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**Maastricht Centre
for European Law**

Maastricht Centre for European Law

Master Working Paper

2019/3

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The safe third country principle and the EU/Turkey deal

**To what extent is the current application of the safe third country
concept under EU law in compliance with international human
rights law?**

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Published in Maastricht, November 2019

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This paper is to be cited as MCEL Master Working Paper 2019/3

Abstract

In response to the recent so-called “refugee-crisis” the EU has tried to intensify its cooperation with Turkey, in order to try and limit the number of migrants gaining access to Union territory. This cooperation has most prominently been given shape through the EU-Turkey statement, commonly referred to as the EU-Turkey deal. This deal allows EU Member States to return all irregular migrants – including refugees – which have entered Greece from Turkey after the 20th of March 2016 to Turkey. The EU argues that this is permitted because in its eyes Turkey can be considered as a ‘safe’ country for all persons returned to it. This mechanism of the deal functions on the basis of a legal notion known as the “Safe Third Country” (STC) concept. With the purpose of providing more clarity on the legal application of this concept, below it is investigated how the concept is interpreted under both international human rights law and European Asylum law and what requirements these areas of the law establish for its application. This must be done in order to find out to what extent the application of the STC concept by the EU – with a particular focus on the EU-Turkey deal - complies with international human rights law.

In this thesis it will be shown that both international human rights law and European Asylum law actually set very similar requirements for the legal application of the STC concept. Both areas of law demand that the person returned is offered the opportunity to apply for international protection in the state that he/she is being returned to and that he/she is awarded with the protection of the principle of *non-refoulement* and the other protections contained in the Refugee Convention, the Protocol and relevant human rights documents. After establishing this, it will be shown that while in theory the European rules on the application of the STC concept are generally in compliance with international human rights law, things are rather different for the practical application of the concept. Based on a case study of returns of migrants to Turkey under the EU-Turkey deal it will be concluded that the practical application of the STC concept in the EU is at present not in accordance with the requirements set by international human rights law nor with those set by European Asylum law.

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1. Introduction

1.1 Background

According to the United Nations High Commissioner for Refugees (UNHCR) more people have been forced to flee their homes today than ever before.¹ The main reason for the increase in displaced persons is the ongoing violence in Syria and other parts of the Middle-East.² While most of the persons fleeing this violence have become internally displaced,³ many others have attempted to find shelter somewhere in the European Union (EU). Despite the fact that today more people than ever need international protection, many states have developed laws and policies which limit the freedom for refugees to choose where they want to apply for asylum and some which prevent refugees from being granted access to a territory at all.⁴ Many of these policies are developed to put the responsibility of providing international protection on another state than the one in which a refugee has applied for it.⁵ These measures are commonly referred to as 'protection elsewhere' policies.⁶ Such policies were also developed by the EU and the Member States in response to the 2015 migration crisis,⁷ with the 2016 EU-Turkey statement – commonly referred to as the EU-Turkey deal - as a prominent example.

In order to deal with the influx of people attempting to gain access to Union territory, the EU aimed to increase cooperation with third countries, particularly Turkey.⁸ Therefore in 2015 the EU and Turkey announced a joint action plan,⁹ and subsequently on the 18th of March 2016 they announced the EU-Turkey

¹ UNHCR, Report by the UN Refugee Agency: Global trends - Forced displacement in 2017, 25 June 2018, p. 2.

² *Ibid.*, p. 6.

³ A. Niemann and N. Zaun, 'EU Refugee Policies and Politics in Time of Crisis: Theoretical and Empirical Perspectives', *Journal of Common Market Studies*, 2018, vol. 56, issue 1, p. 3-22, p. 3.

⁴ J. Hathaway & M. Foster, *The Law of Refugee Status*, Cambridge University Press, Cambridge, 2014, p. 30; See also: R. Cortinovic, 'The Role and Limits of the Safe Third Country Concept in EU Asylum', *Research Social Platform on Migration and Asylum (ReSOMA) Discussion Brief*, 2018, p. 1-13, p. 3-4.

⁵ Hathaway & Foster, *supra* note 4, p. 31. See also: Cortinovic, *supra* note 4, p. 3, and; University of Michigan Law School, *The Michigan Guidelines on Protection Elsewhere*, 2007, p. 209-221, p. 209.

⁶ M. Gil-Bazo, 'The Safe Third Country Concept in International Agreements on Refugee Protection: Assessing State Practice', *Netherlands Quarterly of Human Rights*, 2015, Vol. 33/1, p. 42-77, p. 47. See also: Michigan Guidelines on Protection Elsewhere, *supra* note 5, p. 209.

⁷ M. Wagner, A. Dimitriadi, R. O'Donnell, J. Perumadan, J.H. Scholtzhauer, I. Simic & D. Yabasun, 'The implementation of the Common European asylum system', *research paper requested by the European Parliaments' Committee on Civil Liberties, Justice and Home Affairs*, 2016, p. 1-121, p. 34.

⁸ *Ibid.*

⁹ European Commission, EU-Turkey joint action plan, 15 October 2015, MEMO/15/5860.

deal/statement.¹⁰ Briefly summarized this deal works as follows: From the 20th of March 2016 onwards any irregular migrant (including those who have not applied for asylum or whose claims are considered as unfounded or inadmissible) entering Greece from Turkey will be returned to the latter.¹¹ Secondly the parties have agreed that for every Syrian that is send back to Turkey another Syrian who is entitled to international protection will be resettled to the EU.¹² In this way Turkey, rather than an EU Member State, has become responsible for all people returned to it. Under such protection elsewhere measures persons will be returned to either the first country of asylum (FCA) or a safe third country (STC).¹³ The idea behind policies based on these safe country principles is that a refugee who has come from another country in which he/she was safe from persecution, can be returned to that country because protection should have been provided there.¹⁴

While the EU-Turkey deal has led to a dramatic reduction in the number of refugees entering the Union through Turkey,¹⁵ there exist doubts about its compliance with the 1951 Convention relating to the Status of Refugees (Refugee Convention).¹⁶ These doubts relate first of all to the use of safe country principles in general. It is unclear whether or not the Refugee Convention allows states to return refugees to a FCA or a STC through the application of these principles, and even if it does, there is disagreement about the criteria that must be fulfilled before they can do so.¹⁷ The second issue relates to the application of the STC concept under EU law and the Union's qualification of Turkey as a safe third country. The Recast Asylum Procedures Directive 2013/32/EU (Asylum Procedures Directive) in principle allows EU Member States to declare applications for international protection inadmissible if the applicant has come from a STC.¹⁸ Member States are however only allowed to apply the STC concept, if the domestic authorities are satisfied that the third country concerned can

¹⁰ Council of the EU, EU-Turkey Statement, 18 March 2016, Press Release 144/16.

¹¹ *Ibid.*, §1.

¹² *Ibid.*, §2.

¹³ Gil-Bazo, *supra* note 6, p. 43.

¹⁴ Cortinovis, *supra* note 4, p. 3. See also: R. Byrne & A. Shacknove, 'The Safe Country Notion in European Asylum Law', *Harvard Human Rights Journal*, 1996, vol. 9, p. 185-228, p. 186.

¹⁵ Niemann & Zaun, *supra* note 3, p. 8.

¹⁶ UN General Assembly, Convention relating to the Status of Refugees (Refugee Convention), 28 July 1951, UN Treaty Series Vol. 189, p. 137.

¹⁷ S. Legomsky, 'Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection', *International Journal of Refugee Law*, 2003, Vol. 15 No. 4, p. 567-677, p. 572-573.

¹⁸ Directive 2013/32/EU, [2013], O.J. L 180/60, Article 33 (2) (c).

be considered as safe, meaning that the person concerned will be treated in accordance with the principles mentioned in Article 38 (1).¹⁹ The exact meaning of some of these principles is rather ambiguous,²⁰ and doubts exist whether the criteria formulated in Article 38 Asylum Procedures Directive comply with the requirements for the application of the STC concept under the Refugee Convention. Furthermore, even if it turns out that the criteria established in the Asylum Procedures Directive are in accordance with the requirements for the legal application of the STC concept under the Convention, then that still does not mean that the practical application of the STC concept by EU Member States complies with these criteria. As explained, under the EU-Turkey deal all irregular migrants entering Greece after 20 March 2016 will be returned to Turkey. This procedure is based on a presumption that Turkey can be qualified as a 'safe' third country within the meaning of Articles 33 and 38 of the Asylum Procedures Directive. A large number of NGOs and legal scholars have however made reports arguing that Turkey should not be considered as safe, and that practice in the country is not in compliance with the minimum requirements established by international human rights law – e.g. in the Refugee Convention – and/or the Asylum Procedure Directive.²¹

1.2 Research question and methodology

Everything stated above shows that serious questions can be asked about the compliance of the currently ongoing return of refugees from the EU to Turkey with the Refugee Convention and the measures making up the Common European Asylum System (CEAS) – including the Asylum Procedures Directive -. This thesis will focus on the application of the STC concept - specifically when it is used by EU Member States to expel persons to third countries - and attempts to explore the potential conflict between the international interpretations of the concept and its current application under EU law. The research question of this thesis is formulated as follows:

¹⁹ Ibid, Article 38 (1) (e).

²⁰ See e.g. Ibid., Article 38 (1) (e).

²¹ See e.g. Amnesty International, 'No safe refuge: Asylum-seekers and refugees denied effective protection in Turkey', (3 June 2016), p. 4-34, and; M. Steinbeis, 'Three legal requirements for the EU-Turkey deal: An interview with James Hathaway', *Verfassungsblog on matters constitutional website*, (9 March 2016), available at: <<https://verfassungsblog.de/three-legal-requirements-for-the-eu-turkey-deal-an-interview-with-james-hathaway/>>.

To what extent is the current application of the safe third country concept under EU law in compliance with international human rights law?

In order to answer this question this thesis will in Chapter 2 examine the origins of the STC concept and assess under which circumstances international law allows for its use. Secondly, in Chapter 3 it will be assessed when the STC concept can be used under EU law. Next, in Chapter 4 a case study of the current deal between the EU and Turkey will be conducted, in order to assess whether the application of the STC concept by EU Member States through this deal complies with the criteria established in the previous Chapters. All this will lead to a conclusion in Chapter 5 where the above formulated research question will be answered.

As mentioned above, there currently is not a lot of clarity on which criteria must be fulfilled before a person can be legally returned to a STC. Part of the academic value of this thesis is of a rather theoretical nature, in the sense that it aims to provide more clarity by presenting a list of criteria based on the Refugee Convention, documents issued by UNHCR and comments made by various legal scholars. While this thesis does not claim that the list is exhaustive or fully accepted, it does provide one concise overview of the criteria described in these sources. This overview may not just have theoretical value – in the sense that it tries to explain when states can legally return someone to a STC - though. It could also have some practical impact, as the EU is currently planning to further externalise the solution to the refugee crisis, by making deals similar to the one made with Turkey, with other third countries, - e.g. Tunisia, Egypt, Morocco, Libya, Algeria, etc.²² The criteria established in this thesis and the critical analysis of the deal with Turkey, could also have an effect on the way these future deals are drafted. The other part of the academic value of this thesis relates more specifically to the EU-Turkey deal itself. Ever since its publication in 2016, a lot has already been written about the deal. It is important to keep scrutinizing the

²² See: European Commission, Press release – Commission announces New Migration Partnership Framework: reinforced cooperation with third countries to better manage migration, 7 June 2016. See also: European Council for Refugees and Exiles (ECRE) News, 'EU eyeing up Tunisia for next migration deal?', *ECRE website*, (3 March 2017), available at: <<https://www.ecre.org/eu-eyeing-up-tunisia-for-next-migration-deal/>>; C. Teevan, 'More for less? Europe's new wave of migration deals', *European Council on Foreign Relations (ECFR) website*, (8 October 2018), available at: <https://www.ecfr.eu/article/commentary_more_for_less_europes_new_wave_of_migration_deals#>, and; J. Henley, 'What is the current state of the migration crisis in Europe', *The Guardian website*, (15 June 2018), available at: <<https://www.theguardian.com/world/2018/jun/15/what-current-scale-migration-crisis-europe-future-outlook>>.

deal however because, as with everything, things change over time. As will be explained below both Turkish policy and the facts on the ground for those returned under the deal have changed over time - most importantly there have been reports that as of July 2018 various provincial Turkish authorities have stopped registering Syrian refugees altogether.²³ These changes could affect the legality of the returns under the EU-Turkey deal that are happening today and this thesis tries to take some of these new developments into account.

With regards to methodology this thesis uses a doctrinal legal approach and aims to be descriptive, evaluative and critical, while using desk research as its main research method. Such an approach consists of a structured and logical analysis of the most important sources in the fields of international and European human rights-, refugee- and asylum law. Due to the limited amount of words and time available for the writing of a Master thesis it would be impossible to make a complete and full analysis of all the relevant sources. While this thesis on occasion also refers to other human rights documents, its primary focus is on the Refugee Convention. The sources consulted for this thesis include: The Refugee Convention, its 1967 Protocol and other relevant human rights documents – e.g. the Convention Against Torture (CAT), the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR) through the case law of European Court for Human Rights (ECtHR) -; the Treaty on the Functioning of the European Union (TFEU); the secondary law making up the CEAS – most importantly for this thesis: the Asylum Procedures Directive 2013/32/EU –; academic writing; various reports issued by UNHCR – including: Executive Committee Conclusions; legal considerations, comments and observations, and; other types of reports -, and; reports issued by EU institutions and agencies – such as: the EU Turkey Statement; Commission reports and letters, a report issued by the European Asylum Support Office (EASO) -. Apart from these sources, when conducting the case study of the present situation in Turkey for refugees who have been returned there under the EU-Turkey deal in Chapter 4, this thesis uses additional sources, such as: Turkish Asylum law; additional documents issued by UNHCR – e.g. the Guidelines on Temporary Protection or Stay Arrangements -; a report issued by the United Nations International Children's

²³ See e.g. Human Rights Watch, 'Turkey Stops Registering Syrian Asylum Seekers – New Arrivals Deported, Coerced Back to Syria', *Human Rights Watch website*, (16 July 2018), available at: <<https://www.hrw.org/news/2018/07/16/turkey-stops-registering-syrian-asylum-seekers>>.

Emergency Fund's (UNICEF) on Turkey; additional documents issued by EU institutions – including: the EU-Turkey joint action plan; the EU-Turkey readmission agreement, and; Commission reports on the implementation of the EU-Turkey Statement -; a report issued by Turkish National Police Academy, various NGO reports – including reports by: Human Rights Watch, Amnesty International, the Asylum Information Database (Aida) of the European Council on Refugees and Exiles, the Norwegian Organisation for Asylum Seekers, and the Dutch Council for Refugees -, and; news reports. All the sources used will be interpreted textually and through legal analysis. In doing so this thesis will principally rely on interpretations by relevant organisations such as UNHCR, EU institutions, EASO, NGOs, and legal scholars. Where it proves impossible to determine the meaning of a certain provision on the basis of documents issued by them, this thesis will attempt to establish the meaning of an international obligation itself by relying on the commonly accepted methods of interpretation in international law and legal academia: the textual, contextual and teleological methods of interpretation.²⁴ In doing so it will be possible to critically review the current application of the STC concept under EU law and eventually answer the research question of this thesis.

2. Safe Third Country concept at international level

In order to eventually answer the research question and assess to what extent the current application the STC concept under EU law complies with international human rights standards, it is necessary to provide for an overview of these standards. This Chapter will first of all explain where the safe country principles come from and what they entail exactly. After that, it will be assessed whether international law allows for the application of these principles and if so, under which conditions.

²⁴ Vienna Convention on the Law of Treaties (VCLT), (23 May 1969), Trb. 1972 Nr. 51, Article 31.

2.1 Refugee Convention and the Safe Third Country concept

In the preamble to the 1951 Refugee Convention the United Nations recognise that the matter of providing protection for refugees is an issue that can only be solved through international cooperation.²⁵ The most important documents providing international protection for refugees are the Convention itself,²⁶ and the subsequently adopted 1967 Protocol Relating to the Status of Refugees (1967 Protocol, the Protocol).²⁷ What may be surprising about these documents is that, while they do provide refugees with a variety of rights, they do not explicitly contain a right for refugees to obtain asylum,²⁸ as states are in principle free to control their borders and to remove anyone who their authorities deem undesirable.²⁹ While the Convention does not contain a provision giving all persons access to state parties' territories, it does oblige the state parties to offer all the rights contained in the Convention to anyone who qualifies as a "refugee" in accordance with Article 1.³⁰

The freedom of states parties to control their national borders and regulate who can enter their territory, is restricted by one of the fundamental principles underlying the Convention: the principle of *non-refoulement*.³¹ This principle is contained in Article 33 (1) of the Convention which says that "No Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion".³² The prohibition of *refoulement* can also be found in the CAT,³³ the ICCPR,³⁴ and the ECtHR has explained that the prohibition is also implicitly covered by Article 3 of the ECHR.³⁵ Article 33 (1) Refugee

²⁵ Refugee Convention, *supra* note 16, preamble.

²⁶ H. Battjes, *European Asylum Law and International Law*, Brill Nijhof, Leiden, 2006, p. 8.

²⁷ UNCHR, 'Introductory note by the Office of the United Nations High Commissioner for Refugees', p. 2, available

at:<

²⁸ Battjes, *supra* note 26, p. 8. See also: Legomsky, *supra* note 17, p. 612.

²⁹ UNHCR, 'Refugee Convention: The Travaux préparatoires analysed with a Commentary by Dr Paul Weis, 1990, p. 202, under "paragraph 1".

³⁰ Refugee Convention, *supra* note 16, Article 1.

³¹ Battjes, *supra* note 26, p. 10. See also: UNHCR, *supra* note 27, p. 3.

³² Refugee Convention, *supra* note 16, Article 33 (1).

³³ UN General Assembly, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), 10 December 1984, 1465 UNTS 85, Article 3 (1).

³⁴ UN General Assembly Resolution 2200 A (XXI), International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, Article 7.

³⁵ See e.g. ECtHR, *Chahal v. United Kingdom*, 11 November 1996, no. 70/1995/576/662, §80.

Convention puts an obligation on the state which is confronted with an application for asylum to determine whether a person qualifies as a refugee and subsequently to determine whether his/her return would not lead to *refoulement*.³⁶ If there is a chance that a return could lead to a threat to the life or freedom of the person concerned then the state must either provide the refugee with international protection itself or send that person to another state where he/she will be granted such protection. A state that opts for this latter possibility will argue that another state could have offered this person the necessary protection at an earlier stage.³⁷ That type of decision is based on the so-called safe country principles.

Throughout the seventies and eighties, states have adopted these principles – also referred to as ‘protection elsewhere’ policies – in order to put the responsibility of offering international protection on some other state.³⁸ This responsibility can be put on: (i) the safe country of origin; (ii) the first country of asylum (FCA) or; (iii) a safe-third country (STC).³⁹ A decision by a state saying that a person will not be granted international protection because he/she has come from a safe country of origin, is different from a decision based on the fact that a person should have received protection in the FCA or a STC. This is because the concept of a safe country or origin relates to the question of whether a person qualifies as a refugee at all. If a person has come from a safe country of origin, he/she will not qualify as a refugee under the Convention and therefore does not have a claim to international protection.⁴⁰ If a state however says that protection should have been offered in the FCA or a STC, then it does recognize that the person concerned qualifies for international protection, however that such protection should have been offered elsewhere.⁴¹ Despite the fact that in this sense the FCA and STC are similar they do not refer to the same state. UNHCR has said that the FCA is “a place where protection has been granted, and where the level of protection remains satisfactory”,⁴² and that a STC is “a place with which the asylum seeker has some connection and in which the State applying the

³⁶ Refugee Convention, *supra* note 16, Article 33 (1). See also: Legomsky, *supra* note 17, p. 614, and; Michigan Guidelines on Protection Elsewhere, *supra* note 5, §3-6, p. 211-212.

³⁷ Cortinovis, *supra* note 4, p. 3.

³⁸ *Ibid.* p. 3-4.

³⁹ M. Gil-Bazo, *supra* note 6, p. 47-49.

⁴⁰ Battjes, *supra* note 26, p. 344.

⁴¹ Cortinovis, *supra* note 4, p. 3. See also: Legomsky, *supra* note 17, p. 570.

⁴² J. Van Selm, ‘Access to Procedures: Safe Third Countries, Safe Countries of Origin and Time Limits’, *paper commissioned by UNHCR*, 2001, p. 1-60, p.7, §15. See also: Legomsky, *supra* note 17, p. 570.

principle believes the person could have requested protection”.⁴³ These days many countries have drafted a list of states which they deem safe and have instructed their officials to reject all applications from persons who have transited through those states, because they believe that asylum should have been claimed there.⁴⁴

The safe country principles were developed for a number of reasons. The main ones mentioned in academic literature are: first of all, the prevention of ‘refugees in orbit’.⁴⁵ The idea is that by making one state responsible for a refugee, that person will not be continuously sent from one country to the next, without any state claiming responsibility for them. This provides clarity not just for the refugee himself, but also for all other states. Secondly, making one state responsible also prevents the phenomenon of ‘asylum-shopping’ where asylum-seekers only apply for protection in those places which they prefer.⁴⁶ In that way, it is argued that these principles stimulate a form of burden-sharing between states by allowing them to distribute refugees more fairly among themselves.⁴⁷ Based on the discussion above however, it seems that the most important reason for the development of these principles is to allow states to simultaneously comply with the principle of *non-refoulement* and protect their national sovereignty. By making another ‘safe’ country responsible for the protection of a refugee, a state is able to comply with the prohibition of *refoulement*, whilst at the same time keeping as many refugees as possible out of its territory.

2.2 Application of the Safe Third Country concept at international level

The fact that many states have adopted protection elsewhere policies, does not automatically mean that their use is in compliance with international law. Neither the Convention nor the 1967 Protocol explicitly refer to the practice of returning refugees to the FCA or a STC. Doing this should therefore in principle be held to be in compliance with international law, provided that all other provisions of the Convention are complied with.⁴⁸ UNHCR has accepted that under certain circumstances it will accept a return of a refugee by saying that “Where, however, it appears that a person,

⁴³ Van Selm, *supra* note 42, p.7 See also: Legomsky, *supra* note 17, p. 570.

⁴⁴ Legomsky, *supra* note 17, p. 575.

⁴⁵ Battjes, *supra* note 26 p. 423. See also: Byrne & Shacknove, *supra* note 14, p. 200.

⁴⁶ Cortinovia, *supra* note 4, p. 4. See also: Legomsky, *supra* note 17, p. 637

⁴⁷ Cortinovia, *supra* note 4, p. 4. See also: Michigan Guidelines on Protection Elsewhere, *supra* note 5, p. 209.

⁴⁸ Battjes, *supra* note 24, p. 397. See also: Michigan Guidelines on Protection Elsewhere, *supra* note 5, §1, p. 211.

before requesting asylum, already has a connection or close links with another State, he may if it appears fair and reasonable be called upon first to request asylum from that State".⁴⁹ More recently the High Commissioner again explicitly said that returning refugees to safe third countries is not prohibited by the Refugee Convention and its 1967 Protocol.⁵⁰ This shows that the application of protection elsewhere policies is in principle accepted under international law. As this thesis is principally concerned with the STC concept the next section will clarify under which circumstances international law allows the return of a refugee to a safe third country.

There does not yet exist one clear and comprehensive set of criteria that explain when a person may be returned to a safe third country.⁵¹ Based on the Refugee Convention, documents issued by UNHCR and comments made by legal scholars, a number of criteria can be identified. This thesis does not claim that the subsequent list of criteria is complete or fully accepted by the international community. It merely provides for an overview of a number of common criteria found in various documents: (i) Because only states can become a party to the Refugee Convention a person can only be returned to a state – not to a non-state entity - and preferably one which is a Contracting State to the Convention;⁵² (ii) Article 32 of the Convention says that once a person is 'lawfully' present in the territory of a Contracting State, that state may no longer expel him/her, unless this can be justified on grounds of national security or public order.⁵³ Article 31 of the Convention says that persons are unlawfully present in a territory when they are there without authorization.⁵⁴ A person therefore is lawfully present in the territory of a Contracting State when his/her presence is authorised. This means that a person can only be returned to a STC before his/her presence is declared as lawful, which at the latest is the moment when authorities take a decision on the admissibility of someone's protection claim.;⁵⁵ (iii) The return of a refugee may not lead

⁴⁹ UNHCR, Executive Committee Conclusion No. 15 (XXX) on Refugees Without and Asylum Country, 30th Session, (1979), §h (iv).

⁵⁰ UNHCR, Legal considerations regarding access to protection and a connection between the refugee and the third country in the context of return or transfer to safe third countries, (April 2018), §2.

⁵¹ Legomsky, *supra* note 17, p. 627.

⁵² UNHCR, Legal considerations regarding access to protection and a connection between the refugee and the third country, *supra* note 50, §10. See also: Michigan Guidelines on Protection Elsewhere, *supra* note 5, §2.

⁵³ Refugee Convention, *supra* note 16, Article 32 (1). See also: UNHCR, Executive Committee Conclusion No. 7 (XXVIII) on Expulsion, 28th Session, (1977), §a.

⁵⁴ Refugee Convention, *supra* note 16, Article 31 (1).

⁵⁵ Legomsky, *supra* note 17, p. 614. See also: J. Hathaway, *The Rights of Refugees under International Law*, Cambridge University Press, Cambridge, 2005, p. 658, and: Michigan Guidelines on Protection Elsewhere, *supra* note 5, §5.

to *refoulement*.⁵⁶ This prohibition covers both direct and indirect *refoulement*. The former meaning that a person may not be returned to a state where their life or freedom would be threatened, and the latter meaning that a person may also not be returned to a country where there exists a chance of subsequent *refoulement*;⁵⁷ (iv) Mere compliance with the prohibition of *refoulement* is not enough, as the sending state must also make sure that the person returned will be able to enjoy the other rights contained in the Refugee Convention, its Protocol and other relevant human rights documents, in the receiving state.⁵⁸ About this requirement UNHCR has said that in order to make sure that these protections are offered “being a state party to the 1951 Convention and/or its 1967 Protocol and basic human rights instruments without any limitations is a critical indicator”;⁵⁹ (v) The receiving state must have agreed to the return of the person concerned and must be willing and able to offer that person effective protection or to fairly determine his/her refugee status;⁶⁰ (vi) If the third state determines that the person concerned is entitled to international protection, then this person must be granted a right of legal stay and a timely durable solution.⁶¹ According to the UNHCR, this can take one of three forms: firstly voluntary repatriation, meaning that a person voluntarily returns to his/her country of origin because there no longer exists a threat of persecution.⁶² Secondly integration in the country where the persons are present,⁶³

⁵⁶ Refugee Convention, *supra* note 16, Article 33 (1); See also: UNHCR, Executive Committee Conclusion No. 58 (XL) on Problem of refugees and asylum-seekers who move in an irregular manner from a country in which they had already found protection, 40th Session, (1989), §f (i), and; UNHCR, Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey as part of the EU-Turkey Cooperation in Tackling the Migration Crisis under the safe third country and first country of asylum concept, (23 March 2016), p. 2.

⁵⁷ Battjes, *supra* note 26, p. 397. See also: Legomsky, *supra* note 17, p. 673, §2 + 3, and; Michigan Guidelines on Protection Elsewhere, *supra* note 5, §6.

⁵⁸ UNHCR, Legal considerations regarding access to protection and a connection between the refugee and the third country, *supra* note 50, §7; See also: UNHCR, Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey, *supra* note 56, p. 2; Michigan Guidelines on Protection Elsewhere, *supra* note 5, §3, 8 and 11; UNCHR, Executive Committee Conclusion No. 58, *supra* note 56, §f (ii); UNHCR, Considerations on the ‘Safe Third Country Concept’: EU Seminar on the Associated States as Safe Third Countries in Asylum Legislation, (1996), p. 1; Legomsky, *supra* note 17, p. 673, §4 + 5, and; Battjes, *supra* note 26, p. 403-404.

⁵⁹ UNHCR, Legal considerations regarding access to protection and a connection between the refugee and the third country, *supra* note 50, §10.

⁶⁰ UNHCR, Considerations on the ‘Safe Third Country Concept’, *supra* note 58, p. 2; See also: UNHCR, Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey, *supra* note 56, p. 2, and; Legomsky, *supra* note 17, p. 673, §1 + 7.

⁶¹ UNHCR, Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey, *supra* note 56, p. 2

⁶² UNHCR, 10-Point Plan of Action on Refugee Protection and Mixed Movements, Chapter 7: Solutions for refugees, (first published 2007), p. 178-198, p. 184-186.

⁶³ *Ibid.*, 186.

or lastly resettlement to a third country;⁶⁴ (vii) A return is not allowed, even if the receiving state could offer effective protection, if this violates the person's right to family unity,⁶⁵ and; (viii) These criteria must be applied on a case-by-case basis and the person concerned must be able to agree or object to his/her transfer.⁶⁶

In the documents issued by UNHCR and a number of scholars a ninth criterion can be identified, namely requiring that the person concerned has a meaningful link/connection with the third country he/she is being returned to.⁶⁷ While UNHCR has always maintained that such a connection must exist in order for a return to be reasonable and sustainable,⁶⁸ it has also stated itself that "Requiring a connection between the refugee or asylum-seeker and the third state is not mandatory under international law",⁶⁹ which is why the criterion has not been included in the list of criteria set out above. Despite this, UNHCR has always favoured asylum procedures which do require the existence of a sufficient link and has said about this that in its views a mere transit by an individual through a third state is in principle not enough to establish such a sufficient connection or meaningful link.⁷⁰

The criteria mentioned above show that before a state is allowed to return a refugee to a STC, it must consider a large number of things. Most importantly it must check whether the person concerned will be able to rely on all the protections awarded by the Refugee Convention, its Protocol and other relevant human rights documents and it must find out whether the receiving states will either fairly determine the person's refugee status or be willing to offer him/her effective protection. According to Battjes the third state offers the person concerned such 'effective protection' when it either gives that person permission to stay in that third state, or if it will properly investigate whether or not the person concerned has a right to international protection.⁷¹ It is

⁶⁴ Ibid., 191.

⁶⁵ Legomsky, *supra* note 17, p. 669 and 673, §8; See also: UNHCR, UNHCR's Observation on the European Commission's Proposal for a Council Regulation 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, (2002), §7;

⁶⁶ Legomsky, *supra* note 17, p. 673, §9. See also: Michigan Guidelines on Protection Elsewhere, *supra* note 5, §12.

⁶⁷ UNHCR, Legal considerations regarding access to protection and a connection between the refugee and the third country, *supra* note 50, §6;

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ UNHCR, Comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (COM(2009)554, 21 October 2009), (2009), p. 34.

⁷¹ Battjes, *supra* note 26, p. 398-400.

important to point out that none of the criteria mentioned above require that a third state, to which a person is returned, is a state party to the Refugee Convention, its Protocol or relevant human rights treaties.⁷² While UNHCR does prefer that a person is returned to a state party to the Refugee Convention,⁷³ at the moment international law does not seem to require a third country to be a state party. The High Commissioner has even stated itself that a third country can be considered as offering effective protection if it is a state “that has ratified and fully complies with the 1951 Convention and/or its 1967 Protocol or, at least, has developed a practice akin to the 1951 Convention”.⁷⁴ This last aspect indicates that UNHCR does accept that states which are not state parties to the Convention can still be regarded as safe, as long as they comply with its contents in practice.⁷⁵

In this Chapter it has been shown when and why states have developed the safe country principles and adopted protection elsewhere policies. As explained, the most important reason for this seems to be the protection of national sovereignty. Under international law states are in principle still free to decide on who they allow to enter their territory and who they may wish to remove from it. By ratifying the Refugee Convention however, they have committed themselves towards offering the protections contained in this Convention to anyone who qualifies as a refugee in accordance with Article 1. The sovereign power of all states has furthermore been restricted by the prohibition of *refoulement*. Under this prohibition states are no longer allowed to send a person back to a state where his life or freedom is under threat, thereby limiting a state’s power to remove all persons which it deems undesirable. In order to comply with this principle, whilst at the same time preventing that they would become responsible for persons in need of international protection, states developed the safe country principles. These principles allow states to send persons back to another state, whilst at the same time complying with the principle of *non-refoulement*. Secondly this Chapter has shown that returning persons to a safe third country is in principle in compliance with international refugee law. Sadly, UNHCR has not yet

⁷² Battjes, *supra* note 26, p. 414; See also: Hathaway, *supra* note 55, p. 328.

⁷³ UNHCR, Legal considerations regarding access to protection and a connection between the refugee and the third country, *supra* note 50, §10.

⁷⁴ UNHCR, Aide Memoire – Directive on Minimum Standards and Procedures for Granting and Withdrawing Refugee Status, (18 November 2003), p. 2.

⁷⁵ Hathaway, *supra* note 55, p. 330. See also: UNHCR, Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures), (31 May 2001), §14, p. 4.

clarified which criteria must be fulfilled in order for such a return to be legal. This Chapter has attempted to provide for an overview of a number of these criteria. Even though this thesis does not claim that this list is complete or fully accepted, the criteria identified do follow logically from the Refugee Convention, various UNHCR documents and the writings by legal scholars. It follows from this list that before a state can return a person to a safe third country it must check a great number of things. Most importantly, a return must not only comply with the principle of *non-refoulement*, but the sending state must also make sure that the third state will also offer to the person returned the other rights contained in the Refugee Convention, its Protocol and other relevant human rights documents in practice. Furthermore, it must make sure that the receiving state will fairly determine the person's refugee status or be willing to offer him/her effective protection. In the next Chapter an analysis of the current European asylum procedures will be done. There it will be assessed under which conditions EU law allows for the return of a refugee to a safe third country. On the basis of that analysis it will be possible to assess whether the European procedures comply with the conditions mentioned in this Chapter.

3. Returns under EU law

In the previous Chapter it has been explained why the STC concept was developed and when states are allowed to rely on it under international law. Before it is possible to assess to what extent the application of the concept under European law complies with the criteria identified in the previous Chapter, an overview of the current European asylum procedure must be provided. Such an overview will be given in this Chapter, in order to find out what role there is for the STC concept within this procedure and to explain when EU Member States are allowed to return a person to a STC under EU law.

3.1 European Asylum Procedure

The EU first gained competences over the topics of migration and asylum through the adoption of the Treaty of Maastricht in 1992.⁷⁶ From 1999 onwards the EU has been adopting various pieces of legislation containing rules on: the qualification of persons

⁷⁶ Wagner, Dimitriadi, O'Donnel, Perumadan, Scholtzhauer, Simic & Yabasun, *supra* note 7, p. 17.

in need of international protection (Qualification Directive);⁷⁷ the asylum procedure that should be followed (Asylum Procedures Directive);⁷⁸ which Member State is responsible for examining an asylum application (Dublin Regulation),⁷⁹ and; reception conditions (Reception Conditions Directive).⁸⁰ Together these measures form the so-called Common European Asylum System (CEAS).⁸¹ Article 78 TFEU says that this system is based on 'accordance' with the Refugee Convention and the 1967 Protocol.⁸² Within the CEAS the STC concept plays a role in two situations: either when a Member State wishes to send a person who has applied for international protection to another Member State, or; when a Member State wants to expel a person to a third country.⁸³ While both types of returns are based on the STC concept,⁸⁴ the former situation is governed by the rules contained in the Dublin Regulation and the latter by the rules contained in the Asylum Procedures Directive.⁸⁵ As this thesis focusses on situations where persons are being returned to third countries, the next section will only discuss this latter option.

The Asylum Procedures Directive has as its goal the creation of a common procedure for granting and withdrawing international protection for persons who qualify for such protection in accordance with the Qualification Directive.⁸⁶ Whenever a Member State is confronted with an application for international protection it must in principle examine such a request in accordance with the rules in Chapters II and III of the Asylum Procedures Directive.⁸⁷ The Directive however also contains a number of grounds of refusal on the basis of which a Member State is allowed to refuse to offer protection.⁸⁸ One of these grounds of refusal is the inadmissibility of the application.⁸⁹ Article 33 (2) (c) of the Directive explains that Member States may declare an application inadmissible when a person has come from a country which is not a

⁷⁷ Directive 2011/95/EU, [2011], O.J. L 337/9.

⁷⁸ Directive 2013/32/EU, *supra* note 18.

⁷⁹ Regulation No. 604/2013, [2013], O.J. 180/31.

⁸⁰ Directive 2013/33/EU, [2013], O.J. L 180/96.

⁸¹ Wagner, Dimitriadi, O'Donnell, Perumadan, Scholtzhauer, Simic & Yabasun, *supra* note 7, p. 17.

⁸² Consolidated version of the Treaty on the Functioning of the European Union (TFEU), 2012, C 326/47, Article 78 (1).

⁸³ Battjes, *supra* note 26, p. 385.

⁸⁴ *Ibid.*, p. 197.

⁸⁵ *Ibid.*, p. 385.

⁸⁶ Directive 2013/32/EU, *supra* note 18, Article 1.

⁸⁷ *Ibid.* Chapters II and III.

⁸⁸ Battjes, *supra* note 26, p. 332.

⁸⁹ Directive 2013/32/EU, *supra* note 18, Article 33.

Member State and can be considered as a safe third country, pursuant to Article 38.⁹⁰ The use of the word ‘may’ in Article 33 (2) indicates that under the current rules Member States are free to decide whether they will actually declare such a request inadmissible or not. Section 1 of Article 33 explains that if an application is declared inadmissible on one of the grounds mentioned in section 2, a Member State is not required to assess the merits of an individual application,⁹¹ since another third state - where the person concerned may obtain international protection - is responsible for doing this.⁹²

3.2 Article 38 Asylum Procedures Directive

Article 33 (2) (c) Asylum Procedures Directive stipulates that an application may be declared inadmissible when the person concerned has come from a non-Member State which can be regarded as a safe third country, “pursuant to Article 38”.⁹³ That provision must be analysed next. Article 38 Asylum Procedures Directive explains which criteria must be fulfilled before a Member State is allowed to apply the STC concept. Section 1 of the provision says that a Member State may do so only when its domestic authorities are content that the person returned will be treated in accordance with the principles mentioned in subsections (a)-(e) in the third state.⁹⁴ These subsections will now be discussed. Subsection (a) of Article 38 (1) contains an almost exact copy of Article 33 of the Refugee Convention.⁹⁵ This subsection along with subsection (c) require that returns under the Asylum Procedures Directive do not violate the prohibition of *refoulement*.⁹⁶ This includes both direct and indirect *refoulement*.⁹⁷ In order to determine whether or not an individual return would be in accordance with the principle of *non-refoulement*, it is necessary that the merits of a claim for international protection are assessed at some point - either by the third or even by a subsequent fourth safe country -.⁹⁸ Such an assessment must be made rigorously,⁹⁹ and a decision

⁹⁰ Ibid., Article 33 (2) (c).

⁹¹ Ibid., Article 33 (1).

⁹² Cortinovis, *supra* note 4, p. 5.

⁹³ Directive 2013/32/EU, *supra* note 18, Article 33 (2) (c).

⁹⁴ Ibid. Article 38 (1).

⁹⁵ See: Directive 2013/32/EU, *supra* note 18, Article 38 (1) (a), and; Refugee Convention, *supra* note 16, Article 33.

⁹⁶ Battjes, *supra* note 26, p. 421.

⁹⁷ Ibid.

⁹⁸ Ibid., 421-422.

⁹⁹ Ibid., 418.

that a return would not violate the principle of *non-refoulement* must be open to an appeal by the individual concerned.¹⁰⁰ As was mentioned in Chapter 2, in order to comply with the *non-refoulement* principle it is not necessary that the third state involved is a state party to the Refugee Convention, its Protocol or relevant human rights treaties,¹⁰¹ as long as it meets the material standards set by these documents in practice.¹⁰²

Next, Article 38 (1) (b) requires that there exists no risk of serious harm in the third state for the person returned.¹⁰³ Article 15 of the Qualification Directive defines risk of serious harm as: “(a) the death penalty or execution; (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”.¹⁰⁴ This provision is of particular relevance for those persons who are in need of international protection, but who do not fit the definition of a refugee in Article 1 of the Refugee Convention. They are still protected by EU law, because they are “persons eligible for subsidiary protection”.¹⁰⁵ According to Article 2 (f) Qualification Directive these are third-country nationals or stateless persons who do not qualify as refugees, but who still are in need of protection.¹⁰⁶ Essentially what Article 38 (1) (b) does is offer these persons protection against expulsion in case a return would create a risk of serious harm as defined in Article 15.

Thirdly Article 38 (1) (d) Asylum Procedures Directive requires that the person returned is treated in accordance with 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 the third country.¹⁰⁷ As mentioned in Chapter 2, the prohibition of *refoulement* is not only contained in the Refugee Convention, but also in other international agreements such as the CAT,¹⁰⁸ the ICCPR,¹⁰⁹ and the ECHR.¹¹⁰ The

¹⁰⁰ Battjes, *supra* note 26, p. 418. See also: Directive 2013/32/EU, *supra* note 18, Article 46 (1).

¹⁰¹ Battjes, *supra* note 26, p. 414 and 423. See also: Hathaway, *supra* note 55, p. 330.

¹⁰² Battjes, *supra* note 26, p. 424. See also: UNHCR, *supra* note 75, §14, p. 4.

¹⁰³ Directive 2013/32/EU, *supra* note 18, Article 38 (1) (b).

¹⁰⁴ Directive 2011/95/EU, *supra* note 77, Article 15.

¹⁰⁵ *Ibid.*, Article 1.

¹⁰⁶ *Ibid.*, Article 2 (f).

¹⁰⁷ Directive 2013/32/EU, *supra* note 18, Article 38 (1) (d).

¹⁰⁸ CAT, *supra* note 33, Article 3 (1).

¹⁰⁹ ICCPR, *supra* note 34, Article 7.

¹¹⁰ See e.g. ECtHR, *Chahal v. United Kingdom*, *supra* note 35, §80.

criterion in Article 38 (1) (d) demands that a return also complies with the principle of *non-refoulement* as protected in these international legal documents.

Subsection (e) contains the most ambiguous criterion of Article 38 Asylum Procedures Directive. It demands first of all that the person who is returned must have the possibility to request refugee status in the third country, which seems clear enough. Secondly however the provision also requires that if the applicant can be considered as a refugee, he/she should receive “protection in accordance with the Geneva Convention”.¹¹¹ The Directive does not explain what this phrase means. Sadly, there also is no judgement by the Court of Justice of the European Union (CJEU) in which the court explains the meaning of this provision, nor is there a lot of academic literature which does. UNHCR has said that it interprets this requirement as meaning that the third state must ensure access to refugee status and to the all Conventions rights in law and in practice.¹¹² Battjes seems to agree with this interpretation by UNHCR.¹¹³ UNHCR does however accept that formally it is not empowered to interpret provisions of EU law and adds that the most appropriate way to establish the exact meaning of Article 38 (1) (e) would be for a court of one of the Member States to refer a preliminary question to the CJEU enquiring about the correct interpretation of the provision.¹¹⁴ Despite the fact that the CJEU has not yet been asked to answer such a preliminary question, the correct interpretation Article 38 (1) (e) can be deduced by applying the commonly accepted methods of interpretation of international law as described in Article 31 (1) of the Vienna Convention on the Law of Treaties (VCLT): textual, contextual and teleological interpretation.¹¹⁵ Within the EU legal system the CJEU is the institution which is principally responsible for the interpretation of EU law.¹¹⁶ This court formally only uses the VCLT when it interprets international agreements.¹¹⁷ It does however use all three methods of interpretation mentioned in Article 31, also

¹¹¹ Directive 2013/32/EU, *supra* note 18, Article 38 (1) (e).

¹¹² UNHCR, Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey, *supra* note 56, p. 6.

¹¹³ Battjes, *supra* note 26, p. 421.

¹¹⁴ UNHCR, Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey, *supra* note 56, p. 7.

¹¹⁵ VCLT, *supra* note 24, Article 31.

¹¹⁶ D. Chalmers, G. Davies & G. Monti, *European Union Law*, Cambridge University Press, Cambridge, 2014, p. 157.

¹¹⁷ Battjes, *supra* note 26, p. 42.

when it interprets EU law,¹¹⁸ despite formally not applying the VCLT in such situations. This is why these methods of interpretation can also be used to correctly interpret Article 38 (1) (e) Asylum Procedures Directive.

The textual method of interpretation seeks to ascertain the meaning of a text by looking at the usual meaning of its words.¹¹⁹ The most logical place to find the usual meaning of words is a dictionary. The phrase “in accordance with” is defined in the Online Oxford English Dictionary as “in agreement or harmony with; in conformity to; according to”,¹²⁰ and in the Longman Dictionary of English Language and Culture as “in a way that fulfils or agrees with”.¹²¹ When applying these definitions to Article 38 (1) (e) it can be said that the provision contains an obligation, not just a recommendation, for the relevant authorities to offer the protection that is provided by the Refugee Convention. Using this method of interpretation does however not clarify which protections contained in “the Geneva Convention” must be offered to the person concerned under subsection (e). In order to establish this, the contextual and teleological methods of interpretation will be used.

When applying the contextual method of interpretation, a specific provision is not seen as a separate rule but is interpreted as being a part of a broader system. Lenaerts and Guitérrez-Fons describe this method of interpretation as follows: “Just as the different parts of an engine must work together to keep it running, the CJEU looks at the functional relationship between the EU law provision in question and the normative system to which it belongs”.¹²² Article 31 (2) VCLT explains what can be considered as the context in which the individual provision should be placed, which includes instruments and treaties which are connected to the present rule.¹²³ Within the EU legal sphere the contextual method of interpretation is also used to interpret a specific provision as being part of a piece of legislation as a whole or of EU law in

¹¹⁸ See e.g.: K. Lenaerts & J. Guitérrez-Fons, ‘To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice’, *European University Institute*, EUI Working paper AEL 2013/9, 2013, Chapter 1 p. 6-28. See also: Battjes, *supra* note 26, p. 42.

¹¹⁹ Lenaerts & Guitérrez-Fons, *supra* note 118, p. 6.

¹²⁰ Online Oxford English Dictionary, under “accordance, n., §b in accordance with”, available at: <<https://www-oed-com.ezproxy.ub.unimaas.nl/view/Entry/1170?isAdvanced=false&result=1&rskey=fp2xkq&>>.

¹²¹ *Longman Dictionary of English Language and Culture*, Pearson Education Limited, Harlow, 2005, under “accordance”.

¹²² Lenaerts & Guitérrez-Fons, *supra* note 118, p. 13.

¹²³ M. Scheinin, ‘The art and science of interpretation in human rights law’, B. Andreassen, H. Sano and S. McInerney-Lankford (eds.), *Research Methods in Human Rights: A Handbook*, Edward Elgar Publishing Limited, Cheltenham, 2017, p. 17-37, 23.

general.¹²⁴ The European Asylum Support Office (EASO) has said that the secondary law making up the CEAS should be based on ‘accordance’ with the Refugee Convention and the 1967 Protocol,¹²⁵ which is again said in Article 78 TFEU.¹²⁶ It is because of this that Article 38 (1) (e) should not merely be interpreted in light of the Asylum Procedures Directive and EU law as a whole, but also in light of the Refugee Convention and the Protocol, as these European measures are based on and connected to these international documents. In Chapter 2 of this thesis it has been explained that states who are returning a person to a STC have an obligation under the Refugee Convention not merely to make sure that the return is in accordance with the principle of *non-refoulement*, but also to make sure that refugees are offered the other protections contained in the Convention and international human rights treaties.¹²⁷ Since the provisions of the Asylum Procedures Directive should be interpreted in the context of the Convention it makes sense to interpret Article 38 (1) (e) in a similar fashion. Not only would such an interpretation comply with the broader context of the Convention, but also with that the Asylum Procedures Directive and European asylum law as a whole, since all the measures forming the CEAS - including the Asylum Procedures Directive -,¹²⁸ pursue the full and inclusive implementation of the Refugee Convention.¹²⁹ This shows that these measures wish to implement the Refugee Convention fully, not just Article 33 which contains the prohibition of *refoulement*. It is because of this that Article 38 (1) (e) should be interpreted as meaning that a return to a STC is only in accordance with EU law if it is in accordance with principle of *refoulement*, if the returned person has a right to have his status fairly determined in the STC and that if the person is found to be a refugee, that he/she will be awarded with the other protections contained in the Convention and international human rights documents.

Interpreting the phrase “protection in accordance with the Geneva Convention” in this way would also be compliant with the teleological method of interpretation, which

¹²⁴ Lenaerts & Guitérrez-Fons, *supra* note 118, p. 13-14.

¹²⁵ European Asylum Support Office (EASO), *An Introduction to the Common European Asylum System for Courts and Tribunals – A Judicial Analysis*, (August 2016), p. 13.

¹²⁶ TFEU, *supra* note 82.

¹²⁷ See e.g. UNHCR, *Legal considerations regarding access to protection and a connection between the refugee and the third country*, *supra* note 50, §7; See also: UNHCR, *Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey*, *supra* note 56, p. 2

¹²⁸ Directive 2013/32/EU, *supra* note 18, recital 3.

¹²⁹ EASO, *supra* note 125, p. 13.

attempts to establish the meaning of a phrase by looking at its purpose.¹³⁰ Lenaerts and Guitérrez-Fons say that the teleological and contextual method of interpretation are often interlinked,¹³¹ which can also be said here. As mentioned above European asylum law and the Asylum Procedures Directive pursue the full and inclusive implementation of the Refugee Convention.¹³² Following the same reasoning as above, the purpose of these documents is the full implementation of the Convention, not merely of the principle of *non-refoulement*. On the basis of all this it can be concluded that Article 38 (1) (e) should be interpreted as meaning that national authorities must be satisfied that the person being returned will be able to claim refugee status in the STC and will be offered, not just the protection of the principle of *non-refoulement* there, but also all other protections contained in the Convention, its Protocol and international human rights documents.

Article 38 (2) Asylum Procedures Directive says that the application of the STC concept will furthermore be subject to rules laid down in the domestic law of the Member States.¹³³ The provision says that Member States must adopt rules on the methodology on the basis of which domestic authorities determine a third country to be safe,¹³⁴ and rules which allow the applicant to appeal such a determination in a specific case.¹³⁵ Subsection (a) of Article 38 (2) contains the final criterion that must be complied with, before a return to a STC is legal under EU law. This provision demands that the domestic authorities of the Member State that wish to return a person to a STC consider whether such a return would be reasonable, due to the existence of a sufficient connection between the person concerned and that third state.¹³⁶ As was briefly mentioned in Chapter 2, requiring a sufficient connection between an applicant and the STC is not mandatory under international law,¹³⁷ however the Asylum Procedures Directive does specifically mention it as a requirement. There exists a lot of debate on the question of when the connection between the person concerned and the STC can be classified as sufficient as to warrant the application of the STC concept under EU law. While UNHCR does recognize that the existence of a sufficient

¹³⁰ Lenaerts & Guitérrez-Fons, *supra* note 118, p. 24-25.

¹³¹ *Ibid.*

¹³² See e.g. EASO, *supra* note 125, p. 13. See also: Directive 2013/32/EU, *supra* note 18, recital 3.

¹³³ Directive 2013/32/EU, *supra* note 18, Article 38 (2).

¹³⁴ *Ibid.*, Article 32 (2) (b).

¹³⁵ *Ibid.*, Article 32 (2) (c).

¹³⁶ *Ibid.*, Article 38 (2) (a).

¹³⁷ UNHCR, Legal considerations regarding access to protection and a connection between the refugee and the third country, *supra* note 50, §6. See also: Battjes, *supra* note 26, p. 423.

connection is not required under international law, it has said that in its view such a connection should exist in order for a return to be considered reasonable and sustainable.¹³⁸ Furthermore it has said that the mere transit by the person concerned through the STC is insufficient to constitute a sufficient connection between the two, unless there exists a formal agreement between the two countries with similar asylum systems and standards.¹³⁹ On this issue the European Commission seems to fundamentally disagree with UNHCR, as it does consider a mere transit as sufficient to fulfil the requirement of a sufficient connection.¹⁴⁰ The domestic law and jurisprudence of a number of Member States seems to agree with the views of UNHCR, requiring more than a mere transit for the establishment of a sufficient connection, whereas other Member States do accept the transit as sufficient.¹⁴¹ This shows that there still exists a lot of disagreement about the correct interpretation of this requirement. Since the existence of a connection between the person concerned and the STC is not demanded by international law, the Asylum Procedures Directive offers more protection than is demanded by international law, no matter whether or not a mere transit is enough to establish a sufficient connection. The discussion of whether a mere transit through a STC is enough to establish a sufficient link therefore does not seem too relevant for answering the research question of this thesis, since this thesis seeks to ascertain whether or not the European application of the STC concept is in accordance with international human rights standards, which do not require the existence of such a link.¹⁴²

In this Chapter an analysis of the European asylum procedure has been made, in order to determine when EU Member States are allowed to return an applicant for international protection to a STC under EU law. As explained above Member States will apply this concept either when they wish to return a person to another Member State, or when they want to expel a person to a non-Member State. This latter situation

¹³⁸ UNHCR, Legal considerations regarding access to protection and a connection between the refugee and the third country, *supra* note 50, §6.

¹³⁹ UNHCR, Comments on the European Commission's proposal for a Directive on minimum standards on procedures in Member States for granting and withdrawing international protection, *supra* note 70, p. 34.

¹⁴⁰ European Commission, Letter written by Director-General for Migration and Home Affairs Matthias Ruete to the Secretary-General of the General Secretariat for Population and Social Cohesion of the Ministry of the Interior of Greece, (5 May 2016), Ref. Ares (2016)2149549, p. 2.

¹⁴¹ Asylum Information Database (Aida), Admissibility, Responsibility and Safety in European Asylum Procedures, (September 2016), p. 21.

¹⁴² UNHCR, Legal considerations regarding access to protection and a connection between the refugee and the third country, *supra* note 50, §6. See also: Battjes, *supra* note 26, p. 423.

is governed by the rules in the Asylum Procedures Directive, which allows the Member States to declare an application for international protection inadmissible when it is made by a person who has come from a non-Member State which can be considered as a STC.¹⁴³ Article 38 of the Asylum Procedures Directive explains which criteria must be fulfilled before a Member State is allowed to apply the STC concept.¹⁴⁴ As explained this is only allowed when the national authorities are satisfied that the person who is being returned will be treated in the third state in accordance with the principles mentioned in subsections (a)-(e).¹⁴⁵ Most importantly the domestic authorities must be content that the return does not violate the principle of *non-refoulement*,¹⁴⁶ however this is not all. By applying the textual, contextual and teleological methods of interpretation to subsection (e) of Article 38 (1) it has been shown that Article 38 not merely requires that a return is in compliance with the principle of *non-refoulement*, but also that the national authorities must satisfy themselves with the fact that the person returned will be granted the possibility to apply for international protection in that third state, and if found to be a refugee he/she must also be offered all the other protections contained in the Refugee Convention, its Protocol and relevant international human rights treaties. In that way the Asylum Procedures Directive, like the Refugee Convention and its Protocol as explained in Chapter 2, sets quite a high standard for the application of the STC concept. In the next Chapter it will be examined how all this theory is applied in practice, by investigating the ongoing returns of refugees from Europe to Turkey under the currently functioning EU Turkey deal. These returns are based on the premise that Turkey is a safe third country for all persons being returned. Whether or not the qualification of Turkey as a safe third country is correct and therefore as a consequence whether these returns are compliant with the requirements described in Chapters 2 and 3 will be examined next.

¹⁴³ Directive 2013/32/EU, *supra* note 18, Article 33.

¹⁴⁴ *Ibid.*, Article 38.

¹⁴⁵ *Ibid.*, Article 38 (a)-(e).

¹⁴⁶ *Ibid.*, Article 38 (a), (c) and (d).

4. Assessing the safety of Turkey

In the previous two Chapters it has been explained when a state is legally allowed to return applicants for international protection to another state through the application of the STC concept. Next it will be assessed to what extent practice complies with this theory by examining the currently ongoing return of refugees from EU Member States to Turkey under the EU-Turkey deal.¹⁴⁷ This Chapter will first of all explain what the

¹⁴⁷ EU-Turkey Statement, *supra* note 10.

deal entails. After that, it will be assessed whether the persons returned under the EU-Turkey deal are afforded the necessary protections described in the previous Chapters. On the basis of that analysis it will be possible to assess whether Turkey is correctly qualified as a safe third country for those persons returned under the EU-Turkey deal and therefore whether these returns comply with the standards set by international and European law.

4.1 EU-Turkey deal

In recent years the EU has been confronted with an enormous increase in persons trying to find international protection in one of its Member States.¹⁴⁸ The majority of these people are fleeing the continuous violence in Syria and other countries in the Middle-East.¹⁴⁹ In response to this so called “refugee crisis”,¹⁵⁰ the EU came up with a number of internal solutions – mainly consisting of offering help to those Member States confronted with the largest amount of people and developing new rules on the relocation of refugees among the Member States -, and some external ones.¹⁵¹ One of the external solutions that was thought of, was to increase cooperation with third countries in order to prevent people from getting access to EU territory. One of the third countries the EU decided to focus on was Turkey.¹⁵² The closer cooperation with that country was given shape first through the announcement of a joint action plan in 2015, under which Turkey agreed to increase its efforts to prevent persons from getting access to EU territory,¹⁵³ and to readmit all persons who had travelled through Turkey and were found not to be in need of international protection in accordance with the previously adopted readmission agreement between the EU and Turkey.¹⁵⁴

Subsequently in March 2016 the EU-Turkey Statement was announced,¹⁵⁵ which is commonly referred to as the EU-Turkey deal. This deal consists of a number of arrangements, the most important ones of which will now be discussed. First of all,

¹⁴⁸ Wagner, Dimitriadi, O’Donnel, Perumadan, Scholtzhauer, Simic & Yabasun, *supra* note 7, p. 8.

¹⁴⁹ UNHCR, Global trends – Forced displacement in 2017, *supra* note 1, p. 6.

¹⁵⁰ See e.g. Cortinovic, *supra* note 4, p. 3.

¹⁵¹ Niemann & Zaun, *supra* note 3, p. 7-12.

¹⁵² Wagner, Dimitriadi, O’Donnel, Perumadan, Scholtzhauer, Simic & Yabasun, *supra* note 7, p. 34.

¹⁵³ EU-Turkey joint action plan, *supra* note 9, Part II §1-3.

¹⁵⁴ Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation (EU-Turkey readmission agreement), [2014], O.J. L 134, Article 4.

See also: Amnesty International, ‘No safe refuge: Asylum-seekers and refugees denied effective protection in Turkey’, *supra* note 21, p. 9.

¹⁵⁵ EU-Turkey Statement, *supra* note 10.

it has been agreed that any new irregular migrant which enters Greece from Turkey after the 20th of March 2016 will be returned to Turkey.¹⁵⁶ Secondly the deal introduces a one-for-one resettlement scheme, entailing that for every Syrian that is returned to Turkey another Syrian will be resettled to the EU.¹⁵⁷ This scheme is capped at a maximum of 72.000 persons.¹⁵⁸ In return for all this assistance, the EU has agreed to accelerate the fulfilment of the visa liberalisation roadmap – essentially making it easier for Turkish nationals to obtain a visa -, ¹⁵⁹ and the EU has pledged to pay 3 billion euros in order to help Turkey to pay for all the necessary facilities, with a payment of another 3 billion euros coming later.¹⁶⁰ The fact that this deal allows EU Member States to return all irregular migrants entering Greece after the 20th of March 2016,¹⁶¹ shows that it differs from the previous EU-Turkey readmission agreement and the 2015 joint action plan. Whereas under those rules Turkey would only readmit persons who were found not to be in need of international protection,¹⁶² under the EU-Turkey deal Member States are allowed to expel all irregular migrants, including persons who are in need of international protection - e.g. Syrian refugees - .¹⁶³ In Chapter 2 it has been explained that states will justify such a return by arguing that the individual concerned could have previously obtained international protection in another state,¹⁶⁴ or put differently, they will claim that the person has come from a STC. The fact that the EU-Turkey deal allows Member States to also return persons in need of international protection to Turkey shows that in the eyes of the EU, Turkey can be considered as a safe third country for all persons who are being returned to it.¹⁶⁵

As has been explained above, both international and EU law set quite high standards before a return to a STC can be considered as legal. Most importantly both legal regimes require: (i) that the persons concerned have the possibility to apply for refugee status or be granted effective protection in the third state,¹⁶⁶ - with this latter

¹⁵⁶ Ibid., §1.

¹⁵⁷ Ibid., §2.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid., §5. See also: European Commission, 'Turkey's progress on the visa liberalisation roadmap', (4 May 2016), p. 1.

¹⁶⁰ Ibid., §6.

¹⁶¹ Ibid., §1.

¹⁶² EU-Turkey readmission agreement, *supra* note 154, Article 4.

¹⁶³ EU-Turkey Statement, *supra* note 10, §1.

¹⁶⁴ Cortinovis, *supra* note 4, p. 3. See also: UNHCR, Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey, *supra* note 56, p. 2.

¹⁶⁵ Cortinovis, *supra* note 4, p. 8.

¹⁶⁶ See e.g. Directive 2013/32/EU, *supra* note 18, Article 38 (1) (e); Battjes, *supra* note 26, p. 398-400, UNHCR, Considerations on the 'Safe Third Country Concept', *supra* note 58, p. 2; See also: UNHCR,

option meaning that the third state will either give the person permission to stay or investigate whether he/she should be granted international protection,¹⁶⁷ - and; (ii) that they are offered all the protections contained in the Refugee Convention - including but not limited to protection from *refoulement* -, its Protocol and relevant human rights treaties.¹⁶⁸

Before analysing whether or not these two criteria are complied with when a person is returned under the EU-Turkey deal, it is necessary to first provide a bit more information on Turkey's obligations under the Refugee Convention. As stated in Chapter 2, states that have ratified the Convention are in principle obliged to offer international protection to all persons who qualify as a refugee under Article 1. The possibility for refugees returned to Turkey to be awarded with international protection and to be granted all the rights contained in the Convention would therefore be guaranteed if Turkey had fully ratified the Convention. Sadly, this is not the case. While Turkey has ratified the Convention, to this day it retains a geographical limitation to it.¹⁶⁹ Such a geographical limitation is based on Article 1 (B) (I) of the Convention and allows states to offer the protections of the Convention only to persons who have become refugees in accordance with Article 1, as a consequence of events occurring in Europe.¹⁷⁰ It is because of this limitation that under the Convention Turkey is merely obliged to offer international protection and the other rights contained in the Convention to European refugees. Since the persons returned under the EU-Turkey deal have not become displaced due to events occurring in Europe – but instead due to events in the Middle-East or other parts of the world -,¹⁷¹ they can in principle not obtain any of the protections contained in the Refugee Convention in Turkey. Despite this however these protections must be awarded - also to non-European refugees – in order for returns to Turkey to be legal under international and European law, as explained in

Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey, *supra* note 56, p. 2, and; Legomsky, *supra* note 17, p. 673, §1 + 7.

¹⁶⁷ Battjes, *supra* note 26, p. 398-400.

¹⁶⁸ See e.g. UNHCR, Legal considerations regarding access to protection and a connection between the refugee and the third country, *supra* note 50, §7; See also: UNHCR, Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey, *supra* note 56, p. 2; UNCHR, Executive Committee Conclusion No. 58, *supra* note 56, §f (ii); UNHCR, Considerations on the 'Safe Third Country Concept', *supra* note 58, p. 1, and; Battjes, *supra* note 26, p. 403-404.

¹⁶⁹ UNHCR, Reservations and Declaration to the 1951 Refugee Convention, (last updated 1 April 2011), p. 2 under "Declarations under section B of article 1 of the Convention". See also: UNHCR, Global Appeal 2008-2009: Turkey, (2009), p. 304.

¹⁷⁰ Refugee Convention, *supra* note 16, Article 1 (B) (I).

¹⁷¹ UNHCR, Global trends – Forced displacement in 2017, *supra* note 1, p. 6.

Chapters 2 and 3. Furthermore, the fact that Turkey is formally not obliged to award non-European refugees with the protections contained in the Convention, does not automatically mean that the persons returned under the EU-Turkey deal do not have the possibility to request international protection, or will not be granted with the rights contained in the Convention, its Protocol and human rights instruments there. These returns could still be in accordance with the two criteria for legal returns mentioned above, if Turkey – despite its geographical limitation - offers these rights in practice.¹⁷² In the next sections of this Chapter it will be investigated whether or not this is the case.

4.2.1 Possibility to obtain refugee status or effective protection

As mentioned above, due to its geographical limitation to the Refugee Convention, Turkey is in principle not obliged to offer international protection to non-European refugees.¹⁷³ However as has been explained in Chapters 2 and 3, in order for a return to a STC to be legal under international and European law, it is however required that such a person must be able to apply for refugee status or be granted effective protection there.¹⁷⁴ In order for the returns of refugees under the EU-Turkey deal to be in accordance with international and European standards it is therefore required that those returned will be granted this opportunity in Turkey. While Turkey is not obliged to give non-European refugees this entitlement under the Refugee Convention, it must be investigated whether the country does offer this opportunity in some other way, e.g. under domestic law.

In April 2014 Turkey adopted its first ever asylum law:¹⁷⁵ The Law on Foreigners and International Protection (LFIP).¹⁷⁶ This new law was developed in close cooperation with UNHCR, the Council of Europe and various civil society groups,¹⁷⁷ and was heralded by the High Commissioner as “an important advancement for

¹⁷² Battjes, *supra* note 26, p. 424. See also: UNHCR, *supra* note 75, §14, p. 4.

¹⁷³ UNHCR, Reservations and Declaration to the 1951 Refugee Convention, *supra* note 169.

¹⁷⁴ See e.g. Directive 2013/32/EU, *supra* note 18, Article 38 (1) (e); Battjes, *supra* note 26, p. 398-400, UNHCR, Considerations on the ‘Safe Third Country Concept’, *supra* note 58, p. 2; See also: UNHCR, Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey, *supra* note 56, p. 2, and; Legomsky, *supra* note 17, p. 673, §1 + 7.

¹⁷⁵ UNHCR, ‘Refugees and Asylum Seekers in Turkey’, *UNHCR website*, (accessed 13 July 2019), available at: <<https://www.unhcr.org/tr/en/refugees-and-asylum-seekers-in-turkey>>.

¹⁷⁶ Republic of Turkey Ministry of the Interior Directorate General of Migration Management, Unofficial translation of the Law on Foreigners and International Protection (LFIP), Law No. 6458, (4 April 2014), available at: <https://www.goc.gov.tr/files/files/eng_minikanun_5_son.pdf>.

¹⁷⁷ Amnesty International, ‘No safe refuge: Asylum-seekers and refugees denied effective protection in Turkey’, *supra* note 21, p. 13.

international protection, and for Turkey itself”.¹⁷⁸ Part Three of the LFIP explains who is granted international protection in Turkey and under which conditions. Article 61 starts by giving a definition of the term ‘refugee’ within the meaning of the LFIP.¹⁷⁹ This provision reflects Turkey’s adherence to its geographical limitation to the Refugee Convention, as the definition only grants refugee status to persons who have a well-founded fear of being persecuted “as a result of events occurring in European countries”.¹⁸⁰ These persons are afforded all the protections as described in the Refugee Convention under the LFIP.¹⁸¹

This means that most persons who apply for international protection in Turkey will not be able to obtain full refugee status there, since the majority of them come from Iraq, Afghanistan and Iran.¹⁸² Instead most of these persons will be qualified as ‘conditional refugees’ in accordance with Article 62 LFIP.¹⁸³ This provision says that conditional refugee status will be granted to persons who have a well-founded fear of persecution due to “events occurring outside European countries”.¹⁸⁴ Furthermore the provision states that these persons “shall be allowed to reside in Turkey temporarily until they are resettled to a third country”.¹⁸⁵ This last phrase shows that under Turkish asylum law, these persons are expected to leave again in the future and that the only durable solution the LFIP offers these persons is resettlement to a third state.¹⁸⁶ While the status of conditional refugee does afford some rights, these are less extensive than those awarded to refugees within the meaning of Article 61.¹⁸⁷ E.g. these persons will not be granted the outlook of long-term integration in Turkey, they do not have a right

¹⁷⁸ United Nations News, ‘Turkish law on protection of foreigners wins UN praise’, *UN website*, (12 April 2013), available at: < <https://news.un.org/en/story/2013/04/436952-turkish-law-protection-foreigners-wins-un-praise>>.

¹⁷⁹ LFIP, *supra* note 176, Article 61.

¹⁸⁰ *Ibid.*

¹⁸¹ Norwegian Organisation for Asylum Seekers (NOAS), ‘Seeking Asylum in Turkey: A critical review of Turkey’s laws and practices – December 2018 update’, (2018), p. 10.

¹⁸² Refugee Solidarity Network, ‘About Refugees in Turkey’, (last updated October 2017), *Refugee Solidarity Network website*, available at: <<https://refugeesolidaritynetwork.org/about-refugees-in-turkey/>>.

¹⁸³ LFIP, *supra* note 176, Article 62.

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid.*

¹⁸⁶ N. Asli Sirin Öner & D. Genc, ‘Vulnerability leading to mobility: Syrians’ exodus from Turkey’, *Migration Letters*, Volume: 12, No: 3, (2015) p. 251-262, p. 254.

¹⁸⁷ Aida, Country Report: Turkey – 2018 Update, (2018), under ‘Content of International Protection’ §2, p. 99.

to family reunification,¹⁸⁸ and they do not have a right to employment but merely a right to apply for a work permit.¹⁸⁹

At first glance it would seem that Syrian refugees would also qualify as conditional refugees under Article 62 LFIP, since they have become displaced as a consequence of “events occurring outside European countries”.¹⁹⁰ This is however not the case, because the Turkish government adopted a separate mechanism for Syrians in October 2014:¹⁹¹ the Temporary Protection Regulation (TPR).¹⁹² The government adopted this Regulation on the basis of Article 91 TFIP.¹⁹³ Such a temporary protection regime can be adopted under the LFIP when Turkey is faced with a large increase of refugees attempting to obtain international protection in the country. According to UNHCR, states are in principle allowed to adopt a temporary protection regime in such situations.¹⁹⁴ Under the TPR, Syrians who have arrived in Turkey after the 28th of April 2014 are not granted conditional refugee status, but instead can receive temporary protection status.¹⁹⁵ Whether or not they receive such status is left to the discretion of the Directorate General of Migration Management (DGMM).¹⁹⁶ The TPR offers temporary protection holders a right of legal stay in Turkey – although only temporarily –, protection from *refoulement* and from being punished for having entered Turkey illegally.¹⁹⁷ Since the protection awarded under the TPR is of a temporary nature, these people are not allowed to apply for a long-term residence permit,¹⁹⁸ nor does the Regulation provide them with a right to family reunification.¹⁹⁹ Lastly temporary protection holders are granted some rights relating to access to health services, employment, education and social assistance,²⁰⁰ with some being more extensive than others.

¹⁸⁸ Ibid.

¹⁸⁹ Ibid., p.108.

¹⁹⁰ LFIP, *supra* note 176, Article 62.

¹⁹¹ NOAS, *supra* note 181, p. 11. See also: Asli Sirin Öner & Genc, *supra* note 186, p. 255.

¹⁹² Unofficial Translation of Turkey’s Temporary Protection Regulation (TPR), (22 October 2014), <https://www.goc.gov.tr/files/_dokuman16.pdf>.

¹⁹³ Ibid., Article 2. See also: LFIP, *supra* note 176, Article 91.

¹⁹⁴ UNHCR, Guidelines on Temporary Protection or Stay Arrangements, (February 2014), under ‘Annex’.

¹⁹⁵ TRP, *supra* note 192, Article 7 and provisional Article 1.

¹⁹⁶ Aida Country Report: Turkey, *supra* note 187, p. 111.

¹⁹⁷ Ibid., 122.

¹⁹⁸ TRP, *supra* note 192, Article 25.

¹⁹⁹ Aida Country Report: Turkey, *supra* note 187, p. 111.

²⁰⁰ Asli Sirin Öner & Genc, *supra* note 186, p. 255. See also: Aida Country Report: Turkey, *supra* note 187, p. 133-143.

It has been shown above that both Syrian and non-Syrian refugees can in theory apply for some form of international protection in Turkey and are being granted with the right to legal stay in the country under Turkish law. Turkish authorities will investigate whether or not a person should be granted international protection as a conditional refugee and even if not, it may give these persons a right of legal stay in Turkey as temporary protection holders. It has however been mentioned on multiple occasions that practice rather than theory is decisive for determining whether a return to a STC is in accordance with international and European law.²⁰¹ Whether or not persons returned by EU Member States will actually be able to obtain either conditional refugee or temporary protection status will be discussed in the subsequent sections of this Chapter.

4.2.2 Possibility to obtain conditional refugee status for non-Syrians in practice

It will first of all be discussed whether persons, who do not have the Syrian nationality, returned under the EU Turkey deal will in practice be able to obtain conditional refugee status. Under the LFIP the DGMM is the agency appointed to deal with asylum applications.²⁰² The DGMM is made up of various Provincial Departments for Migration Management (PGMM).²⁰³ Whenever a person wishes to apply for conditional refugee status,²⁰⁴ - or when a Syrian wishes to register for temporary protection, as further discussed below - they must approach the PGMM.²⁰⁵ In case a PGMM is unable to register an individual, it will tell that person to travel to a different province within 15 days in order to be registered there.²⁰⁶ Whereas UNHCR used to be involved in this application procedure, as of September 2018 this is no longer the case.²⁰⁷ The decision to completely leave this process to the PGMM has been criticised by civil society groups claiming that in practice the PGMM does not have the capacity to deal with the

²⁰¹ Battjes, *supra* note 26, p. 424. See also: UNHCR, *supra* note 75, §14, p. 4.

²⁰² Asli Sirin Öner & Genc, *supra* note 186, p. 255. See also: Aida Country Report: Turkey, *supra* note 187, p. 254.

²⁰³ Aida Country Report: Turkey, *supra* note 187, p. 21.

²⁰⁴ *Ibid.*

²⁰⁵ *Ibid.*, p. 118.

²⁰⁶ *Ibid.*, 21.

²⁰⁷ UNHCR Information Leaflet, 'UNHCR will end registration process in Turkey on 10 September 2018', (2018), available at: <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>.

amount of applications that it has to deal with, resulting in people not being able to apply for protection and enormous increases in waiting times.²⁰⁸

Sadly, this is in no way the only problem that is encountered by persons who attempt to apply for conditional refugee status in Turkey. A few more examples of problems will be provided next. When people manage to get themselves registered as an applicant for conditional refugee status, an interview must be arranged within 30 days.²⁰⁹ The LFIP furthermore says that the applicant has a right to have a lawyer and an interpreter present during the interview.²¹⁰ In practice there generally are not enough lawyers and interpreters available and even when they are available they are often not of a very good quality, resulting in people not being able to properly have their story heard by the Turkish authorities which could affect the decision of whether or not protection will be offered.²¹¹

Another problem occurs when applicants are told by the PGMM to report to a different province for registration. It often happens that those persons are not provided with the necessary travel documents by the PGMM resulting in them being arrested by Turkish police during their travels and being sent to so-called 'Removal Centres', which essentially are detention centres for refugees with the purpose of removing them from Turkish territory.²¹² Once inside these removal centres it becomes "virtually impossible" for persons to register for conditional refugee status,²¹³ as they are hardly ever provided with legal representation and even when there are lawyers present, they are often not allowed to consult with their clients or are not provided with access to relevant documents.²¹⁴ The problems encountered by persons detained in removal centres are highly problematic for the legality of returns under the EU-Turkey deal, since most persons returned under the deal have been sent to such centres.²¹⁵

²⁰⁸ See e.g. Aida Country Report: Turkey, *supra* note 187, p. 29: "the earliest registration appointments given to Afghan nationals are for 2021". See also: Amnesty International, 'No safe refuge: Asylum-seekers and refugees denied effective protection in Turkey', *supra* note 21, p. 5.

²⁰⁹ LFIP, *supra* note 176, Article 75.

²¹⁰ *Ibid.*, Article 70 (2) and 75 (1).

²¹¹ Aida Country Report: Turkey, *supra* note 187, p. 33-34.

²¹² *Ibid.*, p. 78.

²¹³ O. Ulusoy & H. Battjes, 'Situation of Readmitted Migrants and Refugees from Greece to Turkey under the EU-Turkey Statement', (2017), *VU Migration Law Series*, No 15, p. 4-42, p. 22.

²¹⁴ Amnesty International, 'No safe refuge: Asylum-seekers and refugees denied effective protection in Turkey', *supra* note 21, p. 16-17. See also: Aida Country Report: Turkey, *supra* note 187, p. 31.

²¹⁵ European Commission, 'Sixth Report on the Progress made in the implementation of the EU-Turkey Statement', Strasbourg, (13 June 2017), COM(2017) 323 final, p. 5. See also: Dutch Council for Refugees (DCR), 'The DCR/ECRE desk research on application of a safe third country and a first country of asylum concepts to Turkey', (May 2016), §32, p. 9.

According to reports, only 57 out of a total of 1360 persons returned to Turkey under the deal have actually been able to become registered with the Turkish authorities whilst being in these detention centres.²¹⁶

A final example of problems encountered by people trying to obtain conditional refugee status in Turkey relates to the decisions on their application. According to the LFIP a decision on an application should be taken within six months,²¹⁷ it must include “material reasons and legal grounds” for the decision and the person concerned must be informed of his possibility to appeal this decision.²¹⁸ In practice however, decisions often violate the time limit set by Article 78 (1) LFIP and decisions often do not explain why an application has been denied.²¹⁹ Furthermore, while the LFIP does allow for appeals, in practice hardly any applicants actually start such proceedings. This seems odd given the enormous number of persons applying for refugee status in Turkey and the impact a negative decision on an asylum application could have on the life of these applicants. According to Amnesty International, the lack of appeals “raises serious doubts about access to review procedures”.²²⁰ On the rare occasion that appeal proceedings are started, they come with their own procedural problems: e.g. there not being enough lawyers available, these lawyers not being of sufficient quality and sometimes the procedural costs of bringing an appeal being too high for applicants – even with the help of Turkey’s Legal Aid Scheme and various NGOs.²²¹

The information provided above shows that while the LFIP formally provides non-Syrians returned under the EU-Turkey deal with the possibility to obtain conditional refugee status in Turkey, in practice it is highly doubtful whether these persons will actually be able to obtain such status. As explained the application procedure is riddled with problems, which only seems to have gotten worse ever since UNHCR has decided to leave the job of registering new applicants to Turkey’s PGMM.²²² Based on everything explained above, it seems that trying to obtain conditional refugee status for refugees returned under the EU Turkey deal is very

²¹⁶ I. Van Liempt, M. Alpes, S. Hassan, S. Tunaboynu, O. Ulusoy & A. Zoomers, ‘Evidence-based assessment of migration deals: the case of the EU-Turkey Statement’, *Final Report by Utrecht University Human Geography and Planning - Faculty of Geosciences*, December 2017, p. 1-31, p. 21.

²¹⁷ LFIP, *supra* note 176, Article 78 (1).

²¹⁸ *Ibid.*, Article 78 (6).

²¹⁹ Amnesty International, ‘No safe refuge: Asylum-seekers and refugees denied effective protection in Turkey’, *supra* note 21, p. 16.

²²⁰ *Ibid.*

²²¹ Aida Country Report: Turkey, *supra* note 187, p. 36-41.

²²² See e.g. Aida Country Report: Turkey, *supra* note 187, p. 29.

difficult as nearly all applications are faced with practical problems. This is especially true for those persons who are placed by the Turkish authorities in a Removal Centre,²²³ with certain lawyers working in the field going as far as saying that for these persons it has become “virtually impossible” to obtain conditional refugee status.²²⁴ As mentioned this is highly problematic for the legality of returns under the EU-Turkey deal because, as the European Commission itself has indicated, most people returned under the deal are placed in such removal centres.²²⁵ In a 2016 report on the safety of Turkey for persons returned under the EU-Turkey deal Amnesty International has stated that “asylum-seekers do not have access to fair and efficient procedures for the determination of their status”.²²⁶ On the basis of the information provided it seems that this conclusion sadly is still true today. So, while the LFIP does in theory provide all non-Syrians returned under the EU-Turkey deal the possibility to obtain conditional refugee status, it seems that in practice this is not always the case, thereby making Turkey not a STC for non-Syrians who are being returned under the deal. Next it will be assessed whether things are better for Syrians returned under the EU-Turkey deal.

4.2.3 Possibility to obtain temporary protection status for Syrians in practice

As mentioned, while formally the DGMM is the authority responsible for determining whether and if so which type of protection should be granted to a particular person,²²⁷ in practice both persons applying for conditional refugee status and persons who wish to register for temporary protection must report to the relevant PGMM.²²⁸ Due to its temporary and emergency nature, temporary protection within the meaning of the LFIP and the TPR is not regarded as a form of international protection.²²⁹ As explained however, the status does grant persons the right of legal stay in Turkey,²³⁰ which means that theoretically it could still be considered as offering ‘effective protection’,²³¹ so that these types of returns could still meet this requirement for a legal return. The

²²³ Amnesty International, ‘No safe refuge: Asylum-seekers and refugees denied effective protection in Turkey’, *supra* note 21, p. 16-17. See also: Aida Country Report: Turkey, *supra* note 187, p. 31.

²²⁴ Ulusoy & Battjes, *supra* note 213, p. 22.

²²⁵ European Commission, *supra* note 215, p. 5. See also: DCR, *supra* note 215, p. 9.

²²⁶ Amnesty International, ‘No safe refuge: Asylum-seekers and refugees denied effective protection in Turkey’, *supra* note 21, p. 5.

²²⁷ Asli Sirin Öner & Genc, *supra* note 186, p. 255. See also: Aida Country Report: Turkey, *supra* note 187, p. 254.

²²⁸ Aida Country Report: Turkey, *supra* note 187, p. 21, 111 and 118.

²²⁹ *Ibid.*, p. 111.

²³⁰ *Ibid.*, p. 122.

²³¹ Battjes, *supra* note 26, p. 398-400.

status of temporary protection should apply to all persons who fall within the scope of the TPR, without any assessment of whether any specific person is actually in need of international protection.²³² Despite this, in practice these persons are obliged to register with the relevant PGMM so that a so-called ‘pre-registration phase’ can start, during which the authorities will determine whether or not temporary protection status will be granted.²³³ This is also the case for those returned under the EU-Turkey deal.²³⁴ Due to the large numbers of persons trying to register, lack of available interpreters and lawyers this pre-registration face is fraught with delays and can take a very long time.²³⁵ The problem with that is, that without being properly registered with the Turkish authorities these persons do not have any legal status in Turkey, meaning that they cannot invoke any rights – e.g. access to healthcare or education – and run the risk of being sent to a removal centre or eventually being deported.²³⁶

Various NGOs claim that these kinds of problems are occurring more and more recently due to the fact that Turkish authorities have stopped registering Syrian asylum seekers in various provinces altogether,²³⁷ including those returned under the EU-Turkey deal.²³⁸ While it is understandable that Turkish provincial authorities are confronted with an enormous amount of work due to the high number of applications, these Syrians should still be able to register with the authorities in order to be granted some form of effective protection in Turkey. According to a report made by Human Rights Watch however, Syrian asylum-seekers are not being granted this opportunity and are being bluntly told by Turkish authorities to leave.²³⁹ According to this NGO “The suspension of registration is Turkey’s latest effort to deny new asylum seekers protection”.²⁴⁰ The Turkish authorities,²⁴¹ and UNHCR however deny that these authorities have stopped registering Syrian refugees.²⁴² Other aid agencies confirmed

²³² Aida Country Report: Turkey, *supra* note 187, p. 112.

²³³ NOAS, *supra* note 181, p. 25. See also: Aida Country Report: Turkey, *supra* note 187, p. 118.

²³⁴ Aida Country Report: Turkey, *supra* note 187, p. 119.

²³⁵ *Ibid.*, p. 119 and 120.

²³⁶ NOAS, *supra* note 181, p. 25.

²³⁷ See e.g. Human Rights Watch report, *supra* note 23. See also: NOAS, *supra* note 181, p. 25, and; Aida Country Report: Turkey, *supra* note 187, p. 118;

²³⁸ Human Rights Watch, *supra* note 23, under ‘European Union Remains Silent’.

²³⁹ *Ibid.*, under ‘Consequences of Suspended Registration’.

²⁴⁰ *Ibid.*

²⁴¹ Human Rights Watch, ‘HRW Translation: Turkey’s Directorate General of Migration Management Responses to Human Rights Watch Questions’ (June 2018), available at:

<https://www.hrw.org/sites/default/files/supporting_resources/201806eca_turkey_refugees_asylum.pdf

>.

²⁴² Human Rights Watch, *supra* note 23. See also: NOAS, *supra* note 181, p. 26.

the findings by Human Rights Watch,²⁴³ with some Turkish news reports even claiming that reporters were told by the Turkish Ministry of the Interior itself that the authorities have stopped registering Syrian asylum seekers.²⁴⁴

While it is true that a very large number of Syrian asylum seekers have been able to register with the Turkish authorities – with the latest UNHCR data saying that more 5.6 million Syrians have been registered -,²⁴⁵ everything explained above seems to suggest that Syrians returned under the EU-Turkey deal also face serious obstacles when trying to obtain temporary protection status under the TPR. If the reports by various NGOs, that Turkish authorities have completely stopped registering Syrian refugees in certain provinces are true, then these people are clearly not offered the possibility to obtain effective protection in Turkey. Even if these reports are not true, or if a person resides in a province where the authorities are still registering asylum seekers, the information provided above has shown that for all Syrians in Turkey it is very hard to obtain temporary protection status, resulting in them not being able to access certain basic human rights and some of them being deported for not being properly registered. The already mentioned conclusion made by Amnesty International in 2016 “asylum-seekers do not have access to fair and efficient procedures for the determination of their status”,²⁴⁶ therefore also seems to also still apply to Syrians trying to register for temporary protection in Turkey. Consequently, this means that in practice it does not seem possible for all persons returned under the EU-Turkey deal to apply for refugee status or be granted effective protection in the third state, as demanded by both international and European law.²⁴⁷

In the next section of this thesis it will be assessed whether or not the returns under the EU-Turkey deal do comply with the second criterion for legal returns: returnees must be awarded with the protections of the Refugee Convention its Protocol

²⁴³ Ibid.

²⁴⁴ F. Kizilkoyun, ‘Turkish government stops relocating Syrians to Istanbul’, *Hürriyet Daily News website*, (9 February 2018), available at: <<http://www.hurriyetdailynews.com/turkish-government-stops-relocating-syrians-to-istanbul-127084>>.

²⁴⁵ UNHCR, ‘Operation Portal Refugee Situations: Syria Regional Refugee Response’, *Operation Portal Refugee Situations website*, (last updated: 4 July 2019), available at: <<https://data2.unhcr.org/en/situations/syria>>.

²⁴⁶ Amnesty International, ‘No safe refuge: Asylum-seekers and refugees denied effective protection in Turkey’, *supra* note 21, p. 5.

²⁴⁷ See e.g. Directive 2013/32/EU, *supra* note 18, Article 38 (1) (e); Battjes, *supra* note 26, p. 398-400, UNHCR, Considerations on the ‘Safe Third Country Concept’, *supra* note 58, p. 2; See also: UNHCR, Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey, *supra* note 56, p. 2, and; Legomsky, *supra* note 17, p. 673, §1 + 7.

and relevant human rights treaties.²⁴⁸ In this assessment, the previously discussed question of whether or not those returned are actually able to obtain conditional refugee status or temporary protection status will be disregarded. In that way it is possible to investigate whether – even if the Turkish authorities manage to better the current procedures and will be able to grant everyone returned under the deal with their applicable status - the rights granted to conditional refugees and temporary protection holders by the LFIP and TPR are sufficient to say that this requirement for a legal return is met both in theory and in practice.

4.3.1 Protection in accordance with the Refugee Convention, its Protocol and relevant human rights treaties

As explained, states that wish to return a person to a STC must not merely make sure that he/she will be able to apply for refugee status or be granted effective protection there, but also that he/she is awarded all the protections offered by the Refugee Convention, its Protocol and relevant human rights treaties.²⁴⁹ In this section it will be investigated - regardless of whether or not persons returned under the EU-Turkey deal will be able to obtain any form of protection – whether the conditional refugee status granted to non-Syrians and/or the temporary protection status awarded to Syrians under Turkish asylum law provides these persons with the necessary protections, so that it can be said that these returns comply with the criterion of protection in accordance with the Convention, its Protocol and relevant human rights instruments. These documents contain a wide array of rights. It is impossible to assess whether or not each and every one of these rights is granted in theory and in practice to those returned under the EU-Turkey deal. As mentioned above however, a return to a STC will only be in accordance with the requirements described in the previous two Chapters if the person returned is granted all the entitlements contained in the Convention, the Protocol and the relevant human rights treaties. Because the person

²⁴⁸ See e.g. UNHCR, Legal considerations regarding access to protection and a connection between the refugee and the third country, *supra* note 50, §7; See also: UNHCR, Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey, *supra* note 56, p. 2; UNCHR, Executive Committee Conclusion No. 58, *supra* note 56, §f (ii); UNHCR, Considerations on the ‘Safe Third Country Concept’, *supra* note 58, p. 1, and; Battjes, *supra* note 26, p. 403-404.

²⁴⁹ See e.g. UNHCR, Legal considerations regarding access to protection and a connection between the refugee and the third country, *supra* note 50, §7; See also: UNHCR, Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey, *supra* note 56, p. 2; UNCHR, Executive Committee Conclusion No. 58, *supra* note 56, §f (ii); UNHCR, Considerations on the ‘Safe Third Country Concept’, *supra* note 58, p. 1, and; Battjes, *supra* note 26, p. 403-404.

must be granted all these rights, a return should be considered as not complying with this criterion if it can be proved that the persons returned under the deal are not offered a few or even one of the rights contained in these documents. It is therefore not necessary to make an analysis over every right contained in the Convention, its Protocol and relevant human rights documents. Instead, this section will only consider a limited number of rights protected by the Refugee Convention: the right not to be returned to a country where the life or freedom of the individual concerned would be threatened;²⁵⁰ a number of rights which protect the ability for refugees to take care of themselves and live socially involved lives in their host state, including: the right to employment, housing and education,²⁵¹ and; the right to a timely durable solution of their situation.²⁵² The choice to analyse these specific is rights is based on UNHCR's 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, in which UNHCR itself indicates that the STC concept under the EU-Turkey deal may only be applied if the Turkey offers those returned with protection from *refoulement*, the other protections contained in the Convention and international human rights treaties, and with a right to a timely durable solution.²⁵³

Before starting with the analysis of these rights however, it is necessary to give a bit more explanation on the type of protections contained in the Refugee Convention. The acquisition of entitlements under the Convention works on the basis of the so-called 'incremental system'. This system is based on the idea that a person's protections become stronger as his/her ties to the host country become tighter.²⁵⁴ It is because of this system that, while initially refugees are merely entitled to the protections contained in those provisions which are meant to apply to all refugees, entitlements will increase once his/her presence becomes 'lawful' in the host country - with the same being true for those 'residing' and those 'lawfully residing' there -.²⁵⁵ The idea behind this incremental system is that refugees should not become socially

²⁵⁰ See e.g. Refugee Convention, *supra* note 16, Article 33.

²⁵¹ *Ibid.*, Articles 17, 21 and 22.

²⁵² UNHCR, Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey, *supra* note 56, p. 2

²⁵³ *Ibid.*

²⁵⁴ Battjes, *supra* note 26, p. 449.

²⁵⁵ *Ibid.*

excluded from the society in which they are residing.²⁵⁶ In order to make sure that these people can participate professionally and socially in the society of their host countries, they will get a claim to more and more entitlements over time - e.g. the right to employment or to education -.²⁵⁷ Importantly, within the Convention system most rights do not contain absolute entitlements, but instead contain rights of equal treatment.²⁵⁸ These provisions contain protections which make sure that “Refugees are supposed to incrementally be on a level with ‘the Others’, the reference group varying depending on the specific right.”²⁵⁹ E.g. Article 17 of the Convention relates to the possibility for refugees to obtain a wage-earning employment in the host country.²⁶⁰ The provision does however not give all refugees an absolute right to employment in their host countries, but rather obliges the host state “to accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances...”.²⁶¹ This means that a host country will only violate Article 17 of the Convention if refugees on their territory are being treated worse than the reference group of this right: nationals of a foreign country in the same circumstances. This must be kept in mind when trying to assess whether or not Turkey provides all persons returned under the EU-Turkey deal with the protections they are entitled to.

4.3.2 Non-refoulement

In the previous Chapters it has been mentioned that one of the fundamental principles underlying international refugee law is the principle of *non-refoulement*.²⁶² As explained, under the Convention and various international human rights documents – e.g. the CAT, ICCPR and ECHR -,²⁶³ a refugee has a right not to be returned to a country “where his life or freedom would be threatened on account of his race, religion,

²⁵⁶ A. Lübke, ‘Deflection of Asylum Seekers to Ghettos in Third Countries?’ *Verfassungsblog on matters constitutional website*, 4 May 2018), available at: <<https://verfassungsblog.de/deflection-of-asylum-seekers-to-ghettos-in-third-countries/>>.

²⁵⁷ Refugee Convention, *supra* note 16, Articles 17 and 22.

²⁵⁸ Lübke, *supra* note 256.

²⁵⁹ *Ibid.*

²⁶⁰ Refugee Convention, *supra* note 16, Articles 17.

²⁶¹ *Ibid.*

²⁶² Battjes, *supra* note 26, p. 10. See also: UNHCR, *supra* note 27, p. 3.

²⁶³ Refugee Convention, *supra* note 16, Article 33 (1); CAT, *supra* note 33, Article 3 (1); ICCPR, *supra* note 34, Article 7 and; ECtHR, *Chahal v. United Kingdom*, *supra* note 35, §80.

nationality, membership of a particular social group or political opinion".²⁶⁴ Given the importance of this principle, it makes sense to start the analysis of whether or not Turkey provides persons returned under the EU-Turkey deal with all necessary entitlements, with this principle. The principle is not merely incorporated in the Convention and the human rights instruments mentioned above, but also in Article 4 LFIP,²⁶⁵ and Article 6 TPR.²⁶⁶ The definition of the principle in these Turkish pieces of legislation is almost identical to the one contained in Article 33 of the Convention. Since the principle is protected by both the LFIP and the TPR, it appears that at least in theory both non-Syrian conditional refugees and Syrian temporary protection holders in Turkey have a right not to be returned to a country where their life and freedom would be threatened.

Quickly after the adoption of the EU-Turkey deal however, a number of scholars and NGOs started to doubt whether Turkey was complying with the principle of *non-refoulement*. Amnesty International for example claims that its research shows that refugees have been send back to countries where their life and freedom would be threatened.²⁶⁷ This specific report already dates back to 2016. Claims however, that Turkish authorities are forcibly removing refugees from Turkish territory and returning to dangerous places continue to be reported today. E.g. an article publicized by the main Dutch public broadcaster: NOS, claims that such forceful removals have occurred on several thousand of occasions since the end of July 2019.²⁶⁸ Furthermore in the large majority of cases coming before Greek Administrative Appeal Committees - who were asked to rule on the legality of a return of a refugee to Turkey under the EU-Turkey deal - it was held that the STC requirements were not fulfilled,²⁶⁹ with some Committees even stating that the principle of *non-refoulement* is "systematically violated in Turkey".²⁷⁰ Concerns about Turkey's adherence to the principle have increased even further lately, after the government's decision to adopt Emergency

²⁶⁴ Refugee Convention, *supra* note 16, Article 33 (1).

²⁶⁵ LFIP, *supra* note 176, Article 4.

²⁶⁶ TRP, *supra* note 192, Article 6.

²⁶⁷ Amnesty International, 'No safe refuge: Asylum-seekers and refugees denied effective protection in Turkey', *supra* note 21, p. 5 and 11.

²⁶⁸ L. Waagmeester, 'Deportaties in Turkije: Ze hebben hem naar Syrië gestuurd', *Nederlandse Omroep Stichting (NOS) website*, (15 August 2019), available at: <<https://nos.nl/artikel/2297678-deportaties-in-turkije-ze-hebben-hem-naar-syrie-gestuurd.html>>.

²⁶⁹ M. Gkliati, 'The EU-Turkey Deal and the Safe Third Country Concept before Greek Asylum Appeals Committees', *Movements, Journal for Critical Migration and Border Regime Studies*, Vol. 3, Issue 2/2017, p. 213-224, p. 213.

²⁷⁰ *Ibid.*, p. 218.

Decree 676 in October 2016.²⁷¹ This decree provides that deportation decisions can be taken at any stage of the procedure against applicants applying for international protection, because of: “(i) leadership, membership or support of a terrorist organisation or a benefit-oriented criminal groups; (ii) threat to public order or public health, or; (iii) relation to terrorist organisations defined by international institutions and organisations”.²⁷² The Emergency Decree can be regarded as problematic for a number of reasons. First of all, the decision of whether or not a person falls within one of the groups mentioned above is made by a government employee rather than a judge.²⁷³ Since these persons will be awarded with a removal decision which the authorities may execute immediately,²⁷⁴ it may happen that a person is deported without any possibility to ask for a judicial review.²⁷⁵ Ever since the adoption of the emergency decree the number of deportations of refugees from Turkey has increased,²⁷⁶ and while the Turkish government may claim that the decree was adopted to combat terrorism,²⁷⁷ its adoption clearly also creates a greater risks for refugees to be arbitrarily removed from Turkish territory.²⁷⁸ Secondly, while removal decisions can be appealed before Turkish administrative courts,²⁷⁹ such an appeal will not have a suspensive effect. This of course creates the risk of a specific person being removed whilst awaiting the outcome of his/her appeal.²⁸⁰ Furthermore Turkish administrative courts hardly ever stop a deportation because of a violation of *non-refoulement* and when they do it seems that compliance with these court orders depends on the individual police officers who are confronted with such orders - with some lawyers reporting that their clients were removed despite a court order which prohibited this -.²⁸¹ In practice it seems that the only effective remedy against a removal

²⁷¹ See e.g. Amnesty International, ‘Refugees at heightened risk of refoulement under Turkey’s State of Emergency’, Index nr. EUR 44/7157/2017, (22 September 2017), p. 1-4.

²⁷² LFIP, *supra* note 176, Article 54 (2), as amended by Emergency Decree 676 (29 October 2016), Article 36. See also: Aida Country Report: Turkey, *supra* note 187, p. 23.

²⁷³ NOAS, *supra* note 181, p. 25. See also: Van Liempt, Alpes, Hassan, Tunaboylu, Ulusoy & Zoomers, *supra* note 216, p. 21.

²⁷⁴ M. Zoetewij, ‘The State of Emergency, Non-Refoulement and the Turkish Constitutional Court’, (9 May 2018), available at: < <https://verfassungsblog.de/the-state-of-emergency-non-refoulement-and-the-turkish-constitutional-court/>>.

²⁷⁵ NOAS, *supra* note 181, p. 25.

²⁷⁶ Aida Country Report: Turkey, *supra* note 187, p. 23.

²⁷⁷ Zoetewij, *supra* note 274.

²⁷⁸ Aida Country Report: Turkey, *supra* note 187, p. 23.

²⁷⁹ *Ibid.*

²⁸⁰ Zoetewij, *supra* note 274.

²⁸¹ Aida Country Report: Turkey, *supra* note 187, p. 23.

decision is an appeal before Turkey's Constitutional Court,²⁸² which has halted the removal of refugees because of possible violations of the principle of *non-refoulement* in over 90% of cases coming before it.²⁸³ This suggests that in many cases the Turkish authorities issue removal decisions, the execution of which would result in a violation of the principle of *non-refoulement*.

On the basis of the information provided above it seems that, while formally Turkey has obliged itself to comply with the principle of *non-refoulement* both through international and domestic law, it seems that in practice the country is not able to adhere to the principle in all cases. This was already true immediately after the announcement of the EU-Turkey deal and seems to have only gotten worse after the adoption of Emergency Decree 676, which has created an even greater risk for persons – including those returned under the EU-Turkey deal - of being sent to a country where their life or freedom would be threatened. While doubts about Turkey's compliance with the principle of *non-refoulement* already existed before the government adopted the Emergency Decree, it is clear that because of this decree at present Turkish Asylum Law is not in full compliance with the principle of *non-refoulement*.²⁸⁴

4.3.3 Employment

Article 17 of the Refugee Convention relates to the ability for refugees to obtain a wage-earning employment in a host country. It has already been mentioned that Article 17 Refugee Convention contains an equal treatment right, since it obliges a host state to treat refugees lawfully staying in their territory equally to "nationals of a foreign country in the same circumstances" with regards to access to employment.²⁸⁵ It is furthermore important to state once more here that Turkey adheres to its geographical limitation to the Refugee Convention,²⁸⁶ which means that if it does not award this entitlement to non-European refugees it is not in violation of its obligations under the Refugee Convention. In such a situation Turkey could however not be classified as a STC, since both international and EU law require that persons who are returned to a STC must be

²⁸² Ibid., p. 26.

²⁸³ Ibid.

²⁸⁴ Van Liempt, Alpes, Hassan, Tunaboylu, Ulusoy & Zoomers, *supra* note 216, p. 21.

²⁸⁵ Refugee Convention, *supra* note 16, Article 17.

²⁸⁶ UNHCR, Reservations and Declaration to the 1951 Refugee Convention, *supra* note 169.

able to claim all their rights under the Convention, the Protocol and international human rights treaties.²⁸⁷

Despite the fact that Turkey is not obliged to award non-European refugees the rights contained in Article 17 Refugee Convention, Turkish law does provide these people with some entitlements relating to employment. Article 89 (4) (a) LFIP allows conditional refugees to apply for a work permit six months after they have applied for international protection.²⁸⁸ The same is true for temporary protection holders.²⁸⁹ Despite this possibility, in practice it seems that it is very difficult for both groups to actually get a job in Turkey. Reports have indicated that only a few conditional refugees have actually been able to obtain a work permit,²⁹⁰ and that less than 1% of temporary protection holders in Turkey have been able to get such a permit.²⁹¹

It seems that in practice it is very difficult for both conditional refugees and temporary protection holders to obtain a work permit in Turkey through which they may be able to find employment. As stated above however, Article 17 Refugee Convention contains an equal treatment right, meaning that the current situation in Turkey does not necessarily violate this provision. This is only the case if conditional refugees and temporary protection holders are not being treated equally to the reference group of the provision: "nationals of a foreign country in the same circumstances".²⁹² Article 89 (4) (b) LFIP indicates that European refugees are awarded with a right to employment upon being granted refugee status.²⁹³ This shows that conditional refugees and temporary protection holders are being treated less favourable than European refugees in Turkey, which is prohibited under Article 17 Refugee Convention. It must therefore be held that persons returned under the EU-Turkey deal are not being awarded with their entitlements under Article 17 Refugee Convention.

²⁸⁷ See e.g. UNHCR, Legal considerations regarding access to protection and a connection between the refugee and the third country, *supra* note 50, §7; See also: UNHCR, Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey, *supra* note 56, p. 2; Battjes, *supra* note 26, p. 403-404, and; Directive 2013/32/EU, *supra* note 18, Article 38 (1) (e), as interpreted in Chapter 3.

²⁸⁸ LFIP, *supra* note 176, Article 89 (4) (a).

²⁸⁹ TRP, *supra* note 192, Article 29, and; Republic of Turkey, Unofficial translation of the Regulation on Work Permits of Foreigners under Temporary Protection, (11 January 2016), Article 5 available at: <<https://www.refworld.org/docid/582c71464.html>>.

²⁹⁰ Aida Country Report: Turkey, *supra* note 187, p. 108.

²⁹¹ *Ibid.*, p. 135. See also: Van Liempt, Alpes, Hassan, Tunaboylu, Ulusoy & Zoomers, *supra* note 216, p. 22.

²⁹² Refugee Convention, *supra* note 16, Article 17.

²⁹³ LFIP, *supra* note 176, Article 89 (4) (b).

4.3.4 Housing

The Refugee Convention also provides refugees with certain entitlements relating to housing. Similar to the provision on employment, Article 21 of the Convention contains an equal treatment right, obliging a host country to offer refugees who are lawfully staying on their territory treatment as regards housing “not less favourable than that accorded to aliens generally in the same circumstances”.²⁹⁴ As previously clarified, Turkey is in principle not obliged to offer the entitlements contained in Article 21 Refugee Convention to non-European refugees, due to its geographical limitation to the Convention.²⁹⁵ In order for a return to Turkey under the STC concept to be legal however, the entitlements of Article 21 must also be awarded to non-European refugees.

The access to housing for refugees in Turkey, or lack thereof, has been severely criticized by civil society. The Asylum Information Database (Aida) of the European Council on Refugees and Exiles has for example said that “one of the most prominent shortcomings of Turkey’s legal framework for asylum is the failure to commit to providing state-funded accommodation to asylum applicants”.²⁹⁶ With Amnesty International adding that “all the available evidence indicates that the housing conditions of most asylum-seekers and refugees in Turkey are inadequate” and that the newly introduced LFIP has not improved the situation.²⁹⁷ The problems result from the fact that under Article 95 (1) LFIP applicants for international protection must provide for their own accommodation.²⁹⁸ The same is true for temporary protection holders.²⁹⁹ While the Turkish government is empowered to build Reception and Accommodation Centres for refugees,³⁰⁰ and Temporary Accommodation Centres for temporary protection holders,³⁰¹ the access to such facilities is extremely limited.³⁰² It is because of this that the majority of persons attempting to find protection in Turkey have to try and find accommodation in the private sector. The problem with that is that access to private housing is very limited as well, due to high rent prices.³⁰³ Furthermore

²⁹⁴ Refugee Convention, *supra* note 16, Article 21.

²⁹⁵ UNHCR, *supra* note 169.

²⁹⁶ Aida Country Report: Turkey, *supra* note 187, p. 65.

²⁹⁷ Amnesty International, ‘No safe refuge: Asylum-seekers and refugees denied effective protection in Turkey’, *supra* note 21, p. 24-25.

²⁹⁸ LFIP, *supra* note 176, Article 95 (1).

²⁹⁹ Aida Country Report: Turkey, *supra* note 187, p. 130.

³⁰⁰ *Ibid.*, p. 66.

³⁰¹ *Ibid.*, p. 130.

³⁰² *Ibid.*, p. 66 and 131.

³⁰³ *Ibid.*, p. 66

the Turkish authorities do not offer any assistance to refugees who are attempting to find accommodation in the private sector with regards to these costs.³⁰⁴ According to a Report by the Turkish Police Academy many refugees have to try and live “under harsh conditions and are deprived of healthy housing conditions”.³⁰⁵

It has been shown above that Turkey does not properly provide the many refugees in the country with decent housing conditions and that many of them are living in rather unhealthy conditions. Because the LFIP says that all applicants for international protection must provide for their own accommodation, it however appears that both European and non-European refugees are being treated equally in the country. Be it equally badly. So, despite the fact that the issue of providing proper housing for refugees in Turkey seems highly problematic, the current system is not in violation of Article 21 of the Refugee Convention, since refugees are treated in the same way as “aliens generally in the same circumstances”.³⁰⁶

4.3.5 Education

Under Article 22 of the Convention, host countries are obliged to treat refugees on their territory equally to nationals with regards to access to elementary education.³⁰⁷ In Turkey everyone should have access to elementary and secondary education.³⁰⁸ Turkish law does not differentiate between European and non-European refugees with regards to this right,³⁰⁹ and formally provides access to education to both conditional refugees and temporary protection holders.³¹⁰ This shows that in theory, persons returned under the EU-Turkey deal will be awarded with this entitlement.

At the end of 2018 roughly 645.000 refugee children were enrolled in education services in Turkey, which is an increase of 5% compared to the year before.³¹¹ Despite this progress, in practice it continues to be difficult for these children to gain access to education services, with UNICEF estimating that roughly 400.000 children are not able to attend school.³¹² According to UNICEF this can be explained by a number of

³⁰⁴ Van Liempt, Alpes, Hassan, Tunaboylu, Ulusoy & Zoomers, *supra* note 216, p. 20.

³⁰⁵ Turkish National Police Academy, ‘Mass Immigration and Syrians in Turkey’, Conference Final Report, (November 2017), p. 1-48, p. 20.

³⁰⁶ Refugee Convention, *supra* note 16, Article 21.

³⁰⁷ *Ibid.*, Article 22.

³⁰⁸ Aida Country Report: Turkey, *supra* note 187, p. 108 and 138.

³⁰⁹ *Ibid.*

³¹⁰ See: LFIP, *supra* note 176, Article 89 (1), and; TRP, *supra* note 192, Article 28.

³¹¹ UNICEF, ‘Turkey 2018 Humanitarian Results’ Report, (31 December 2018), p. 1-9, p. 1.

³¹² *Ibid.*, p. 2.

reasons. First of all, children who start attending Turkish schools are confronted with the practical problem that the curriculum at Turkish schools is taught in Turkish and Turkish law does not yet provide for mechanism which helps refugee children with this problem.³¹³ Furthermore, while enrolment is free of charge in Turkey any additional costs – e.g. books, uniforms etc. – are to be borne by the refugees/temporary protection holders, who are often already struggling to make ends meet.³¹⁴ UNICEF also points to lack of awareness of available services, isolation, discrimination, and various forms of exploitation as other factors which may explain why many children are not able to get an education in Turkey.³¹⁵ Sadly this also makes these children vulnerable to child labour practices.³¹⁶

Above it has been shown that in theory all children present on Turkish territory have a right to primary and secondary education. Based on the latest data it can be said that Turkey is heading in the right direction given the fact that more and more children are able to gain access to education services in Turkey. However, it has also been shown that in practice refugee children are still confronted with various problems when they are trying to access education services in Turkey, with around 400.000 children not having such access. Given this high number it seems unlikely that all children returned under the EU-Turkey deal will have access to education services, however it cannot be concluded that access to these services is not available for any of them. This means that the domestic migration authorities of the EU Member States should be very cautious when they are considering sending a person back to Turkey, since they are only allowed to do this if they manage to obtain information which satisfies them in such a way to conclude that a specific child will have access to education services in Turkey.

4.3.6 Durable solution

Lastly this thesis will try and analyse whether or not persons returned under the EU-Turkey deal have access to a timely durable solution in Turkey. As explained in the previous Chapters, both international and EU law demand that in order for a return to a STC to be legal, the person returned must, on top of the rights discussed above, also

³¹³ Aida Country Report: Turkey, *supra* note 187, p. 70.

³¹⁴ *Ibid.*

³¹⁵ UNICEF, *supra* note 311, 2.

³¹⁶ *Ibid.*; See also: Aida Country Report: Turkey, *supra* note 187, p. 139-140.

be granted a timely durable solution.³¹⁷ Despite the fact that the right to a durable solution is not explicitly mentioned in the Refugee Convention, UNHCR has said that it is part of the protections of the Convention.³¹⁸ Battjes has explained that the right to a durable solution is not explicitly mentioned in the Convention, because it “is a side-effect of the prohibition of *refoulement*”.³¹⁹ As already mentioned, UNHCR has clarified that there are three types of durable solutions: (i) voluntary repatriation; (ii) integration in the host country, or; (iii) resettlement to a third country.³²⁰ It will now be assessed which of these solutions, if any, are available to persons returned to Turkey under the EU Turkey deal.

First of all, with regards to voluntary repatriation, UNHCR has explained that this may only happen when a refugee’s wish to return to his/her country of origin has established itself “voluntarily, free from coercion, and based on objective information”,³²¹ and that such a return may only happen if this is safe for the persons concerned.³²² Both the LFIP and the TPR allow for the voluntary repatriation of refugees.³²³ While this type of durable solution may be available to some refugees in Turkey, it seems unlikely that a safe return home is an option for the majority of them, due to the ongoing violence in many countries in the Middle East which is exactly what many refugees are fleeing from.³²⁴ This shows that first type of durable solution will most likely not be an option for the majority of non-European refugees in Turkey. Regrettably, the second type of solution is not available to any of them. This is because both the LFIP and the TPR both explicitly indicate that neither conditional refugees, nor temporary protection holders have a right to long term integration in Turkey.³²⁵ As explained above, the TPR merely offers Syrian refugees with temporary protection. Sadly, the Regulation does not explain what the maximum duration of that temporary protection is. This aspect of the TPR should be regarded as problematic since it is in conflict with the UNHCR’s Guidelines on Temporary Protection or Stay Arrangements,

³¹⁷ See e.g. UNHCR, Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey, *supra* note 56, p. 2. See also: Battjes, *supra* note 26, p. 114, 399-401 and 435.

³¹⁸ UNHCR, Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey, *supra* note 56, p. 2.

³¹⁹ Battjes, *supra* note 26, p. 401.

³²⁰ UNHCR, *supra* note 62, p. 184-191.

³²¹ *Ibid.*, p. 181.

³²² *Ibid.*

³²³ LFIP, *supra* note 176, Article 87, and; TRP, *supra* note 192, Article 42.

³²⁴ UNHCR, *supra* note 1, p. 6.

³²⁵ LFIP, *supra* note 176, Article 42 (2), and; TRP, *supra* note 192, Article 25.

which explicitly say that temporary protection should be time-limited.³²⁶ UNHCR has said that the possibility of long-term integration should be offered to non-European refugees in Turkey, in order for the country to comply with the right to a timely durable solution.³²⁷ Since neither of these two types of solutions are available to the majority of refugees in Turkey, the only durable solution that is available to them is resettlement to a third country.³²⁸ Whenever a conditional refugee or temporary protection holder applies for resettlement in Turkey, UNHCR along with the DGMM will attempt to find an appropriate place of resettlement for the persons concerned.³²⁹ Whether or not persons can be successfully resettled to a third country depends on the willingness of those third states to agree to this, as they will have the final say on resettlement.³³⁰ Sadly there are not that many states who are willing to accept the resettlement of refugees from Turkey at the moment,³³¹ which has resulted in severe delays for persons applying for resettlement— e.g. in 2018 Iraqi nationals were told that the earliest available dates for a resettlement interview are in 2024.³³²

Quickly after the announcement of the EU-Turkey deal Amnesty International concluded that Turkey does not offer refugees access to a timely durable solution.³³³ On the basis of the information provided above, this conclusion still seems to be correct. While some people may be able to voluntarily return to their countries of origin, the fact that Turkey does not grant non-European refugees the prospect of long-term integration and that not many third states are willing to accept resettlement of refugees from Turkey, shows that at present persons returned under the EU-Turkey deal will most likely not have access to a timely durable solution.³³⁴

³²⁶ UNHCR, *supra* note 194, p. 2.

³²⁷ UNHCR, Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey, *supra* note 56, p. 2

³²⁸ Amnesty International, 'No safe refuge: Asylum-seekers and refugees denied effective protection in Turkey', *supra* note 21, p. 19.

³²⁹ Aida Country Report: Turkey, *supra* note 187, p. 107 and 128.

³³⁰ *Ibid.*

³³¹ Amnesty International, 'No safe refuge: Asylum-seekers and refugees denied effective protection in Turkey', *supra* note 21, p. 19-20.

³³² Aida Country Report: Turkey, *supra* note 187, p. 107.

³³³ Amnesty International, 'No safe refuge: Asylum-seekers and refugees denied effective protection in Turkey', *supra* note 21, p. 5.

³³⁴ Van Liempt, Alpes, Hassan, Tunaboylu, Ulusoy & Zoomers, *supra* note 216, p. 20.

4.4 A safe third country

In this Chapter it has been attempted to explain to what extent the theory described in Chapters 2 and 3 applies in practice. Above the EU-Turkey deal and its consequences for persons returned under it, have been analysed in order to establish whether or not Turkey is correctly qualified as a STC for them. This analysis consisted of looking at two criteria, which were identified in the previous Chapters as being the most important requirements for assessing the legality of a return to a STC: (i) the possibility to apply for refugee status or be granted effective protection in there,³³⁵ and; (ii) whether the people returned are offered all the protections contained in the Refugee Convention, its Protocol and relevant human rights treaties.³³⁶

Before starting with this analysis, it was necessary to first better explain Turkey's obligations under the Convention. It has been shown that, due to its adherence to a geographical limitation, Turkey is in principle not obliged to offer non-European refugees with all the protections contained in the Refugee Convention.³³⁷ Despite this however, it is necessary that these protections are awarded also to non-European refugees, in order for the returns to Turkey to be considered as legal under both international and European law.³³⁸ Furthermore, it has been shown that the fact that Turkey adheres to its geographical limitation, does not automatically mean that it does not offer the necessary entitlements to non-European refugees. As explained, practice rather than theory is decisive for determining the legality of a return to a STC.³³⁹ It therefore does not matter too much that Turkey is formally not obliged to offer the protections contained in the Refugee Convention to non-European refugees. Returns to that country could still be lawful, if Turkey does provide the persons returned to its territory with the necessary rights in some other way – e.g. under domestic law -. In

³³⁵ See e.g. Directive 2013/32/EU, *supra* note 18, Article 38 (1) (e); Battjes, *supra* note 26, p. 398-400, UNHCR, Considerations on the 'Safe Third Country Concept', *supra* note 58, p. 2; See also: UNHCR, Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey, *supra* note 56, p. 2, and; Legomsky, *supra* note 17, p. 673, §1 + 7.

³³⁶ See e.g. UNHCR, Legal considerations regarding access to protection and a connection between the refugee and the third country, *supra* note 50, §7; See also: UNHCR, Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey, *supra* note 56, p. 2; UNCHR, Executive Committee Conclusion No. 58, *supra* note 56, §f (ii); UNHCR, Considerations on the 'Safe Third Country Concept', *supra* note 58, p. 1, and; Battjes, *supra* note 26, p. 403-404.

³³⁷ UNHCR, *supra* note 169.

³³⁸ See e.g. UNHCR, Legal considerations regarding access to protection and a connection between the refugee and the third country, *supra* note 50, §7; See also: UNHCR, Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey, *supra* note 56, p. 2; Battjes, *supra* note 26, p. 403-404, and; Directive 2013/32/EU, *supra* note 18, Article 38 (1) (e), as interpreted in Chapter 3.

³³⁹ Battjes, *supra* note 26, p. 424. See also: UNHCR, *supra* note 75, §14, p. 4.

order to find out whether persons returned under the EU-Turkey deal are provided with all necessary protections, this thesis has subsequently analysed Turkish asylum law and practice.

With regards to the first criterion, of being able to apply for refugee status or be granted effective protection in Turkey, it has been shown that in theory both the LFIP applying to non-Syrian conditional refugees and the TPR applying to Syrian temporary protection holders,³⁴⁰ provide these groups with the possibility to apply for refugee status, or at least provides them with effective protection – since the STC will grant them permission to stay or will investigate whether he/she should be granted international protection -.³⁴¹ Practice however seems to differ from theory in this regard, as both Syrians and non-Syrians face various problems when trying to register with the Turkish authorities, including: long waiting times; lack of available lawyers and interpreters – both in quantity and in quality –; lack of awareness of judicial remedies, and; risks of being send to detention centres where registering with the Turkish authorities is reported as being “virtually impossible”.³⁴² This last issue is especially problematic for the legality of returns under the EU-Turkey deal because, as confirmed by the European Commission, the majority of persons returned under the deal have been send to such centres.³⁴³ It has furthermore been reported that in 2018 in various parts of Turkey, the authorities stopped registering Syrian refugees altogether.³⁴⁴ As indicated above, on the basis of all the information provided in this Chapter it seems that the conclusion by Amnesty International in a 2016 study that “asylum-seekers do not have access to fair and efficient procedures for the determination of their status”,³⁴⁵ sadly is still true in Turkey today. For the various reasons mentioned above, it is very difficult for both persons who could qualify as conditional refugees or temporary protection holders under Turkish law to actually register with the Turkish authorities and actually obtain either type of status. It must therefore be held that, at least at the time of writing, the returns under the EU-Turkey deal do not comply with the first criterion for legal returns to a STC. It is because of this that for now Turkey should not be considered as a STC for all persons being returned to it under the EU Turkey deal.

³⁴⁰ LFIP, *supra* note 176, Article 62, and; TRP, *supra* note 192, Article 7 and provisional Article 1.

³⁴¹ Battjes, *supra* note 26, p. 398-400.

³⁴² Ulusoy & Battjes, *supra* note 213, p. 22.

³⁴³ European Commission, *supra* note 215 p. 5, and; DCR, *supra* note 215, p. 9.

³⁴⁴ Human Rights Watch, *supra* note 23.

³⁴⁵ Amnesty International, ‘No safe refuge: Asylum-seekers and refugees denied effective protection in Turkey’, *supra* note 21, p. 5.

Despite the fact that it was already possible to make this sub-conclusion after the analysis of the first criterion of being able to register as a refugee or be granted effective protection in Turkey, the Chapter has also analysed the second criterion of whether the persons returned are being awarded with all entitlements following from the Refugee Convention, its Protocol and relevant human rights treaties.³⁴⁶ This was done in order to conclude whether or not Turkey could be considered as a STC for those being returned under the deal, if it somehow manages to solve all of the problems relating to the registration of refugees that were explained in the first part of this Chapter. The second part has tried to establish whether or not the returns under the EU-Turkey deal are in accordance with the second criterion for legal returns mentioned above, irrespective of whether these returns comply with the first criterion.

As stated, it is not possible for this thesis to assess whether or not persons returned under the EU-Turkey deal are being awarded with every entitlement following from the Convention, its Protocol and relevant human rights treaties. Luckily such an assessment is not necessary in order to conclude whether the returns under the deal comply with this criterion. Since international and EU law demand that those returned are awarded with all the protections contained in these various documents,³⁴⁷ it is possible to conclude that this criterion is not being complied with if these persons are not awarded with some or even one of the entitlements contained in these documents. Above it was shown that sadly conditional refugees and temporary protection holders in Turkey are not offered with some of the protections that this Chapter focussed on. E.g. these persons run a serious risk of being returned to a country where their life or freedom is threatened, which would constitute a violation of the principle of *non-refoulement* as protected in Article 33 Refugee Convention.³⁴⁸ Additionally it has been shown that persons returned under the deal are not being awarded with their entitlements relating to employment, their right to a timely durable solution and serious questions can be raised about the possibility for children returned under the deal to access education services in Turkey. On the basis of the information provided above it must be held that Turkey does not offer persons returned under the EU-Turkey deal

³⁴⁶ See e.g. UNHCR, Legal considerations regarding access to protection and a connection between the refugee and the third country, *supra* note 50, §7; See also: UNHCR, Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey, *supra* note 56, p. 2; UNCHR, Executive Committee Conclusion No. 58, *supra* note 56, §f (ii); UNHCR, Considerations on the 'Safe Third Country Concept', *supra* note 58, p. 1, and; Battjes, *supra* note 26, p. 403-404.

³⁴⁷ *Ibid.*

³⁴⁸ Refugee Convention, *supra* note 16, Article 33.

with all of the rights which they are entitled to. Therefore, these returns also fail to comply with the second criterion for legal returns to a STC. This means that even if Turkey somehow manages to solve all the problems surrounding the registration of refugees, it can still not be considered as a STC for all persons who are returned to it under the EU-Turkey deal.

5. Conclusions and recommendations

5.1 Conclusions

This thesis has tried to find out when states can legally return refugees to a safe third country through the application of the STC concept in order to answer the following research question: *To what extent is the current application of the safe third country concept under EU law in compliance with international human rights law?*

In order to answer this question, it was first of all necessary to explain where the STC concept comes from and what it entails exactly. In Chapter 2 it has been shown that the STC concept was developed by states in order for them to comply with the principle of *non-refoulement*, whilst at the same time protecting their national sovereignty. Even though states are in principle free to decide on who they permit to enter their territory, those states that have ratified the Refugee Convention have voluntarily limited their freedom in this regard since they must provide the protections contained in that Convention to all persons who can be considered as a refugee in accordance with Article 1. Most importantly the sovereign power to decide on who may enter and legally stay on the territory of a state is restricted by the principle of *non-refoulement*. Following that principle states cannot return a person to a country where his/her life or freedom would be threatened. In order for states to adhere to this principle, whilst at the same time keeping as many people as possible out of their territories, the safe country principles/protection elsewhere policies were developed. Under these policies persons can be legally returned to either the first country of asylum or a safe third country. As explained, the STC is a country in which the sending state believes that the person concerned could have requested protection previously. After having outlined the origins and contents of the STC concept, Chapter 2 also clarified under which conditions international law allows states to apply this concept. Based on various sources, a list of criteria which must be fulfilled in order for a return to be legal under international law has been provided in Chapter 2. Most importantly it was shown that the sending state must satisfy itself that the person returned will be able to apply for international protection and is protected by the principle of *non-refoulement*, and; be provided with the other rights contained in the Refugee Convention, its Protocol and other relevant human rights documents, both in theory and in practice.

After having explained when states are allowed to return a person to a STC under international law, in Chapter 3 this thesis went on to analyse when EU law allows for this to happen. Here it was shown that the situation in which an EU Member State

wishes to return a person to a safe third country is governed by the rules contained in the Asylum Procedures Directive. Article 38 (1) (a)-(e) of that Directive provides for a list of criteria which must be fulfilled before a Member State can legally apply the STC concept under EU law. Firstly, the provision demands that a person can only be expelled to a STC if the return does not violate the principle of *non-refoulement*. Furthermore Article 38 (1) (e) requires that the persons returned must be awarded with “protection in accordance with the Geneva Convention”. The exact meaning of that phrase can formally only be determined by the CJEU, it being the sole interpreter of EU law. Sadly, at the time of writing the CJEU has not yet been granted the opportunity to clarify the exact meaning of this phrase. Through the application of the commonly accepted methods of interpretation mentioned in Article 31 VCLT however, this thesis has explained that Article 38 (1) (e) should be interpreted as demanding that for a return to a STC to be legal under EU law it must not only comply with the principle of *non-refoulement*, but the authorities of the sending state must furthermore be satisfied that the person concerned will be offered the chance to apply for international protection in the STC and that he/she must be awarded with all the entitlements contained in the Refugee Convention, its Protocol and relevant international human rights treaties, both in theory and in practice. Article 38 (1) (e) Asylum Procedures Directive has been interpreted in a similar way by UNHCR. Because the phrase “protection in accordance with the Geneva Convention” in the Asylum Procedures Directive must be interpreted in this broad fashion, it can be said that both international and European law set quite high and similar standards for a legal return to a STC, since both demand that the person returned is offered the opportunity to apply for international protection and is awarded with the protection of the principle of *non-refoulement* and the other protections contained in the Convention, the Protocol and relevant human rights documents.

In the 4th Chapter of this thesis, it was investigated whether the ongoing returns of refugees from EU Member States to Turkey under the EU-Turkey deal comply with the criteria established in the previous Chapters and therefore whether Turkey is correctly qualified as a STC for those returned. That analysis was made on the basis of the two most important criteria for legal returns under international and European law as described in Chapters 2 and 3: (i) the possibility to apply for refugee status or be granted effective protection in theory and in practice and; (ii) whether the people returned are offered all the protections contained in the Refugee Convention, its

Protocol and relevant human rights treaties – including, but not limited to the prohibition of *non-refoulement* - in theory and in practice. Before considering these two criteria, it was first explained that due to Turkey's adherence to a geographical limitation to the Refugee Convention, Turkey is formally not obliged to offer non-European refugees with all Convention rights. However, it was shown in Chapters 2 and 3 that these rights must be granted to all persons – including non-European refugees – in order for a return to a STC – e.g. Turkey - to be in accordance with the criteria set by both international and European law. In order to determine whether or not the returns under the EU-Turkey deal are in accordance with these criteria, it was necessary to investigate whether Turkey provides the persons returned under the EU-Turkey deal with the relevant protections, e.g. under national law, since it is formally not obliged to offer them under the Refugee Convention. When analysing the first requirement - the possibility to apply for refugee status or be granted effective protection in theory and in practice – it has been explained that formally Turkish law provides both non-Syrian conditional refugees and Syrian temporary protection holders with the possibility to apply for refugee status, or at least provides them with effective protection. Sadly, this does not appear to be true in practice. It has been shown that both Syrian temporary protection holders and non-Syrian conditional refugees encounter a lot of problems when they try to get themselves registered with the Turkish authorities, which include: long waiting times; not enough lawyers and interpreters available; not sufficient awareness of judicial remedies in case an application is rejected, and; running the risks of being send to a detention centre where it is even more difficult to become registered. As also emphasized above, this last issue is particularly problematic for the legality of returns under the EU-Turkey deal since the majority of returnees were send to these centres. On top of these problems, various NGOs and news organisations have reported that in numerous parts of the country, Turkish authorities have stopped registering Syrian refugees completely. On the basis of all this, it was concluded above that Turkey does in practice not offer all persons returned under the EU Turkey deal with the possibility to apply for refugee status or be granted effective protection, which means that the returns under that deal are not in accordance with the requirements established in Chapters 2 and 3. While it was already possible to conclude that the practice of returning persons to Turkey under the EU-Turkey deal does not comply with the theory described in Chapters 2 and 3 at that point, the second important requirement for legal returns to an STC - whether the people returned are offered all

the protections contained in the Refugee Convention, its Protocol and relevant human rights treaties in theory and in practice – has also been analysed. This was done in order to conclude whether Turkey would comply with both requirements, if it were somehow able to solve all existing problems relating to the first one. On the basis of the analysis made in the second part of Chapter 4, it must be held that Turkey does not offer all persons returned under the EU-Turkey deal with all the protections contained in the Refugee Convention, its Protocol and relevant human rights treaties. It has been shown that these persons face a serious risk of being involuntarily sent to a state where their life or freedom is threatened – in violation of the principle of *non-refoulement* -. Furthermore, it has been explained that not all those returned under the EU-Turkey deal are in practice granted their rights with regards to employment and a timely durable solution. On the basis of that, it has been shown that Turkey also fails to comply with the second criterion for legal returns, which consequently means that Turkey should not be considered as a STC for all persons returned under the EU-Turkey deal.

Everything mentioned above shows that both international human rights law and EU law set high and similar standards for legal returns of refugees to a STC. Both areas of law formally require that persons returned to a STC must be granted the possibility to apply for refugee status or at least be granted effective protection in the STC and that they must be awarded with all rights contained in the Refugee Convention, its Protocol and important human rights documents there. Since both international human rights law and EU law demand that these two criteria must be fulfilled, it must be held that in theory the European rules on the application of the STC concept are generally in compliance with international human rights law. As has been expressed on multiple occasions above however, in order for a return to a third country to be considered as safe, practice rather than theory is decisive. Based on the case study of returns to Turkey under the EU-Turkey deal it must sadly be concluded that the practical application of the STC concept in the EU is at present not in accordance with the requirements set by international human rights law nor by those set by European Asylum law. It is because of this that the answer to the research question of this thesis must be that while the European rules on the use of the STC concept are in accordance with international human rights law, the practical application of the concept under EU law clearly is not.

5.2 Recommendations

At international level

- 1) UNHCR should draw up a list of criteria which must be fulfilled for a return to be in accordance with international human rights law, in order to provide more clarity about the correct application of the STC concept.
- 2) UNHCR should try to once more become involved in the registration procedure of refugees and temporary protection holders in Turkey, since the problems relating the registration process have only gotten worse since the termination of UNHCR's involvement in the procedure.
- 3) UNHCR should continue to help the Turkish authorities in trying to find suitable countries for resettlement of refugees Turkey, as a type of a durable solution.
- 4) UNHCR should urge the Turkish government to lift its geographical limitation to the Refugee Convention and remind them of the 2005 National Action Plan on Migration and Asylum which included the plan to do this.³⁴⁹
- 5) UNHCR should use its supervisory powers to closely monitor the reports of non-registration of Syrians in various parts of Turkey and of cases of refoulement in the country.
- 6) The international community should show more solidarity with the plight of refugees in Turkey and should offer themselves up as a place for resettlement, as a type of durable solution.

At EU level

- 7) The EU should suspend the implementation of the EU-Turkey deal immediately, until the many issues – including, but not limited to those identified above – have been solved and returns will actually be in accordance with the requirements contained in the Refugee Convention, its Protocol, relevant human rights treaties and the Asylum Procedures Directive.
- 8) The EU must make sure that Turkey is provided with sufficient funds in order to try and solve the current problems relating to the application of the EU-Turkey deal.
- 9) EU institutions should attempt to increase the willingness and capacity of EU Member States to offer themselves up as a place for resettlement for refugees in Turkey, as a form durable solution.

³⁴⁹ See e.g. UNHCR, Global Appeal 2008-2009: Turkey, *supra* note 169, p. 304.

- 10) *The European Parliament should urge the Commission to explain in detail what the criteria for legal returns to a STC in Article 45 of the new 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 – including the requirement in subsection (1) (e) “the possibility exists to receive protection in accordance with the substantive standards of the Geneva Convention” – entail exactly.*
- 11) *The European Parliament should urge the Commission to make sure that the newly drafted requirements for returns to a STC in the new 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 are interpreted broadly as to allow for full compliance with the Refugee Convention, its Protocol and relevant human rights treaties.*
- 12) *Whenever confronted with a case where persons try to stop their return to Turkey under the EU-Turkey deal, a court of a Member State should let the CJEU provide clarity on the correct application of the STC concept, by allowing the Court to rule on the interpretation of the phrase “protection in accordance with the Geneva Convention” contained in Article 38 (1) (e) Asylum Procedures Directive.*

Domestic level - Turkey

- 13) *The Turkish government should lift the country’s geographical limitation to the Refugee Convention.*
- 14) *The Turkish government should amend the LFIP and the TPR in such a way that these pieces of legislation offer non-Syrian conditional refugees and Syrian temporary protection holders the prospect of long-term integration in the country, as a type of durable solution and in such a way that they offer all the other rights contained in the Refugees Convention, its Protocol and human rights documents – e.g. treating non-European refugees similar to “nationals of a foreign country in the same circumstances” as demanded by Article 17 Refugee Convention -.*
- 15) *The Turkish government must amend national asylum law in such a way that appeals against removal decisions are given suspensive effect, in order to*

prevent persons being removed from Turkish territory without any judicial appeal possibilities.

- 16) Turkish authorities must use their powers to investigate the reports that local authorities have stopped registering Syrian refugees completely and make sure that, if these reports are true, registration will recommence.*
- 17) Turkish authorities must investigate the reports that cases of refoulement are occurring in the country and must use all its powers to stop this from happening again.*
- 18) The Turkish government should ask UNHCR to once again become involved in the registration process in order to deal with the enormous amount of applications for international protection which the Turkish authorities must deal with.*
- 19) Turkish authorities should create better awareness about the registration process and the legal remedies that are available to persons whose applications have been rejected – this is especially necessary for persons who have been sent to detention centres -.*
- 20) Temporary protection status should immediately be granted to all persons who fall within the scope of the TPR present on Turkish territory, without assessing beforehand whether or not these persons are actually entitled to international protection – as was meant to be the case -.³⁵⁰ In that way Syrians can access vital services, such as health care and education, without having to wait for the conclusion of their application.*
- 21) The Turkish government should allocate more funds to provide for state funded housing for refugees in the country.*
- 22) The Turkish government should make sure that refugee children in practice have the same access to education services and nationals, e.g. through the creation of a fund for additional school costs and by creating possibilities for refugee children to quickly learn Turkish.*
- 23) Turkish judicial institutions should do a better job in investigating the claims by refugees who start an appeal against an expulsion decision, arguing that their expulsion would threaten their life or freedom, given the fact that in over 90% of*

³⁵⁰ Aida Country Report: Turkey, *supra* note 187, p. 112.

such cases coming before it, the Turkish Constitutional Court has halted expulsion due to a risk of refoulement.

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