has proved to be unreasonably complicated and burdensome for persons seeking international protection. Because asylum seekers were required to directly approach one of 81 Provincial Directorates for Migration Management of the Ministry of Interior of the Republic of Turkey (PDMM) as provincial organizations of the DGMM operating in every Turkish province in order to lodge an application for international protection.[282] However, as of March 2017 the system of the PDMMs has not yet been managed to take over the whole registration process. And despite the fact that the LFIP was adopted in 2013, its provisions have

[277] TPR, provisional art. 1(1).

[278] ECRE Turkey Report 2018, at 112.

[279] TPR, art. 1.

[280] United Nations High Commissioner for Refugees [UNHCR], *United Nations High Commissioner for Refugees (UNHCR) will end registration process in Turkey on 10 September 2018*, accessed May 1, 2019, https://static.help.unhcr.org/wp-content/uploads/sites/11/2018/09/06134921/UNHCR_ending_registration_leaflet_ENG.pdf#_ga=2.189937707.1431832477.1536428038-987117320.1359371329.

[281] Sari and Dinçer, "Toward a New Asylum Regime in Turkey?" 64.

[282] Refugee Rights Turkey, *International Protection Procedure in Turkey. Rights and Obligations*, at 4 (August 2017), accessed May 1, 2019, https://www.mhd.org.tr/images/yayinlar/MHM-14.pdf.

not been fully implemented in practice.[283] There was an ongoing transition period with regard to the registration functions between two main actors participating in the asylum procedure in Turkey, namely, PDMMs and the Association for Solidarity with Asylum Seekers and Migrants (ASAM) as an implementing partner organization of the UNHCR.[284] As a result, in practice persons seeking international protection were required to approach the only Registration Center situated in Oran district of Ankara "far from the city centre and thereby not easily accessible"[285] to get access to the procedure of 'joint registration' and attend a 'joint interview' mostly held by the ASAM with huge delays.[286] After successful interview the asylum seeker was obliged to reach the assigned satellite city, register before the respective PDMM within 15 days, lodge an application for international protection, attend a personal interview and wait up to 6 months for the PDMM's decision.[287] Consequently, the mentioned two-tiered system was too burdensome for asylum seekers who have been required to travel throughout Turkey's provinces just to get an opportunity to lodge an application for international protection. It is also worth to emphasize that asylum seekers' participation in two simultaneous refugee status determination procedures had no sense because a positive decision of the ASAM as to recognition of their refugee status had no influence on their legal status in Turkey which could be determined only by a respective PDMM.[288] Since September 10, 2018, the asylum procedure in Turkey has started from the lodging of an application for international protection directly to one of the 81 PDMMs currently functioning in Turkey as chosen by the applicant concerned.[289]

As the ECRE and the Dutch Council for Refugees pointed out, "the individualised assessment of [. . .] enjoyment of effective protection in a third country should include *the evaluation of the practice in the country concerned* and cannot be limited to a mere review of the legal provisions in national law or adherence to international human rights treaties (emphasis added)."[290] In practice, violations of the *non-refoulement* principle committed, *inter alia*, at the

[283] European Council on Refugees and Exiles [ECRE], *Country Report: Turkey 2017 update*, at 27, accessed May 1, 2019, http://www.asylumineurope.org/sites/default/files/report-download/aida_tr_2017update.pdf.

[284] Refugee Rights Turkey, *International Protection Procedure in Turkey. Rights and Obligations*, at 21 (August 2017), accessed May 1, 2019, https://www.mhd.org.tr/images/yayinlar/MHM-14.pdf.

[285] European Council on Refugees and Exiles [ECRE], *Country Report: Turkey 2017 update*, at 27.

[286] Ibid.

[287] Ibid., at 22.

[288] Refugee Rights Turkey, *International Protection Procedure in Turkey. Rights and Obligations*, at 21–22.

[289] ECRE Turkey Report 2018, at 14.

[290] Dutch Council for Refugees and European Council on Refugees and Exiles [ECRE], *The DCR/ECRE Desk Research on Application of a Safe Third Country and a First Country of Asylum Concepts to Turkey*, para. 11 (May

Turkish borders as well as the abovementioned provisions of the TPR which exclude Syrian nationals who have a well-founded fear of being persecuted for refugee reasons from the scope of a refugee status could be reasonably considered as obstacles to "the possibility [. . .] to request refugee status" in compliance with the criterion of Article 38(1)(e) of the rAPD. Furthermore, as the ECRE reported, "[e]specially single male asylum seekers from Afghanistan face particular obstacles to accessing registration compared to other nationalities, as many PDMM are reluctant to register their asylum applications. When given, appointments to register applications are scheduled for 2021."[291] A petition lodged with the UNHCR because of the "systematic and automatic rejection of applications for international protection [lodged] by nationals of Iran after September 2018, including for cases already interviewed by UNHCR under the previous registration system"[292] additionally substantiate the conclusion that applicants of particular nationalities constantly face discriminative treatment regarding access to Turkish asylum procedure.

It should be emphasized that the meaning of a broadly formulated expression "protection in accordance with the Refugee Convention" is of particular importance for the reasonability of further conclusions. Taking into consideration the following generally recognized principle of interpretation set forth in Article 31(1) of the Vienna Convention on the Law of Treaties of May 23, 1969, "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty *in their context* and in the light of its object and purpose."[293] Mark Eugen Villiger pointed out that "[t]reaty terms are not drafted in isolation, and their meaning can only be determined by considering the entire treaty text. The context will include the remaining terms of the sentence and of the paragraph; the entire article at issue; and the remainder of the treaty."[294] However, there are no similar rules of interpretation applicable to secondary EU law, including directives and regulations. But the CJEU as the institution of the EU responsible for ensuring the observance of the EU law interpretation[295] resorted to "the general scheme of [. . .] the Treaty as a whole"[296] and "the whole scheme of the

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2016), accessed May 1, 2019, https://www.ecre.org/wp-content/uploads/2016/07/DCR-and-ECRE-Desk-Research-on-application-of-a-safe-third-country-and-a-first-country-of-asylum-concepts-to-Turkey_May-2016.pdf.

[291] ECRE Turkey Report 2018, at 55.

[292] Ibid.

[293] Vienna Convention on the Law of Treaties, art. 31(1), May 23, 1969, 1155 U.N.T.S. 331.

[294] Mark Eugen Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, (Leiden: Martinus Nijhoff Publishers, 2009), 427.

[295] Treaty on the European Union, art. 19(1), February 7, 1992, 1755 U.N.T.S. 3.

[296] Joined Cases C–2/62 & C–3/62, Comm'n v. Grand Duchy of Luxembourg and Kingdom of Belgium, 1962 E.C.R. 00813, para. 1.

Treaty no less than to its substantive provisions"[297] on numerous occasions, having concluded that "[f]or the purposes of interpreting Article [. . .] it must be considered *in its context* in relation to the other paragraphs of the same article *and in its place in the general scheme of the Treaty* (emphasis added)."[298] Consequently, the expression "protection in accordance with the Refugee Convention" referred to in Article 38(1)(e) of the rAPD shall be interpreted, *inter alia*, within the context of other provisions of the rAPD. It should be mentioned that a third State may be considered as a European STC for the purposes of Article 39(1) of the rAPD only if the State concerned "*has ratified* and observes *the provisions of the Geneva Convention* [Refugee Convention] *without any geographical limitations* (emphasis added)," [299] whereas no similar requirement has been included into Article 38(1) of the rAPD. Moreover, the European Parliament proposed to replace currently valid provision of Article 38(1)(e) of the rAPD with the following criterion in Article 45 of the pAPR: "(eg) it is possible to request refugee status and, if found to be a refugee, to receive protection *in accordance with the Geneva Convention* [Refugee Convention] *ratified and applied without any geographical limitations* (emphasis added)."[300] Ralph Groeneveld, having interpreted respective provisions of the rAPD, concluded that "a third country should provide *in practice* the substance of all [Refugee] Convention rights without geographical or temporal limitation to recognized refugees. [. . .] The substance of [Refugee] Convention rights could also be provided under a different heading than refugee status (italics in original)."[301] All of the abovementioned substantiate the conclusion that for the purposes of the STC concept's application a third State is not required to express its consent to be bound by the Refugee Convention with no geographical limitations provided that persons seeking international protection are entitled to the rights equivalent in substance to the ones set forth in the Refugee Convention upon a recognition of their status and could enjoy them in practice.

[297] Case C–22/70, Comm'n v. Council, 1971 E.C.R. 00263, para. 15.

[298] Case C–59/75, Pubblico Ministero v. Flavia Manghera and Others, 1976 E.C.R. 00091, para. 6.

[299] rAPD, art. 39(2)(a).

[300] Draft European Parliament Legislative Resolution on the Proposal for a Regulation of the European Parliament and of the Council Establishing a Common Procedure for International Protection in the Union and Repealing Directive 2013/32/EU, (COM(2016)0467 – C8-0321/2016 – 2016/0224(COD)), accessed May 1, 2019, http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A8-2018-0171+0+DOC+XML+V0//EN&language=EN.

[301] Ralph Groeneveld, "The Meaning of 'Protection in Accordance with the Geneva Convention' Under Article 38(1)(e) EU Procedures Directive in the Light of the Safe Third Country Concept with a Case of Turkey" (master thesis, Vrije Universiteit Amsterdam, 2018), 39, accessed May 1, 2019, http://steenbergenscriptieprijs.nl/wp-content/uploads/2011/10/scriptie-Ralph-Groeneveld.pdf.

Before proceeding with the analysis of existing differences, if any, in the legal statuses of refugees, conditional refugees and beneficiaries of temporary protection in Turkey, it should be underlined that the scope of "protection in accordance with the Refugee Convention" for the purposes of Article 38(1)(e) of the rAPD shall be defined as covering "all substantive [Refugee] Convention rights other than Article 33 [of the Refugee Convention]"[302] referred to in Article 38(1)(c) of the rAPD. The UNHCR also resorted to the same scope of protection, having required Turkey to allow "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 [Refugee] Convention* (emphasis added)."[303] It should be emphasized that a detailed examination of Turkey's compliance with each of the refugee rights and corresponding obligations under the Refugee Convention would obviously go beyond the aim and the objectives of the present research. However, conditions of invoking the following Refugee Convention rights by refugees, conditional refugees and beneficiaries of temporary protection in Turkey will be analyzed in the present subchapter for the evaluation of Turkey's designation as a STC: (1) right to choose a place of residence to move freely within host State's territory (Article 26), (2) the right to engage in wage-earning employment (Article 17); (3) right to be issued identity papers (Article 27); and (4) right to be issued travel documents for the purpose of travel outside host State's territory (Article 28).

Pursuant to Article 26 of the Refugee Convention, "[e]ach Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence *to move freely within its territory* (emphasis added)."[304] As it has already been mentioned, persons seeking asylum in Turkey are entitled to lodge applications for international protection directly to one of the 81 PDMMs currently functioning in Turkey as chosen by the applicants.[305] However, PDMMs are authorized to refer the applicants concerned to "satellite cities" defined on the basis of publicly unavailable criteria with the obligation to register before the respective PDMM of the assigned "satellite city" within 15 days burdened with automatic withdrawal of the lodged application in case of failure to appear within the mentioned timeframe.[306] An application

[302] Ralph Groeneveld, "The Meaning of 'Protection in Accordance with the Geneva Convention" (master thesis, Vrije Universiteit Amsterdam, 2018), 39.

[303] United Nations High Commissioner for Refugees [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*, para. 2.2.1, at 6 (March 23, 2016), accessed May 1, 2019, https://www.unhcr.org/56f3ec5a9.pdf.

[304] Refugee Convention, art. 26 (see chap. 2, n. 91).

[305] ECRE Turkey Report 2018, at 14.

[306] Ibid., at 28, 63.

for international protection shall be also considered withdrawn if asylum seekers "fail to comply with the reporting obligation three consecutive times without excuse, do not show up in the designated place of residence or, *leave the place of residence without permission* (emphasis added).[307] Therefore, person seeking international protection are prohibited from leaving the territory of assigned "satellite cities" defined as "[p]rovinces determined by the Directorate General [DGMM], where foreigners requesting international protection are obligated to reside."[308] However, it should be emphasized that in practice both conditional refugees and beneficiaries of temporary protection upon the recognition of their status are obliged to reside in respective assigned provinces up to their resettlement in accordance with Article 82(1) of the LFIP, in spite of its discretionary character, and Article 33(2)(a) of the TPR respectively.[309] Tomáš Boček, Special Representative of the Council of Europe Secretary General on Migration and Refugees, even underlined that Syrian nationals have started to face even more difficulties in obtaining permissions to travel outside their assigned provinces since the announcement of the EU–Turkey statement.[310] No similar possibility to restrict the right of recognized refugees to choose their place of residence and move freely within Turkish territory has been set forth in Turkish asylum legislation.

Refugees shall be granted the most favourable treatment as regards the right to engage in wage-earning employment in compliance with Article 17(1) of the Refugee Convention.[311] Refugees in Turkey are entitled to work independently or be employed "as of receiving their status"[312] on the basis of the issued identity documents,[313] whereas conditional refugees and beneficiaries of temporary protection are required to lodge an application for a work permit but not earlier than on the expiry of 6 months after the date of a lodged application for international

[307] LFIP, art. 77(1)(ç).

[308] Regulation of the Republic of Turkey No. 29656 on the Implementation of the Law on Foreigners and International Protection of March 17, 2016, art. Article 3(1)(hh), Official Gazette No. 29656, accessed May 1, 2019, https://www.refworld.org/docid/5747fb7a4.html.

[309] ECRE Turkey Report 2018, at 106, 126.

[310] Special Representative of the Council of Europe Secretary General on Migration and Refugees, *Report of the fact-finding mission to Turkey by Ambassador Tomáš Boček, Special Representative of the Secretary General on migration and refugees 30 May–4 June 2016*, para. IV.5, SG/Inf(2016)29 (August 10, 2016), accessed May 1, 2019, https://www.refworld.org/docid/5a4cb0604.html.

[311] Refugee Convention, art. 17(1).

[312] Regulation of the Republic of Turkey No. 29695 on Work Permit of Applicants for International Protection and those Granted International Protection of April 26, 2016, art. 4(1), Official Gazette No. 29695, accessed May 1, 2019, https://www.refworld.org/docid/582c6ff54.html.

[313] LFIP, art. 89(4)(b).

protection[314] or the date of temporary protection registration respectively.[315] Furthermore, taking into account the abovementioned obligation to reside in assigned provinces, conditional refugees and beneficiaries of temporary protection are under *de facto* geographical restriction on access to employment.

On the basis of the obligation to "issue identity papers to any refugee in their territory"[316] set forth in Article 27 of the Refugee Convention persons granted refugee status in Turkey shall be issued "[a]n identity document bearing the foreigner identification number [. . .] with three years validity period at a time."[317] Conditional refugees are also entitled to receive the mentioned identity documents but with one year validity period,[318] whereas persons benefiting from temporary protection in Turkey shall be issued temporary protection identification documents with unlimited validity due to the undefined duration of this type of protection.[319] However, in comparison with international protection status holder identification documents amounting to residence permits,[320] temporary protection identification documents "shall grant the right to stay in Turkey. However, this document shall not be deemed to be equivalent to a residence permit."[321] As the ECRE reasonably concluded, "Article 25 [of the] TPR explicitly excludes temporary protection beneficiaries from the possibility of long-term legal integration in Turkey."[322]

Refugees shall be issued travel documents for the purpose of travel outside Turkish territory in compliance with Article 26 of the Refugee Convention. Article 84(1) of the LFIP, authorizing refugees to receive travel documents, explicitly refers to "the travel document stipulated in the [Refugee] Convention."[323] However, conditional refugees and beneficiaries of temporary protection are required to additionally lodge a request with the DGMM for issuance of

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[314] LFIP, art. 89(4)(a); Regulation of the Republic of Turkey No. 29695 on Work Permit of Applicants for International Protection and those Granted International Protection of April 26, 2016, art. 6(3), Official Gazette No. 29695, accessed May 1, 2019, https://www.refworld.org/docid/582c6ff54.html.

[315] Regulation of the Republic of Turkey No. 29695 on Work Permit of Applicants for International Protection and those Granted International Protection of April 26, 2016, art. 5(1), Official Gazette No. 29695, accessed May 1, 2019, https://www.refworld.org/docid/582c6ff54.html.

[316] Refugee Convention, art. 27.

[317] LFIP, art. 83(1).

[318] Ibid., art. 83(2).

[319] TPR, art. 22(1).

[320] LFIP, art. 83(3).

[321] TPR, art. 25.

[322] ECRE Turkey Report 2018, at 123.

[323] LFIP, art. 84(1).

travel documents,[324] taking into consideration exclusive DGMM's discretion on the decisions in question.[325]

Summarizing all of the abovementioned, it should be concluded that Turkey, retaining the geographical limitation with regard to the access to a refugee status, would be considered as a STC if, *inter alia*, beneficiaries of the analyzed types of protection, irrespective of their countries of origin, were equally entitled to the same extent of rights in compliance with those ones set forth in the Refugee Convention. However, the conditions of invoking at least some of the Refugee Convention rights analyzed in this subchapter for refugees, conditional refugees and beneficiaries of temporary protection in Turkey drastically differ. Consequently, Turkey shall be considered as violating its international obligation to "apply the provisions of this [Refugee] Convention to refugees *without discrimination as to* race, religion or *country of origin* (emphasis added)."[326] Moreover, Turkey shall not be considered as a STC for any applicant entitled to receive either a conditional refugee status or a temporary protection under Article 62 of the LFIP and Article 1(1) of the TPR respectively because of having no practical possibility to receive "protection in accordance with the Refugee Convention" in the equal manner with recognized refugees from Member States of the Council of Europe.

[324] LFIP, art. 84(2); TPR, art. 43.

[325] ECRE Turkey Report 2018, at 107.

[326] Refugee Convention, art. 3.

3. THE EUROPEAN UNION–TURKEY STATEMENT: PREREQUISITES OF CONCLUSION, LEGAL NATURE AND ASSESSMENT OF IMPLEMENTATION

Turkey as the largest refugee hosting state worldwide hosted 3.6 million of refugees by the middle of 2018,[327] in addition to 52,400 applications for international protection lodged only during the first half of 2018.[328] However, despite apparently overloaded functioning of Turkish asylum system, applicants for international protection, whose applications have been found inadmissible by Greek determining authorities under Article 33(2)(c) of the rAPR and Article 54(1)(d) of the Law of the Hellenic Republic No. 4375 on the organization and operation of the Asylum Service, the Appeals Authority, the Reception and Identification Service, the establishment of the General Secretariat for Reception, the transposition into Greek legislation of the provisions of Directive 2013/32/EC,[329] shall be returned to Turkey pursuant to the most controversial provision of the EU–Turkey statement.[330] Consequently, the main objectives of this Chapter is to define the main reasons of the EU–Turkey enhanced cooperation in asylum issues resulting in a number of legal instruments, clarify the legal nature of the announced EU–Turkey statement as to the character of imposed obligations and assess its implementation in terms of its compliance with international and EU law.

European States, having faced rising numbers of lodged applications for international protection because of a drastic increase of migrants' attempts to reach welfare States through asylum channels of Europe, were forced by circumstances to cooperate in order to collectively address the issues of secondary refugee movements within their borders. This cooperation resulted in the conclusion of the CISA in 1985 and subsequent conclusion of the Dublin Convention in 1990 between Members States of the then European Economic Community. Both of the abovementioned international agreements were aimed at, *inter alia*, the allocation of

[327] UNHCR Mid–Year Trends 2018, at 6 (see introduction, n. 8).

[328] Ibid., at 15.

[329] Law of the Hellenic Republic No. 4375 of April 3, 2016, on the organization and operation of the Asylum Service, the Appeals Authority, the Reception and Identification Service, the establishment of the General Secretariat for Reception, the transposition into Greek legislation of the provisions of Directive of the European Parliament and of the Council 'on common procedures for granting and withdrawing international protection (recast)' (L 180/29.6.2013), provisions on the employment of beneficiaries of international protection and other provisions, Gazette 51/A/3-4-2016, accessed May 1, 2019, https://www.refworld.org/docid/573ad4cb4.html.

[330] "Migrants [. . .] whose application has been found unfounded or inadmissible in accordance with the said directive [the rAPD] will be returned to Turkey." European Council, Press Release No. 144/16, *EU–Turkey statement* (March 18, 2016), accessed May 1, 2019, https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/.

responsibility for processing asylum applications. However in 2015, as Frontex pointed out, "Member States [of the EU] reported more than 1 820 000 detections of illegal border-crossing along the external borders. This never-before-seen figure was more than six times the number of detections reported in 2014, which was itself an unprecedented year."[331] The European Commission also reported that since 2015 the EU has been experiencing unprecedented influxes of migrants and refugees[332] mostly because of the large-scale hostilities having taken place in the Syrian Arab Republic. The largest number of the mentioned arrivals was reported on the Eastern Mediterranean route.[333] The UNHCR emphasized that "[h]undreds of thousands of individuals embarked on a dangerous journey, crossing the Mediterranean Sea to reach Europe in an effort to find safety."[334] Missing Migrants Project estimated 85 migrant and refugee deaths occurred in the Eastern Mediterranean migration route in 2015 defined as "the deadliest year on record for migrants and refugees crossing the Mediterranean, trying to reach Europe,"[335] whereas the UNHCR informed of 3,770 persons died or reported to be missing in the Mediterranean Sea in the same year.[336]

The challenges having occurred with regard to the abovementioned enormous influx of refugees and migrants concerned not only Greece, Italy and other Mediterranean countries which have obviously faced unaffordable numbers of lodged applications for international protection.[337] In practice all States which have expressed their consents to be bound by the CISA have subsequently faced similar problems mostly caused by uncontrolled secondary refugee movements within their borders and respective borderless Schengen Area. Because pursuant to Article 2(1) of the CISA, "[i]nternal borders [the common land borders of the Contracting Parties, their airports for internal flights and their sea ports for regular ferry connections exclusively from

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[331] Frontex, *Risk Analysis for 2016*, at 6 (March 2016), accessed May 1, 2019, https://frontex.europa.eu/assets/Publications/Risk_Analysis/Annula_Risk_Analysis_2016.pdf.

[332] European Commission, *The EU and the Migration Crisis*, COM (2017) (July 2017), accessed May 1, 2019, https://publications.europa.eu/en/publication-detail/-/publication/e9465e4f-b2e4-11e7-837e-01aa75ed71a1/language-en.

[333] Frontex, *Risk Analysis for 2016*, at 6 (March 2016).

[334] United Nations High Commissioner for Refugees [UNHCR], *Global Trends: Forced Displacement in 2015*, at 7 (June 20, 2016), accessed May 1, 2019, https://www.unhcr.org/statistics/unhcrstats/576408cd7/unhcr-global-trends-2015.html.

[335] Missing Migrants Project, "Over 3,770 Migrants Have Died Trying to Cross the Mediterranean to Europe in 2015," accessed May 1, 2019, https://missingmigrants.iom.int/over-3770-migrants-have-died-trying-cross-mediterranean-europe-2015.

[336] United Nations High Commissioner for Refugees [UNHCR], *Global Trends: Forced Displacement in 2015*, at 7 (June 20, 2016).

[337] Frontex, *Risk Analysis for 2016*, at 7 (March 2016).

or to other ports within the territories of the Contracting Parties and not calling at any ports outside those territories] may be crossed at any point without any checks on persons being carried out."[338] As a result, 1,322,800 applications for international protection were lodged to different Member States of the EU in 2015.[339]

It should be underlined that Article 13(1) of the Regulation 604/2013 of the European Parliament and of the Council of June 26, 2013, establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) unambiguously specifies that "[w]here it is established, [. . .], that an applicant has *irregularly crossed the border into a Member State by* land, *sea* or air having come from a third country, *the Member State thus entered shall be responsible* for examining the application for international protection (emphasis added)."[340] The CJEU in *Jafari* case even specifically emphasized that "[t]he fact that the border crossing occurred in a situation characterised by the arrival of an unusually large number of third-country nationals seeking international protection cannot affect the [. . .] application of Article 13(1) of the Dublin III Regulation."[341] Consequently, Greece had to be designated as the Member State responsible for examining almost all of the abovementioned 1,322,800 applications for international protection. However, the transfer of persons seeking international protection to Greece was not permissible because of "the deficiencies in the Greek authorities' examination of the applicant's asylum request and the risk he faces of being returned directly or indirectly to his country of origin without any serious examination of the merits of his asylum application and without having access to an effective remedy"[342] recognized by the ECtHR in *M. S. S. v. Belgium and Greece* case. On May 13, 2015, the European Commission communicated to other EU institutions the European Agenda on Migration proposing, *inter alia*, "*a mandatory and automatically-triggered relocation system* to distribute those in clear need of international protection within the EU *when a mass influx*

[338] CISA, art. 2(1) (see chap. 1, n. 48).

[339] European Statistical Office, "Asylum Statistics," accessed May 1, 2019, https://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics.

[340] Regulation No. 604/2013 of the European Parliament and of the Council of June 26, 2013, Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in one of the Member States by a Third-Country National or a Stateless Person (recast), art. 13(1), 2013 O.J. (L 180) 31.

[341] Case C–646/16, Proceedings brought by Khadija Jafari and Zainab Jafari, 2017 ECLI:EU:C:2017:586, para. 93.

[342] M. S. S. v. Belgium and Greece, App. No. 30696/09, Judgment, para. 321 (Eur. Ct. H.R. January 21, 2011).

emerges (emphasis added)."[343] But the Agenda concerned has not been unanimously approved by all Member States of the EU, whereas Slovak Republic and Hungary even lodged an application with the CJEU, having sought the annulment of a Decision of the Council of the EU No. 2015/1601 of September 22, 2015, establishing provisional measures in the area of international protection for the benefit of Italy and Greece.[344]

Consequently, as Arne Niemann and Natascha Zaun pointed out, "[c]onfronted with the relative failure of the internal measures taken to solve the challenges of the crisis, the EU simultaneously tried to find external solutions."[345] More precisely, Member States of the EU were forced by the abovementioned circumstances to find another mutually acceptable way to stop the uncontrolled flows of alleged refugees and migrants, first and foremost, from Turkey to the EU, taking into consideration the ineffectiveness of the Dublin system. Because in order to reach the territory of the EU across the Aegean Sea persons seeking international protection mainly used the territory of Turkey as a transit point having 822 km of state border with the Syrian Arab Republic, 499 km with the Islamic Republic of Iran and 332 km with Iraq.[346] Furthermore, taking into account the attempts of Turkey to acquire the membership of the EU and the objective necessity of Turkey's commitment to the solution proposed by the EU in the form of a conditional agreement, the EU and the Republic of Turkey agreed on October 15, 2015, on the EU–Turkey Joint Action Plan designed to facilitate "a coordinated effort to address the crisis created by the situation in Syria."[347]

Furthermore, on March 18, 2016, the European Council publicly announced the "EU–Turkey statement" in the form of a Press Release No. 144/16 aimed at, *inter alia*, returning "[a]ll new irregular migrants crossing from Turkey into Greek islands as from 20 March 2016"[348] to

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[343] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *European Agenda on Migration*, at 4, COM(2015) 240 final (May 13, 2015), accessed May 1, 2019, https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/communication_on_the_european_agenda_on_migration_en.pdf.

[344] Joined Cases C–643/15 & C–647/15, Slovak Republic and Hungary v. Council, 2017 ECLI:EU:C:2017:631.

[345] Arne Niemann and Natascha Zaun, "EU Refugee Policies and Politics in Times of Crisis: Theoretical and Empirical Perspectives," *Journal of Common Market Studies* 56, no. 1 (2018): 8.

[346] WorldAtlas, "Which Countries Border Turkey?" February 28, 2018, accessed May 1, 2019, https://www.worldatlas.com/articles/what-countries-border-turkey.html.

[347] European Commission, *EU–Turkey Joint Action Plan*, MEMO/15/5860 (October 15, 2015), accessed May 1, 2019, http://europa.eu/rapid/press-release_MEMO-15-5860_en.htm.

[348] European Council, Press Release No. 144/16, *EU–Turkey statement* (March 18, 2016), accessed May 1, 2019, https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/.

Turkey as "a temporary and extraordinary measure."[349] In comparison with the provisions of the Agreement between the EU and the Republic of Turkey on the readmission of persons residing without authorization of December 16, 2013, the EU–Turkey statement sets forth an additional legal ground to return to Turkey not only illegal migrants but also persons in need of international protection provided that their applications are found inadmissible in accordance with Article 33 of the rAPD. Additionally, the following resettlement scheme was introduced by the EU–Turkey statement: "[f]or every Syrian being returned to Turkey from Greek islands, another Syrian will be resettled from Turkey to the EU." As of March 31, 2019, 341 Syrians have been returned to Turkey on the basis of the mentioned resettlement scheme,[350] whereas 3,621,330 Syrian nationals benefiting from temporary protection are currently pending their resettlement from Turkey.[351] Summarizing the content of the announced EU–Turkey statement, it should be concluded that initial motives of both sides of the EU–Turkey enhanced cooperation in asylum issues are quite apparent. Turkey received visa liberalization for its nationals in prospect and renewal of its accession negotiations with the EU in addition to 3 billion euros allocated under the Facility for Refugees in Turkey with the commitment to be invested another 3 billion euros for the improvement of humanitarian conditions for Syrian beneficiaries of temporary protection in Turkey, whereas the EU was granted an alternative external tool of dealing with increasing influxes of refugees and migrants against the backdrop of Member States' refusals to fully participate in the allocation of responsibility for persons in need of international protection.

However, it is worth to emphasize that the legal nature of the EU–Turkey statement announced by the European Council in the form of a press release is a matter of particular concern because of its direct influence on the character of the abovementioned obligations assumed by Turkey and the EU. The ECRE, having reviewed the content and reasoning of second instance decisions delivered by the Independent Appeals Committees in 2018, reported that "[i]n 11 cases, the Appeals Committees consider the EU–Turkey statement as *a legally binding international agreement*. In 4 cases the statement is considered as *"an agreement with political commitment."* In 10 cases the EU–Turkey statement is considered as *a return measure*. In 5 cases no assessment is made in this regard (emphasis added)."[352] Consequently, even Greek

[349] European Council, Press Release No. 144/16, *EU–Turkey statement* (March 18, 2016), accessed May 1, 2019, https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/.

[350] UNHCR Returns from Greece (see introduction, n. 7).

[351] United Nations High Commissioner for Refugees [UNHCR], "Syrian Refugee Regional Response," accessed May 1, 2019, https://data2.unhcr.org/en/situations/syria/location/113.

[352] ECRE Turkey Report 2018, at 107 (see introduction, n. 32).

determining authorities, including the EASO, Greek Asylum Service and Independent Appeals Committees, as the main actors obliged to constantly apply respective provisions of the EU–Turkey statement do no follow a common consistent approach to the legal nature of the statement concerned. In response to the unknown nature of the EU–Turkey statement having been fully implementing in practice as a legal ground of a considerable number of migrants and refugees returns to Turkey, three similar applications have been lodged with the CJEU for the annulment of an agreement entitled 'EU–Turkey statement' under Article 263 of the Treaty on the Functioning of the European Union of March 25, 1957. The CJEU in its highly controversial order delivered in *NF v. European Council* case defined the legal nature of the EU–Turkey statement as follows: "it was clear from the vocabulary used in the EU–Turkey statement, in particular the use of the word 'will' in the English version, that *it was not a legally binding agreement but a political arrangement* (emphasis added)."[353] Moreover, the CJEU explicitly excluded the announced EU–Turkey statement from its jurisdiction, having subsequently excluded the responsibility of the EU institutions for the results of its implementation in the following way:

> "the expression 'Members of the European Council' and the term 'EU', contained in the EU–Turkey statement [. . .], must be understood as *references to the Heads of State or Government of the European Union* who, [. . .], met with their Turkish counterpart and agreed on operational measures with a view to restoring public order [. . .]. [T]he EU-Turkey statement, as published by means of Press Release No 144/16, cannot be regarded as a measure adopted by the European Council, or, moreover, by any other institution, body, office or agency of the European Union, [. . .]. [W]ith regard to the reference in the EU–Turkey statement to the fact that 'the EU and [the Republic of] Turkey agreed on … additional action points,' the Court considers that, even supposing that an international agreement could have been informally concluded during the meeting of 18 March 2016, [. . .], that agreement would have been an agreement concluded *by the Heads of State or Government of the Member States of the European Union and the Turkish Prime Minister* (emphasis added)."[354]

The CJEU also dismissed the appeals lodged by the mentioned applicants in *NF, NG and NM v. European Council* joined cases.[355] Furthermore, the ECtHR in *J.R. and Others v. Greece* case

[353] Case T–192/16, NF v. Council, 2017 ECLI:EU:T:2017:128, para. 29.

[354] Ibid., paras. 69–72.

[355] Joined Cases C–208/17 P, C–209/17 P & C–210/17 P, NF, NG and NM v. Council, 2018 ECLI:EU:C:2018:705, para. 30.

also determined the EU–Turkey statement as "an agreement concluded between the EU Member States of the European Union and Turkey"[356] and a "declaration,"[357] having generally confirmed the legal nature of the EU–Turkey statement in the abovementioned CJEU's interpretation.

Therefore, it should be emphasized that in spite of the obvious leading role of the EU institutions in the preparation, subsequent conclusion and further implementation of the EU–Turkey statement, the EU easily reached initial objectives of the EU–Turkey enhanced cooperation in asylum issues, having successfully circumvented the obstacles of checks and balances system applicable within the EU system in case of a conclusion of an international agreement on behalf of the EU in compliance with Article 218 of the Treaty on the Functioning of the European Union. Moreover, taking into consideration the abovementioned rather controversial reasoning and conclusions of the CJEU specified in *NF v. European Council* case with regard to the legal nature of the EU–Turkey statement and the character of its provisions, it should be concluded that the CJEU explicitly disregarded the division of competences, having tolerated respective acts of Member States of the EU in areas of exclusive EU competences which have been previously condemned in *Commission of the European Communities v. Council of the European Communities* case.[358]

Since the announced EU–Turkey statement entered into force on March 20, 2016, the Greek Ministry of Citizen Protection reported on 1,843 nationals who have already been returned to Turkey.[359] The European Commission estimated 2,164 returns of irregular migrants to Turkey as of April 2018, in addition to 12,569 migrants allegedly returned to Turkey on the voluntarily basis.[360] And in spite of the fact that initially EU–Turkey statement was aimed at returning all new irregular migrants reaching the territory of the EU across the Aegean Sea back to Turkey as "a temporary and extraordinary measure,"[361] the political arrangement[362] in question with open-ended duration has been successfully implementing for the forth consecutive year. Moreover, the European Commission reported a considerable number of tangible positive effects of the EU–Turkey statement's implementation, including, *inter alia*, a significant reduction of irregular

[356] J. R. and Others v. Greece, App. No. 22696/16, Judgment, para. 7 (Eur. Ct. H.R. January 25, 2018).

[357] Ibid., para. 39.

[358] Case C–22/70, Comm'n v. Council, 1971 E.C.R. 00263, paras. 8, 17, 18.

[359] UNHCR Returns from Greece (see introduction, n. 7).

[360] European Commission, *EU–Turkey Statement: Two Years On*, April 2018, accessed May 1, 2019, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20180314_eu-turkey-two-years-on_en.pdf.

[361] European Council, Press Release No. 144/16, *EU–Turkey statement* (March 18, 2016), accessed May 1, 2019, https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/.

[362] Case T–192/16, NF v. Council, 2017 ECLI:EU:T:2017:128, para. 29.

arrivals on the Eastern Mediterranean route and a substantial decrease of migrant and refugee deaths in the Aegean Sea.[363] However, an assessment of the results of the implementation of the EU–Turkey statement for their "full accordance with EU and international law"[364] shall be carried out on the basis of the conclusions reached in the previous chapter of the present research as to Turkey's compliance with each of the criteria enumerated in Article 38 of the rAPD.

First and foremost, it should be pointed out that immediately upon the lodging of an application for international protection the State concerned assumes primary responsibility for its examination and further protection of a person qualifying as a refugee or eligible for other forms of international protection. And even in case of possible allocation of responsibility for ensuring international protection either though the Dublin system within the EU or through the application of the STC concept, the State in question is obliged to take all reasonable actions to be satisfied that another State shall provide protection at the level required by the international community in accordance with recognized standards of human rights and international protection. Otherwise, allocation of responsibility shall be excluded.

It should also be emphasized that the UNHCR and the ECRE which dedicated a significant number of guidelines and recommendations to the appropriate application of the STC concept focused the attention of the refugee hosting States on the necessity to carry out an individualized assessment of a third State's compliance with each of the STC criteria for a particular applicant, taking into consideration "the personal circumstances of the applicants and the general situation prevailing in the country of return."[365] The UNHCR also concluded that "[a]ny list-based general assessment of safety of the third country needs to be applied flexibly, and ensure due consideration of that country's safety *for the individual asylum-seeker* (emphasis added)."[366] As to the acceptable sources for an individualized assessment to be properly carried out, the ECRE stated as follows: "[b]eyond an individualised assessment of whether the country

[363] European Commission, *EU–Turkey Statement: Two Years On*, April 2018, accessed May 1, 2019, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20180314_eu-turkey-two-years-on_en.pdf.

[364] European Council, Press Release No. 144/16, *EU–Turkey statement* (March 18, 2016), accessed May 1, 2019, https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/.

[365] Dutch Council for Refugees and European Council on Refugees and Exiles, *The DCR/ECRE Desk Research on Application of a Safe Third Country and a First Country of Asylum Concepts to Turkey*, para. 12, May 2016, accessed May 1, 2019, https://www.ecre.org/wp-content/uploads/2016/07/DCR-and-ECRE-Desk-Research-on-application-of-a-safe-third-country-and-a-first-country-of-asylum-concepts-to-Turkey_May-2016.pdf.

[366] United Nations High Commissioner for Refugees [UNHCR], *Asylum Processes (Fair and Efficient Asylum Procedures) in Global Consultations on International Protection*, para. 14, EC/GC/01/1 (May 31, 2001), accessed May 1, 2019, https://www.unhcr.org/protection/globalconsult/3b389254a/asylum-processes-fair-efficient-asylum-procedures.html.

can be considered safe for a particular asylum seeker, this places *an obligation* on asylum authorities *to take into account international organisatoins'* [*sic*] *and NGOs' reports* and the extent to which such organisations are able to carry out independent human rights monitoring in the country (emphasis added)." [367] However, the ECRE, having analyzed the content and reasoning of decisions dismissing the applications of Syrian nationals as inadmissible on the basis of Turkey's identification as a STC, reported that both first and second instance decisions were based on pre-defined templates without any individualized assessment neither of the safety nor of the effectiveness of protection to be granted by Turkey.[368] The UN Special Rapporteur on the human rights of migrants defined inadmissibility decisions rendered by Greek determining authorities as "consistently short, qualify Turkey as a safe third country and reject the application as inadmissible: this makes them practically unreviewable [*sic*]."[369] Consequently, neither the EU institutions nor Greece and its determining authorities, including the EASO, Greek Asylum Service and Independent Appeals Committees, evaluated Turkey by the purposeful application of each of the STC criteria.

Moreover, the conclusions regarding the conditions enumerated in Article 38(1) of the rAPD were made solely on the basis of the provisions of Turkish asylum legislation and correspondence between the European Commission and the then Permanent Delegate Ambassador of the Republic of Turkey to the EU dated by 2016,[370] in which Turkey allegedly provided assurances of its commitment to all required standards of international protection. But the ECtHR unambiguously clarified in a considerable number of its decisions that "the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection" [371] and emphasized that "[t]here is an obligation to examine whether assurances provide, in their

[367] European Council on Refugees and Exiles [ECRE], *Policy Note No. 8 Debunking the "Safe Third Country" Myth: ECRE's Concerns About EU Proposals for Expanded use of the Safe Third Country Concept*, at 4 (October 2017), accessed May 1, 2019, https://www.ecre.org/wp-content/uploads/2017/11/Policy-Note-08.pdf.

[368] ECRE Turkey Report 2018, at 104–5 (see introduction, n. 32).

[369] U.N. Human Rights Council, *Report of the Special Rapporteur on the Human Rights of Migrants on his Mission to Greece*, para. 81, A/HRC/35/25/Add.2 (April 24, 2017), accessed May 1, 2019, https://reliefweb.int/sites/reliefweb.int/files/resources/G1709841.pdf.

[370] "Correspondence between the European Commission and the then Permanent Delegate Ambassador of the Republic of Turkey to the EU," accessed May 1, 2019, http://asylo.gov.gr/wp-content/uploads/2016/10/scan-file-mme.pdf.

[371] Saadi v. United Kingdom, App. No. 13229/03, Judgment, para. 147 (Eur. Ct. H.R. January 29, 2008).

practical application, a sufficient guarantee."[372] The ECtHR even specifically explained in its pilot decision delivered in case of *M. S. S. v. Belgium and Greece* that

> "the diplomatic assurances given by Greece to the Belgian authorities *did not amount to a sufficient guarantee*. [. . .] [T]he agreement document [. . .] contained no guarantee concerning the applicant in person. Nor did the information document [. . .], provided by the Greek authorities, contain any individual guarantee; *it merely referred to the applicable legislation, with no relevant information about the situation in practice* (emphasis added)."[373]

Therefore, it should be reasonably concluded that no individual guarantees have been provided by Turkey with regard to those 38 Syrian asylum seekers who have already been returned to Turkey on the basis of inadmissibility of their asylum claims, taking into consideration the analysis of the abovementioned correspondence between the European Commission and Turkish Ambassador to the EU. Moreover, as it has already been unambiguously clarified in Chapter 2 of the present research, Turkey shall not be considered as a STC for any applicant for international protection, including Syrian nationals, because of unjustified high risk of their right to protection against refoulement to be violated with no effective access to asylum procedure, legal assistance and even the possibility to appeal against a removal decision with the guaranteed right to remain in the Turkish territory in violation of the prohibition on refoulement. Turkey shall not be considered as a STC for any non-European applicant for international protection, including Syrian nationals, because of having no practical possibility to receive "protection in accordance with the Refugee Convention" in the equal manner with recognized refugees from Member States of the Council of Europe. Therefore, Syrian nationals seeking asylum will not be definitely treated in Turkey in compliance with the principles set forth in Article 38(1)(c), (d) and (e) of the rAPD. However, Greece currently dismisses the applications for international protection lodged by Syrian nationals as inadmissible, having tolerated all of the reported infringements of the abovementioned principles in violation of its obligation to "abide by the final judgment of the Court [ECtHR] in any case to which they are parties"[374] in compliance with Article 46(1) of the ECHR. And alleged pressure faced by the Greek determining authorities from the EASO systematically issuing opinions which recommended considering applications for international protection lodged by non-Syrian

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[372] Othman v. United Kingdom, App. No. 8139/09, Judgment, para. 189 (Eur. Ct. H.R. January 17, 2012).

[373] M. S. S. v. Belgium and Greece, App. No. 30696/09, Judgment, para. 354 (Eur. Ct. H.R. January 21, 2011).

[374] Amnesty International, *Greece: Lives on hold – Update on situation of refugees and migrants on the Greek islands*, at 4, EUR25/6745/2017 (July 14, 2017), accessed May 1, 2019, https://www.amnesty.org/download/Documents/EUR2567452017ENGLISH.PDF.

nationals as inadmissible[375] shall not exempt Greece from its obligations under international treaties.

Furthermore, it should be emphasized that the principle of *non-refoulement* precludes any act of expulsion not only to asylum seekers' countries of origin, where their lives or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion but also to any other territory with insufficient guarantees protecting a refugee or an asylum seeker from the risk of being arbitrarily returned to their countries of origin. And, as the ECtHR underlined in *Hirsi Jamaa and Others v. Italy* case,

> "[i]t is a matter for the State carrying out the return to ensure that the intermediary country offers sufficient guarantees to prevent the person concerned being removed to his country of origin. [. . .] The Court considers that when the applicants were transferred to Libya, the Italian *authorities knew or should have known that there were insufficient guarantees protecting the parties concerned from the risk of being arbitrarily returned to their countries of origin*, [. . .]. The Italian authorities should have ascertained how the Libyan authorities fulfilled their international obligations in relation to the protection of refugees (emphasis added)."[376]

However, 38 Syrian asylum seekers have been returned by Greece to Turkey on the basis of inadmissibility of their asylum claims amid systematically repeated and widely reported expulsions of refugees and persons seeking international protection, *inter alia*, to the Syrian Arab Republic. Consequently, it should be reasonably concluded that sending of 38 Syrian asylum seekers to Turkey on the basis of pre-defined template decisions with no individualized assessment of safety and effectiveness of protection to be granted by Turkey shall amount to the violations of Article 3 of the ECHR, Articles 18 and 19 of the Charter of Fundamental Rights of the European Union of October 2, 2000.

However, it should be also pointed out that the order delivered by the CJEU in *NF v. European Council* case was primarily aimed not at excluding the announced EU–Turkey statement from the jurisdiction of the CJEU with no access to other effective remedies against the implementing practice of the EU–Turkey statement but at excluding the responsibility of the EU institutions for the results of the EU–Turkey statement implementation. Because the conclusion of this allegedly political arrangement with no strictly imposed obligations has granted to the EU a powerful external tool of dealing with increasing influxes of refugees and migrants amid apparent ineffectiveness of the Dublin system and refusal of Member States to

[375] ECRE Turkey Report 2018, at 108–9.

[376] Hirsi Jamaa and Others v. Italy, App. No. 27765/09, Judgement, paras. 156–57 (Eur. Ct. H.R. February 23, 2012).

participate in respective 'burden sharing.' The Greens/European Free Alliance in the European Parliament emphasized that by implementing the EU–Turkey statement the EU constituted "an externalisation mechanism of protection obligations under the EU acquis to Turkey, a non-EU country, where the acquis is not applicable. Instead of 'burden sharing', *hotspot* procedures result in 'burden dumping' on Member States at the external EU borders, such as Greece, and third countries neighbouring the EU, such as Turkey (italics in original)."[377] However, taking into consideration the leading role of the EU institutions in the preparation, subsequent conclusion and further implementation of the EU–Turkey statement, the EU shall obviously share responsibility for all of the abovementioned results of the EU–Turkey statement implementation and respective violations of international and EU law. Additionally, the implementation of the EU–Turkey statement under auspices of the EU has resulted in the violation of Article 78(1) of the Treaty on the Functioning of the European Union of March 25, 1957, according to which

> "[t]he Union shall develop a common policy on asylum, [. . .] with a view to [. . .] *ensuring compliance with the principle of non-refoulement.* This policy must be in accordance with the Geneva Convention of 28 July 1951 [Refugee Convention] and the Protocol of 31 January 1967 relating to the status of refugees [New York Protocol], and other relevant treaties (emphasis added)."[378]

And the fact that the European Commission announced its intention to establish "tailor made partnerships with key third countries of origin and transit"[379] on the basis of the successful EU–Turkey statement and promoted respective policies towards the Islamic Republic of Afghanistan and the State of Libya[380] just substantiate the conclusion that the EU has strong intentions to proceed with the abovementioned violations of international and EU law, further allocating responsibility for ensuring international protection of refugees beyond its borders.

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[377] The Greens/European Free Alliance in the European Parliament, *The EU–Turkey statement and the Greek Hotspots: a Failed European Pilot Project in Refugee Policy*, at 30 (June 2018), accessed May 1, 2019, http://extranet.greens-efa-service.eu/public/media/file/1/5625.

[378] Treaty on the Functioning of the European Union, art. 78(1), March 25, 1957, 1957 O.J. (C 326) 47.

[379] European Commission Press Release, *Commission announces New Migration Partnership Framework: reinforced cooperation with third countries to better manage migration*, IP/16/2072 (June 7, 2016), accessed May 1, 2019, http://europa.eu/rapid/press-release_IP-16-2072_en.htm.

[380] "Joint Way Forward on migration issues between Afghanistan and the EU," October 2, 2017, accessed May 1, 2019, https://eeas.europa.eu/sites/eeas/files/eu_afghanistan_joint_way_forward_on_migration_issues.pdf; "Memorandum of understanding on cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the State of Libya and the Italian Republic," February 2, 2017, accessed May 1, 2019, http://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf.

CONCLUSIONS

1. Based on the analysis of the compliance with the requirements for the STC set forth in Article 38(1) of the rAPD, it has been proved that Turkey could not be considered as a STC for any applicant for international protection, including Syrian nationals, because of unjustified high risk of their right to protection against refoulement to be violated with no effective access to asylum procedure, legal assistance and even the possibility to appeal against a removal decision with the guaranteed right to remain in the Turkish territory in violation of the prohibition on refoulement.

2. Turkey could not be considered as a STC for any non-European applicant for international protection, including Syrian nationals, because of having no practical possibility to receive "protection in accordance with the Refugee Convention" in the equal manner with recognized refugees from Member States of the Council of Europe in violation of Article 38(1)(e) of the rAPD.

3. The large-scale violations of the rights to life, liberty and security, committed primarily by Turkish state authorities on account of persons' political opinions, nationalities and membership of particular social groups support the conclusion that Turkey shall not be automatically considered as a STC for any applicant for international protection without properly conducted individualized assessment of their particular individual circumstances.

4. The death penalty reintroduction supported by highest Turkish state officials, the scale of reported grave violations of the absolute right to freedom from torture and other cruel, inhuman and degrading treatment as well as ongoing armed conflict between Turkish armed forces and armed groups of the PKK shall be also taken into consideration in the course of individualized assessment of applicants' individual circumstances in order to apply the STC concept with respect to Turkey.

5. Neither the EASO nor Greece and its determining authorities, including Greek Asylum Service and Independent Appeals Committees, evaluated Turkey by the purposeful application of each of the STC criteria.

6. The affirmative conclusions as to Turkey's compliance with the conditions enumerated in Article 38(1) of the rAPD were made by the Greek determining authorities solely on the basis of the provisions of Turkish asylum legislation and correspondence between the European Commission and the then Permanent Delegate Ambassador of the Republic of Turkey to the EU. No individual guarantees have been provided by Turkey in the correspondence in question with regard to 38 Syrian asylum seekers who have already been returned to Turkey on the basis of inadmissibility of their asylum claims as of March 31, 2019.

7. Alleged pressure faced by the Greek determining authorities from the EASO systematically issuing opinions which recommended considering applications for international protection lodged by non-Syrian nationals as inadmissible shall not exempt Greece from its obligations under international and EU law.

8. Sending of 38 Syrian nationals in need of international protection to Turkey on the basis of pre-defined template decisions with no individualized assessment of safety and effectiveness of protection to be granted by Turkey shall amount to the violations of Article 3 of the ECHR, Articles 18 and 19 of the Charter of Fundamental Rights of the European Union.

9. The conclusion of the EU–Turkey statement as an allegedly political arrangement with no strictly imposed obligations has granted to the EU a powerful external tool of dealing with increasing influxes of refugees and migrants amid apparent ineffectiveness of the Dublin system and refusal of Member States of the EU to participate in respective 'burden sharing.'

10. The EU easily reached initial objectives of the EU–Turkey enhanced cooperation in asylum issues, having induced Member States to conclude the EU–Turkey statement as an allegedly political arrangement instead of an international agreement on behalf of the EU, first and foremost, in order to circumvent the obstacles of checks and balances system applicable within the EU system.

11. The order delivered by the CJEU in *NF v. European Council* case excluded the announced EU–Turkey statement from the jurisdiction of the CJEU with no access to other effective remedies against the implementing practice of the EU–Turkey statement.

12. The CJEU in *NF v. European Council* case explicitly disregarded the division of competences, having tolerated respective acts of Member States of the EU in areas of exclusive EU competences.

13. Taking into consideration the apparent leading role of the EU institutions in the preparation, subsequent conclusion and further implementation of the EU–Turkey statement, the EU is obviously obliged to share responsibility for all of the results of the EU–Turkey statement implementation and respective violations of international and EU law, including Article 78(1) of the Treaty on the Functioning of the European Union.

14. The EU has apparent intentions to proceed with further allocation of responsibility for ensuring international protection of refugees beyond its borders, likely continuing to violate international and EU law as it has been taken place with the EU–Turkey statement's application.

RECOMMENDATIONS

1. The implementation of the EU–Turkey statement shall be suspended at least until Turkey carries out genuine extensive reforms towards the establishment of a properly functioning asylum system with the possibility for any applicant to receive "protection in accordance with the Refugee Convention" and the guaranteeing of due level of respect and protection of fundamental human rights, including the prohibition on refoulement.

2. Turkey shall stop a commonly used practice of allegedly "voluntarily" returns of refugees and persons seeking international protection as *de facto* collective forced expulsions into the Syrian Arab Republic, Iraq and Afghanistan in violation of the prohibition on refoulement and Turkey's obligations under a considerable number of ratified international treaties, customary international law and its national legislation. Moreover, Turkey shall stop its cross-border practices at the Turkish–Syrian border widely accompanying with push backs and violence against Syrian nationals in need of international protection.

3. The amendments to Article 54(1) of the LFIP made by Emergency Decree No. 676 of October 29, 2016, like *de facto* additional exceptions to the prohibition on refoulement in violation of Article 33(2) of the Refugee Convention and Turkey's respective international obligation shall be canceled by the Turkish Government.

4. Emergency Decrees No. 668 of July 25, 2016, and No. 676 of October 29, 2016, which eliminated the suspensive effect of appeals lodged against any administrative or judicial decision adopted during the declared state of emergency, including the ones against any removal decision issued on the basis of Article 54(1) of the LFIP or in alleged violation of Article 55(1) of the LFIP shall be also canceled by the Turkish Government as the ones violating Turkey's obligations under Article 13 of the ECHR.

5. Turkey, retaining the geographical limitation with regard to the access to a refugee status, would be considered as a STC if, *inter alia*, beneficiaries of protection, irrespective of their countries of origin, were equally entitled to the same extent of rights in compliance with those ones set forth in the Refugee Convention. Therefore, necessary legislative amendments shall be made by Turkey in order to grant any applicant for international protection, irrespective of their recognized legal status in Turkey, a practical possibility to receive "protection in accordance with the Refugee Convention" in the equal manner with recognized refugees from Member States of the Council of Europe.

6. The EASO and Greek determining authorities, including Greek Asylum Service and Independent Appeals Committees, shall change the existing pattern of their decisions with regard to the pre-defined inadmissibility of applications for international protection lodged by Syrian

nationals because of Turkey's recognition as a STC. Greek determining authorities shall make individualized assessment of safety and effectiveness of protection to be granted by Turkey for every particular applicant, taking into consideration applicant's individual circumstances, instead of using pre-defined templates of decisions with identical reasoning and conclusions.

7. Decisions of Greek determining authorities as to Turkey's designation as a STC for a particular applicant shall be substantiated by the analysis of reports of international organizations and bodies, applicant's individual circumstances and the assessment of individual guarantees provided by Turkey in respect of the applicant concerned, instead of invoking the provisions of Turkish asylum legislation and correspondence between the European Commission and the Permanent Delegate Ambassador of the Republic of Turkey to the EU.

8. Neither the EU, nor the Member States of the EU shall conclude with the Islamic Republic of Afghanistan or the State of Libya any political arrangement similar to the EU–Turkey statement because of a risk that it would violate the international and EU law.

9. If conditions of the STC concept's implementation exhaustively enumerated in respective legal instruments, including Article 38(1) of the rAPD, were fulfilled at the level required by the international community in accordance with recognized standards of human rights and international protection, the concept concerned would be invaluable tool for dealing with overburdened functioning of States' asylum systems.

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ABSTRACT

Member States of the EU were forced by the circumstances in 2015 to find a mutually acceptable way to stop the uncontrolled flow of alleged refugees and migrants from Turkey as the largest refugee hosting state worldwide to the EU. As a result, 38 Syrian nations have been returned to Turkey as of March 31, 2019, on the basis of the announced EU–Turkey statement because of inadmissibility of their applications for international protection on the basis of recognition of Turkey as a STC. As neither the EU institutions nor Greek determining authorities purposefully evaluated Turkey by the application of the STC criteria, having used pre-defined templates of inadmissibility decisions, this research is aimed at the ascertainment of a possibility of Turkey's designation as a STC on the basis of definitive conclusions regarding Turkey's compliance with each of the criteria enumerated in Article 38(1) of the rAPD. Upon the evaluation of the level of respect for the *non-refoulement* principle in Turkey and the analysis of its currently functioning asylum system, the present research emphasizes the necessity to suspend the EU–Turkey statement's implementation and stop violations of obligations imposed on Greece and the EU by international agreements, customary international law and EU law.

Keywords: safe third country; inadmissibility; Turkey; EU–Turkey statement; refugee.

SUMMARY

Member States of the EU were forced by the circumstances in 2015 to find a mutually acceptable way to stop the uncontrolled flow of alleged refugees and migrants from Turkey as the largest refugee hosting state worldwide having state borders with the Syrian Arab Republic, the Islamic Republic of Iran and Iraq to the EU. As a result, 38 Syrian nations have been returned to Turkey as of March 31, 2019, on the basis of the announced EU–Turkey statement because of inadmissibility of their applications for international protection on the basis of recognition of Turkey as a STC. As neither the EU institutions nor Greek determining authorities purposefully evaluated Turkey by the application of the STC criteria, having used pre-defined templates of inadmissibility decisions, the present research titled "Turkey in the Context of 'Safe Third Country' Notion" is aimed at the ascertainment of a possibility of Turkey's designation as a STC on the basis of definitive conclusions regarding Turkey's compliance with each of the criteria enumerated in Article 38(1) of the rAPD. Taking into account the historical development of the STC concept analyzed in Chapter 1, the concept concerned is considered to be an invaluable tool for dealing with overburdened functioning of States' asylum systems. Upon the evaluation of the level of respect and guaranteeing the protection of fundamental human rights in Turkey in subchapter 2.1, the large-scale violations of the rights to life, liberty and security, committed primarily by Turkish state authorities on account of persons' political opinions, nationalities and membership of particular social groups are reported. Moreover, the death penalty reintroduction supported by highest Turkish state officials, the scale of reported grave violations of the absolute right to freedom from torture and other cruel, inhuman and degrading treatment as well as ongoing armed conflict between Turkish armed forces and armed groups of the PKK analyzed in subchapter 2.2 shall be also taken into consideration in the course of individualized assessment of applicants' individual circumstances in order to apply the STC concept with respect to Turkey. The assessment of the level of respect for the *non-refoulement* principle in Turkey in subchapter 2.3 leads to the conclusion that Turkey shall not be considered as a STC for any applicant for international protection because of unjustified high risk of their right to protection against refoulement to be violated with no effective access to asylum procedure, legal assistance and even the possibility to appeal against a removal decision with the guaranteed right to remain in the Turkish territory in violation of the prohibition on refoulement. The same conclusion is reached in subchapter 2.4 dedicated to the analysis of currently functioning Turkish asylum system because non-European asylum seekers have no practical possibility to receive "protection in accordance with the Refugee Convention" in the equal manner with recognized refugees from Member States of the Council of Europe. The

implementation of the EU–Turkey statement, whose legal nature and main provisions are analyzed in Chapter 3, violate a considerable number of obligations imposed on Greece and the EU by international agreements, customary international law and EU law. Hence, it is recommended to suspend the EU–Turkey statement's implementation at least until Turkey carries out genuine extensive reforms to comply with the criteria enumerated in Article 38(1) of the rAPD.

HONESTY DECLARATION

01/05/2019

Vilnius

I, Artem Maksymchuk, student of Mykolas Romeris University (hereinafter referred to University), Mykolas Romeris Law School, International Law Master's Degree Programme confirm that the Master thesis titled "Turkey in the Context of 'Safe Third Country' Notion":

1. Is carried out independently and honestly;

2. Was not presented and defended in another educational institution in Lithuania or abroad;

3. Was written in respect of the academic integrity and after becoming acquainted with methodological guidelines for thesis preparation.

I am informed of the fact that student can be expelled from the University for the breach of the fair competition principle, plagiarism, corresponding to the breach of the academic ethics.

(signature) *(name, surname)*