
THE EU - TURKEY STATEMENT: A DESIGN FOR HUMAN RIGHTS VIOLATIONS?

An examination concerning the compatibility of the EU – Turkey Statement
with human rights in EU law

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ABSTRACT

On 18 March 2016, the EU – Turkey Statement was conducted by the heads of states or governments of the EU and Ahmed Davutoğlu, Turkish minister of foreign affairs, with the aim to control irregular migration from the Aegean Sea towards the European Union.

Yet, concerns have been raised regarding the compliance of the EU – Turkey Statement with human rights. Human rights have to be respected in the EU member states as well as in Turkey. When Turkey does not respect these rights, it cannot be considered as safe. As long as Turkey cannot be considered as a safe third country, the EU – Turkey Statement will violate the law of the European Union. This would not only have consequences for the current Statement, but also for similar statements conducted in the near future in which the EU – Turkey Statement might serve as a blueprint for human rights violations. To that end, the aim of this thesis is to examine the compatibility of the EU – Turkey Statement with international and European law, based on human dignity, the right to asylum, the principle of non-refoulement and the assumption of Turkey as a safe third country.

The legal examination resulted in the main findings that the EU – Turkey Statement shows malfunctions on the upholding of human rights in the European Union and that Turkey cannot be considered as a safe third country. This because Turkey is part of the Geneva Convention with geographical limitation, the absence for non-Europeans to be granted with asylum in Turkey, a history of violations concerning the non-refoulement principle and serious concerns for inhuman or degrading treatment. In other words, the EU – Turkey Statement is not in accordance with European law and does not safeguard human rights.

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ABBREVIATIONS

CEAS	Common European Asylum System
CJEU	Court of Justice of the European Union
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EU	European Union
EU Charter	Charter of Fundamental Rights of the European Union
Geneva Convention	1951 Convention Relating to the Status of Refugees
LFIP	Law on Foreigners and International Protection
NGO	Non-Governmental Organisation
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
TPR	Temporary Protection Regulation
UDHR	Universal Declaration on Human Rights
UN	United Nations
UNHCR	United Nation's High Commissioner for Refugees

CHAPTER ONE: Introduction

Since 2015, the migration crisis has proved to be one of the main challenges that the European Union (EU) was, and still is, facing. As a result of political situations and conflicts, many persons crossed the Aegean Sea in order to reach the coasts of Greece. At the highest point, 221.374 persons arrived in Greece within a month.¹ The crossings are perceived as illegal pathways with the consequences that these persons are considered as irregular migrants. Due to the high numbers of the migration flows, the EU and its member states felt the urge to stop the irregular crossings from Turkey towards the Union. As a result, the heads of states or governments of the EU member states met with Davutoğlu, Turkish Minister of foreign affairs, in a European Council meeting. The meeting resulted in the conduction of an agreement between the actors: the EU – Turkey Statement.²

However, human rights organisations and scholars have claimed that the conducted Statement is in violation of international and European human rights law, in particular with regards to aspects of human dignity, the right to asylum and non-refoulement. Furthermore is argued that the notion of Turkey as a safe third country is controversial and unjustifiable.³ When the EU – Turkey Statement breaches international and human rights, this would not only have an impact on the lives of the persons who fall under this Statement but also on the future of tackling migration via the closure of agreements with third countries. Therefore, it is of importance to apply these rights and the concept to the EU – Turkey Statement in order to examine whether the Statement complies with European law. More concrete, this thesis addresses the following research question:

“To what extent is the EU – Turkey Statement of 18 March 2016 in compliance with human rights in the European Union and the assumption of Turkey as a safe third country?”

In order to answer this research question, this thesis provides an analysis of main international and European Union law concerning the human rights which form part of the EU – Turkey Statement. In this regards, legal sources consist primarily of the Refugee Convention, the European Convention on Human Rights (ECHR) and primary and secondary law of the European Union. Furthermore, academic literature along with official reports from international and human rights organisations will be used in

¹ T. Spijkerboer, p. 2.

² European Council, ‘EU – Turkey Statement, 18 March 2016’, <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>, accessed on 18 May 2018.

³ For example by human rights organisations as Amnesty International and Human Rights Watch and scholars as R. Barbulescu and J. Poon.

order to supplement the legal resources.

The thesis starts with the facts of the EU – Turkey Statement itself. This does not only include the subsequent parts of the Statement but also the distinction between refugees and irregular migrants as well as the role of international human rights law in the EU. The following chapters are structured in a tri-partite framework concerning the right in international law, in European Union law and in the EU – Turkey Statement. The third chapter constitutes therefore the right to human dignity, which is followed by the right to asylum in chapter four and the principle of non-refoulement in chapter five. Subsequently, the concept of a safe third country shall be applied to Turkey and indicates whether Turkey can be perceived as safe. Finally, this thesis ends with an overall conclusion in which the research question is answered and recommendations for further research are provided.

CHAPTER TWO: The facts

This chapter discusses the facts of the EU – Turkey Statement in more detail. The Statement did not only lead to the resettlement of persons but also brought obligations for the contracting parties of the Statement. What does the EU – Turkey Statement exactly entail and which actions are deriving from it? Besides, in this chapter is the distinction between refugees and irregular migrants analysed. Furthermore, the main international conventions which are for importance for European Union law are described in this chapter, focussing on the relation with EU law and jurisdiction over the EU – Turkey Statement.

2.1 Contents of the EU – Turkey Statement

The EU - Turkey Statement was concluded in Brussels on 18 March 2016. On this day, heads of states or governments of the EU and the Turkish Minister of Foreign Affairs, Davutoğlu, agreed upon additional measures of the EU Joint Action Plan of November 2015. As declared in the Statement, the aim of these additional measures is to:

“(…) replace disorganised, chaotic, irregular and dangerous migratory flows by organised, safe and legal pathways to Europe for those entitled to international protection in line with EU and international law”.⁴

Besides, the surge of arrivals and migrant deaths in the Aegean Sea should be decreased substantially by creating these organised, legal and safe pathways towards the European Union.⁵

Nonetheless, the conduction of the Statement brings obligations and responsibilities for Greece, the European Union and Turkey. First of all, Turkey is bound to adopt all irregular migrants that are sent back from Greece under this Statement and shall prevent that these irregular migrants are refouled to their country of origin as long as these persons would face serious risk or harm in that country. Besides, the Turkish authorities must prevent that irregular migrants reach the coasts of Greece and shall prevent the creation of illegal pathways to the EU. The contracting parties also agreed upon the creation of a 1:1 resettlement scheme, meaning that for every Syrian relocated to Turkey, another Syrian will be resettled from Turkey towards the European Union. In order to provide refugees in Turkey with support, the EU allocated 3 billion euros via the use of the Facility for Refugees in Turkey (FRIT). Furthermore,

⁴ European Council, ‘EU – Turkey Statement, 18 March 2016’, <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>, accessed on 18 May 2018.

⁵ Ibidem.

humanitarian conditions in Syria would be improved and a Voluntary Humanitarian Admission Scheme (VHAS) would be activated once the flow of irregular migrants has been decreased substantially. Another important part of the Statement is the fact that the EU reopened negotiations for the accession of Turkey to the EU. Due to political circumstances, such as the *Coup d'état*, the negotiations have been suspended in November 2016. Furthermore, visa liberalisation for Turkish citizens travelling to the EU was implemented as part of the Statement.⁶

Since the enforcement of the EU – Turkey Statement, one may conclude that there is a decrease of migrants arriving at the coasts of Greece. With a daily average of 84 migrants, the European Commission claims that the arrivals on the islands of Greece have dropped by 97%.⁷ However, stating that solely the Statement has led to a decrease of migrants arriving in Europe, sounds like a premature conclusion to me. Also other factors have to be weighed in investigating the reasons for this decrease, for example the situation in the countries of origin and the closure of the Balkan routes. Research has furthermore shown that the numbers of arrivals in Greece were already declining prior to the enforcement of the EU – Turkey Statement.⁸ Moreover, despite the fact that the numbers of arrivals in Greece decreased, migrants might still reach Europe via other routes, such as the Mediterranean Sea. Since the EU – Turkey Statement, the numbers of migrants flowing from Northern Africa towards Italy and Europe have been increased.⁹

Via the use of the 1:1 resettlement scheme, more than 11.490 Syrian refugees have already been resettled from Turkey to Greece and vice versa. According to the Statement, the resettlements take place on an individual basis.¹⁰ Nonetheless, in the case of *NF v European Council* claims the applicant that his proposed relocation to Turkey will lead to degrading treatment or to an expulsion to his country of origin. In this regards, NF asks the CJEU to rule over the Statement.¹¹ However, the CJEU declared the application not admissible because it does not have jurisdiction to determine and hear this case. The Court reasons that the used words in the Statement can be interpreted in a way which indicates that the Statement was conducted by the heads of states or governments of the member states and not by the European Council as an institution of the EU.¹² Based on article 263 TFEU, the Court has lack of jurisdiction to rule over agreements made by the national representatives who gathered in one of the European institutions, acting as the heads of states or governments.¹³ Remarkable in this ruling is the interpretation of the Court concerning the ambiguous wording in the Statement. The interpretation by

⁶ European Commission, 'Six principles for further developing EU - Turkey Cooperation in tackling the Migration Crisis', http://europa.eu/rapid/press-release_IP-16-830_en.htm, accessed on 18 May 2018.

⁷ European Commission, 'EU – Turkey Statement. The Commission's contribution to the leader's agenda', December 2017.

⁸ Spijkerboer, p. 2.

⁹ K. Rygiel, F. Baban and S. Ilcan, p. 315.

¹⁰ European Commission, 'EU – Turkey Statement. The Commission's contribution to the leader's agenda', December 2017.

¹¹ CJEU T-192/16, *NF v European Council*, paras 10-13.

¹² *Ibidem*, paras 69-73.

¹³ *Ibidem*, para 44.

the CJEU thus indicates that the Statement was closed outside the boundaries of the EU, with the consequence that there is no legal protection of the CJEU. The interpretation by the Court could lead to some speculations whether this interpretation is correct or whether the CJEU follows political lines by stating that it has no jurisdiction. The European Commission was engaged in the process by drafting several documents before the conduction of the Statement although these documents did not concern the decision-making.¹⁴

Under the FRIT, the EU has currently disbursed 3 billion euros. €1,38 billion euros is used for contracting humanitarian projects in order to improve the basic needs, education, health and protection of children and vulnerable people in Turkey. The remaining amount of money is allocated and will be used for long-term development of the facility mechanism in the field of socio-economic support, education and health. Due to this facility, the EU supports over 1,2 million refugees in Turkey and gives over 500.000 children access to primary and secondary education. In February 2018, the European Commission has proposed to continue with the facility and to allocate and disburse another 3 billion euros in the near future.¹⁵

2.2 Distinction between refugees and irregular migrants

Despite the fact that many persons travel towards Europe during the migration crisis, not all persons can be considered as refugees or as seekers of international protection. In essence are all migrants who flee towards Europe in legal terms considered as irregular until an asylum status has been requested and perceived. The persons who are intercepted in Turkish waters by the Turkish coast guard are therefore considered as irregular by EU law since they are not in possession of a status.¹⁶

The term refugee is in the European Union adopted in Directive 2004/83/EG, which states that a stateless person or third country national must fall under the criteria of:

“(...) owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable, or owing to such fear, unwilling to avail himself or herself of the protection of that country”.¹⁷

These criteria, and therefore also the definition of a refugee, are based on the 1951 Refugee Convention relating to the status of a refugee.¹⁸ Any person who does not fall under the scope of this Convention cannot be considered as a refugee. Also, exceptions and exclusions of granting the refugee status to a

¹⁴ CJEU T-851/16, *Access Info Europe v European Commission*, paras 109-111.

¹⁵ European Commission, ‘EU Facility for Refugees in Turkey: The Commission proposes to mobilise additional funds for Syrian refugees’, http://europa.eu/rapid/press-release_IP-18-1723_en.htm, accessed on 21 May 2018.

¹⁶ European Council, ‘EU – Turkey Statement, 18 March 2016’, <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>, accessed on 18 May 2018.

¹⁷ Directive 2004/83/EC, art. 2(c).

¹⁸ UNHCR, Convention and Protocol relating to the status of refugees.

person are justified when the applicant has committed a serious crime.¹⁹ An example concerning the exclusion of granting a refugee status is the case of *Lounani*, a national from the country of Morocco, who applied for asylum in Belgium while illegally residing in this member state. Moreover, Lounani had been convicted of participating in a terrorist group for which he would be persecuted in Morocco if expelled. According to the CJEU, his conviction falls under a particularly serious crime with the consequence that the exclusion of granting asylum is justified.²⁰ Besides, a person can be granted with subsidiary protection when a person is not recognised as a refugee but still faces a serious risk when expelled to the country of origin.²¹

Albeit a person is considered as an irregular migrant, this does not mean that this person has no human rights. The norms of international human rights are in general applicable to every human being, despite the status of their migration. Only when a provision is explicitly excluded by law, a human right is not applicable for the irregular migrant. In this regards, also rights deriving from the ECHR and EU law are applicable for irregular migrants, such as human dignity and non-refoulement.²²

The distinction between irregular migrants and refugees forms an important factor of the EU – Turkey Statement because Turkey has to take back the irregular migrants arriving in Greece. Furthermore, both parties have committed to participate in the 1:1 resettlement scheme. This means that only migrants who do not want to apply for asylum in Greece or migrants whose application has been rejected are expelled under the Statement.²³ If all resettled migrants are irregular, this would mean that these persons can be expelled to a third country or to their country of origin as long as human rights are respected. The fact that a person is perceived as irregular does not automatically indicate that this person shall not be subject to a violation of absolute rights. Also persons who do not want to apply for asylum in Greece, but in another EU member state, can still flee from prosecution although they are not in possession of the status of a refugee. Furthermore, question marks can be placed whether all resettled persons from Greece to Turkey are considered as irregular migrants since it is possible that asylum seekers are sometimes unjustifiably perceived as irregular or as unwilling to apply for asylum as a result of flaws in asylum systems.

2.3 Refugee convention and ECHR in the European Union

The Geneva Convention forms the cornerstone of international protection of refugees. In this Convention was not only the definition of a refugee defined but also the rights of a refugee. Since all member states form part of this Convention, the Geneva Convention is applicable in the European

¹⁹ Directive 2004/83/EC, art. 12(2).

²⁰ CJEU C-573/14 *Commissaire général aux réfugiés et aux apatrides v Mostafa Lounani*, paras 30, 31 and 75.

²¹ Directive 2011/95/EU, art. 15.

²² Fundamental Rights Agency, 'Fundamental rights of migrants in an irregular situation in the European Union', November 2011, pp. 19-23.

²³ European Council, 'EU – Turkey Statement, 18 March 2016', <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>, accessed on 18 May 2018.

Union. As described above, the Convention is furthermore implemented in primary and secondary law of the Union. As a consequence, not only the member states and EU citizens can be held accountable with regards to these provisions but also the institutions of the European Union. Besides, the amended Protocols are adopted by the member states of the EU, meaning that the additions also are safeguarded in the European Union. An example of this is the New York Protocol, which removed the time limitation of the Geneva Convention.

However, certain parties of the Geneva Convention have adopted the Convention with a geographical limitation. Turkey is one of these parties and has adopted the Geneva Convention with regards to European refugees, meaning that the country only recognises European asylum seekers as refugees. This indicates that Turkey shall not perceive Syrian refugees as refugees, but as seekers of international protection.

Other international human rights which are respected in the European Union are the rights deriving from the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Since the European Convention was adopted in the Council of Europe, also non-EU states are bound to safeguard these rights, such as Turkey. In contrast to the international conventions of the United Nations, the ECHR has its own court to rule on human rights: the European Court of Human Rights (ECtHR). As a result, all members of the Council of Europe can be held accountable by the ECtHR for violating the rights of individuals.

The European Union itself is no contracting party of the ECHR despite the fact that in the TEU is adopted that the EU shall accede to the Convention and that the fundamental rights of the ECHR form part of the general principles of the EU.²⁴ An accession has been sought in the opinions 2/94 and 2/13. In opinion 2/94 was stated that an amendment or a new treaty was required before the European Union could be a contracting party of the Convention. Opinion 2/13 contained the compatibility of EU law with an accession treaty of the EU to the Council of Europe. In the latter opinion, the CJEU has ruled that the accession to the ECHR would lower the standards of the protection of human rights in the EU, in particular with regards to Justice and Home Affairs matters.²⁵ As a result, the provisions of the ECHR are not legally binding for the European Union, its institutions and its organisations.

Nevertheless, in the case of *J.R. and Others v Greece*, the Strasbourg Court follows the reasoning of the Luxembourg Court in the case of *N.F. v European Council*. It therefore refers to the EU – Turkey Statement as a statement conducted by Davutoğlu and the heads of states or governments of EU member states, leaving aside a legal examination of the Statement by the ECtHR.²⁶ Nonetheless, this case also indicates that individuals may ask the ECtHR for referral, arguing that their fundamental rights are violated under the EU – Turkey Statement.

²⁴ TFEU, art. 6.

²⁵ Peers, Accession EU to ECHR, pp. 215-217.

²⁶ ECtHR 22696/16, *J.R. and Others v Greece*, paragraph 39.

CHAPTER THREE: Human dignity

Human dignity is considered as an important value in human rights, which definition develops over time. Seen as a starting point for other human rights, safeguarding the right to human dignity is essential for respecting other human rights, such as the right to asylum and the right to non-refoulement. Human dignity is therefore of importance with regards to asylum law and not only applicable to seekers of international protection but also to irregular migrants. As long as the dignitarian rights are not respected, the Statement would not be in accordance with international and European law.

3.1 Definition of human dignity

Despite the importance of human dignity, there is no common definition of this term. This comes to light when analysing the development of human dignity over time: it represented the status of a person in the Roman Empire (*dignitas homines*)²⁷, while it represented the autonomy of a person in the Enlightenment.²⁸ One philosopher in the Enlightenment was Immanuel Kant, whose concept of human dignity is often used nowadays. In view of the Kantian concept, human dignity must be perceived as a goal. Furthermore, a person must be treated as an autonomous individual person who is able to choose its own destiny. By recognising this autonomy, it is given that the dignitarian rights of others are to be respected.²⁹ In the twentieth century, the term of human dignity developed further and was introduced in political spheres by the philosopher Jacques Maritain. This philosopher enhances an interpretation of the concept in which human dignity is not only a given in the nature of a man but also in the relations and political life of a man. Since Maritain played a role in writing the United Nations Universal Declaration of Human Rights (UDHR), this interpretation of human dignity was adopted in the Declaration. As part of this Declaration, human dignity was not merely seen as an individual right, but as a right for the common good.³⁰ Nevertheless, the term of human dignity continues to develop over time and contexts, for example with regards to anti-Communism, Nelson Mandela and bio-medicines.

Despite the diverging definitions, human dignity contains a minimum core. First of all, there is an ontological claim that reflects the irreplaceable and priceless unique qualities of an individual.³¹

²⁷ C. McCrudden, pp. 656-657.

²⁸ Ibidem, p. 659.

²⁹ E. Boot, pp. 907-908.

³⁰ C. McCrudden, pp. 661-662.

³¹ R. Steinmann, p. 6.

Furthermore, human dignity consists of a relational claim. The relational claim brings human dignity in a social dimension in which respect and recognition of others are safeguarded. The third common element enhances a limited-state claim that represents the relation between the state and the individual.³²

3.2 Human dignity in international law

Human dignity was for the first time adopted in the Universal Declaration on Human Rights in the aftermath of the Second World War. The concept formed the first article in this Declaration, with the words:

“All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”³³

In the Declaration is furthermore adopted that human dignity forms the foundation of peace, freedom and justice in the world.³⁴ Besides, the dignity of a person is included in other provisions of the UDHR, with regards to cultural, economic and social rights.³⁵

Human dignity is also of significance in later international human rights Conventions by adopting this right into articles and preambles of International Conventions on Social, Economic and Cultural Rights, on Elimination of Racial Discrimination, on Civil and Political Rights, on the Prevention of Torture and on the Discrimination against Women. Subsequently, the role of human dignity in human rights has been expanded by adopting this right on a wide variety of international conventions with the result that human dignity forms also part of the right to health, the right of disabled persons and the right to the protection of personal data.³⁶

Although human dignity is not explicitly adopted in the ECHR, it is to be considered as “the very essence of the ECHR”.³⁷ Implicitly is human dignity safeguarded in article 3 ECHR with the words: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment”.³⁸ With the use of this article, human dignity is therefore to be interpreted as a broad interpretation of the right to the absence of torture. The connection between human dignity and article 3 ECHR was for the first time made by the Court in the case of *Tyrer v the United Kingdom*. In 1972, Tyrer assaulted a pupil of his school and pleaded guilty in front of the local juvenile court. Consequently, Tyrer was sentenced with three strokes of the birch, which the police authorities performed. Before the ECtHR the main question was whether this punishment was a degrading treatment. Albeit the applicant did not suffer severely, the Court ruled that the birch violated his physical integrity and personal dignity, being the main aims of article 3

³² C. McCrudden, pp. 679-680.

³³ UDHR, art. 1.

³⁴ *Ibidem*, p. v.

³⁵ *Ibidem*, art. 22.

³⁶ C. McCrudden, pp. 668-669.

³⁷ ECtHR 28957/95, *Christine Goodwin v the United Kingdom*, para 90.

³⁸ ECHR, art. 3.

ECHR.³⁹

It may be clear that the right to human dignity is taken seriously by the ECtHR, despite the absence of explicitly mentioning in the Convention. The importance of human dignity is furthermore stressed in its absolute and inviolable character with the result that no human right justifies a breach of article 3 ECHR, as is conducted in the case of *Gäfgen v Germany*. In this case, the applicant murdered a child and demanded afterwards a ransom of the parents, pretending like the child was still alive. After the payment, the police were able to arrest Gäfgen. During the interrogation, the suspect was threatened with torture by the police and confessed under duress. As a consequence of this ill-treatment, evidence was obtained and used in his process before the German courts. However, when brought to the ECtHR, the Strasbourg Court stated that threatening with torture is a form of degrading or inhuman treatment. Furthermore, the Court held that article 3 cannot be violated, even when an individual's life is at risk.⁴⁰

Nonetheless, article 3 is in cases often combined with other articles of the Convention in order to frame or complement these rights. One example is the case of *Jalloh v Germany*. In this case, Jalloh was caught by the German police while dealing drugs. At that time, Jalloh swallowed one package of drugs through his mouth. In order to charge the applicant, the German police gave Jalloh an emetic for regurgitating the drugs as a piece of evidence. According to the applicant, this evidence was obtained in an illegal way, that infringed the rights of article 3, 6 and 8 of the ECHR by stating that the emetic was humiliating and life-threatening.⁴¹ This case indicates that human dignity is being invoked to give the claim a more moral weight and to frame the application.

Human dignity forms also part of asylum law, with regards to the living conditions of refugees and asylum seekers. The case of *M.S.S. v Belgium and Greece* has shown that the dignity of an individual is harmed when the living conditions of asylum-seekers are not sufficient and thus degrading or inhuman. The fact that the applicant was not provided with the basic needs and had no sanitary facilities nor resources, show that the Greek authorities did not respect this person's dignity and therefore breached article 3 ECHR.⁴²

3.3 Human dignity in EU law

The right to human dignity is also respected in the EU via a codification in the Treaty on the European Union (TEU). In order to stress the importance of this right and value in the EU, it is to be considered as one of the founding values of the European Union itself. Dignitarian rights should therefore be respected by all member states of the Union.⁴³ In the case of *the Netherlands v European Parliament and the Council*, the ECJ confirmed that human dignity is a fundamental right within European Union

³⁹ ECtHR 5856/72, *Tyrer v the United Kingdom*, para 33.

⁴⁰ ECtHR 22978/05, *Gäfgen v Germany*, paras 101-108.

⁴¹ ECtHR 54810/00, *Jalloh v Germany*, paras 58-61.

⁴² ECtHR 30696/09, *M.S.S. v Belgium and Greece*, para 253.

⁴³ TEU, art. 2.

law.⁴⁴

In contrast to the ECHR, human dignity is explicitly adopted in the EU Charter with the words: “Human dignity is inviolable. It must be respected and protected”.⁴⁵ Placing human dignity as the first article of the Charter indicates that human dignity forms the basis of the Charter and that dignity flows through the other articles of the Charter, such as citizen’s rights and solidarity. Besides, no other right of the EU Charter may harm a person’s dignity.⁴⁶ Human dignity is thus inviolable and absolute and cannot be infringed by other rights and values of EU law. This was concluded by the ECJ in the case of *Omega*, in which the company Omega Spielhallen claimed that the right to free movements of services was restricted by the German police. Reason for this is that the police argued that the opening of a ‘laserdrome’, including the game ‘killing at people’, would affront human dignity and be a danger for public safety and order.⁴⁷ The Court indicated that a restriction on the free movement of services was justified because the dignity is an individual human right with a particular status.⁴⁸

Besides the adoption of human dignity in article 1, dignitarian rights form a whole chapter in the EU Charter. Therefore, a comparison can be made with human dignity in the ECHR since the prohibition of torture and the right to life are also included in this chapter.⁴⁹ This indicates that the European Union brings human dignity in line with the case law of the ECtHR. This is shown in the joined cases of *Aranyosi and Căldăraru* for a preliminary ruling. In both cases were the applicants taken into custody in Bremen on grounds of a European Arrest Warrant for criminal activities in their country of origin, respectively Hungary and Romania. As a result, the national authorities of these countries demanded extradition in order for sentencing and imprisoning the applicants. The CJEU stated that these extraditions would, however, violate article 4 of the EU Charter since the circumstances in the prisons of Hungary and Romania were degrading and inhuman.⁵⁰ In this regards, the Court considered the prohibition of degrading or inhuman treatment closely linked with human dignity and made a correspondence with article 3 ECHR.⁵¹

Despite the consideration of human dignity as an important value and right, the European Union has no common definition of the term itself. This has the consequence that the dignity of a person is open to interpretation by the CJEU. The interpretation of the Court also depends on how human dignity is used: putting emphasis on the centrality of humanity, highlighting vulnerability and complex dimensions of a petitioner or for developing new rights in order to protect a situation in which no specific right is embedded.⁵² The grey zone concerning the absence of a common definition might be problematic

⁴⁴ ECJ C-377/98, *the Netherlands v European Parliament and the Council*, paras 70-77.

⁴⁵ EU Charter, art. 1.

⁴⁶ J. Jones, p. 284.

⁴⁷ ECJ C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn.*, considerations 4-7.

⁴⁸ *Ibidem*, consideration 34.

⁴⁹ EU Charter, artt. 2 and 4.

⁵⁰ CJEU Joined cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*, para 104.

⁵¹ *Ibidem*, paragraphs 85-86.

⁵² C. Dupré, p. 335-336.

since this might create inconsistency of interpretation on human dignity by the Court.

Also in the field of EU asylum and migration policy forms human dignity an important factor. Although the right is hardly used as a right on its own, it plays a role in interpreting and enforcing EU legislation. As indicated in Directive 2003/9/EC, human dignity is to be fully respected in the establishment of conditions for the reception of asylum seekers by promoting articles 1 and 18 of the Charter.⁵³ The combination of human dignity and asylum legislation is sought more often, for example in Directive 2008/115 which sets common standards for the return of irregular migrants. According to this Directive, the removal of an irregular migrant shall take place in accordance with human dignity as a fundamental right, respecting the physical integrity and the dignity of a third-country national.⁵⁴

Several cases were brought to the Luxembourg Court concerning the connection of human dignity and asylum. One example is the case of *ABC v Secretary of Security and Justice of the Netherlands* in which the applicants applied for asylum in the Netherlands, based on a fear for persecution in the country of origin due to their sexual orientation. The Dutch authorities rejected the applications of A, B and C on grounds of tests that demonstrated the credibility of their sexual orientation.⁵⁵ The Court held in its proceedings that such tests infringe the dignity of a person. In order to comply with human dignity, the applicants have been granted asylum.⁵⁶ Nevertheless, it is questionable whether this ruling of the CJEU created a loophole in EU law because all asylum seekers can claim that they are homosexual, even when they are not, knowing that they cannot be tested on their sexual orientation as part of their dignity.

3.4 Human dignity in the EU – Turkey Statement

Despite no explicitly mentioning of human dignity in the EU – Turkey Statement, this right has to be respected since it is one of the founding values of the European Union. Besides, human dignity is connected with other rights, such as non-refoulement and asylum. Due to the fact that the EU Charter is also applicable for third country nationals, the right to human dignity is also valid for persons seeking asylum in Greece as well as irregular migrants.

Nonetheless, the right to human dignity shall be seen in light of a combination with other rights, such as the right to asylum and the right to non-refoulement. Following the reasoning of the ECtHR and the CJEU, the living conditions of third country nationals shall be in compliance with article 1 and 4 of the EU Charter and article 3 of the ECHR. Therefore, the third country nationals shall not face an inhuman or degrading treatment while residing in Greece or relocated to Turkey. When a person is relocated from Greece towards Turkey or vice versa, the living conditions of these persons must be humane and not be degrading in order to comply with the right to human dignity. Furthermore, asylum

⁵³ Directive 2003/9/EC, recital 5.

⁵⁴ Directive 2008/115/EC, article 8(4).

⁵⁵ CJEU Joined cases C-148/13 to C-150/13, *ABC v Secretary of Security and Justice of the Netherlands*, paras 22-29.

⁵⁶ *Ibidem*, para 65.

seekers shall be treated in a humane manner when processing the asylum procedure. Case laws of both European Courts have indicated that the right to human dignity is not always respected, also with regards to asylum.

If the conditions for asylum seekers under the EU – Turkey Statement are not sufficient and found degrading or inhuman, the Statement is incompatible with the right to human dignity in European and international law. In this regards, the right to asylum is being discussed in more detail in order to find a violation of human dignity in the EU – Turkey Statement.

CHAPTER FOUR: Right to asylum

The right to asylum is not only focused on providing asylum seekers to seek asylum but also gives states the positive obligation to uphold all aspects of this right. In this regards, the right to asylum provides asylum seekers with the possibility to request asylum, protects those who have been granted with the status of a refugee or with subsidiary protection and assures that asylum seekers are granted with a sufficient level of reception conditions. This indicates that these rights must also be safeguarded under the EU – Turkey Statement in order to prevent a breach with EU law.

4.1 Right to asylum in international law

The right to asylum was for the first time in international law adopted in the UDHR, providing rights for seeking asylum in other countries on grounds of prosecution.⁵⁷ In the wording of the UDHR, the right to asylum is considered as a right for everyone. The word ‘everyone’ indicates that there shall be no distinction of nationality, apart from the fact that the right to asylum is only applicable in another country than the country of origin. This means that a person is obliged to cross borders in order to be eligible for this right.⁵⁸ The scope of the UDHR is further limited by placing exceptions for granting the right to asylum in article 14(2): “This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations”⁵⁹.

Granting asylum is determined by qualified officials of the national authorities who assessed the application during a complete personal interview with the applicant. During this process, the applicant has to be provided with legal assistance.⁶⁰ In the year 1951 was built upon the UDHR with the conduction of the Geneva Convention, which was amended by the 1967 New York Protocol.⁶¹

Another convention in which the right to asylum is not explicitly mentioned, is the European Convention on Human Rights. Comparable with human dignity, the right to asylum is safeguarded in article 3 ECHR. This means that the right is perceived as inviolable and prohibits torture and degrading or inhuman treatment as part of asylum.⁶² The word ‘treatment’ brings an obligation for the state to provide

⁵⁷ UDHR, art. 14.

⁵⁸ R. Stern, p. 57.

⁵⁹ UDHR, art. 14(2).

⁶⁰ C.W. Wouters, pp. 166-167.

⁶¹ R. Stern, pp. 58-59.

⁶² C.W. Wouters, pp. 324-325.

the asylum seeker with sufficient basic needs in order to make sure that the situation is compatible with human dignity. The basic needs, as part of standard protection, contain the elements of shelter, food and hygiene as well as the prospects of an improving situation.⁶³ One of many examples in case law, is the case of *M.S.S. v Belgium and Greece*. Because the living conditions in Greece were inhuman and degrading for the applicant, the ECtHR ruled that a return to Greece would violate article 3 ECHR.⁶⁴

When ruling on this right, the Strasbourg Court relies on official reports concerning analyses of the living conditions of asylum seekers. These reports are not only written by bodies of the Council of Europe but also by the United Nations High Commissioner for Refugees, National Human Rights and Refugee Councils and NGO's.⁶⁵

4.2 Right to asylum in EU law

The right to asylum is also safeguarded by the legal provisions of the European Union. In the TFEU is therefore adopted that asylum policy of the EU shall respect relevant international treaties, such as the Geneva Convention and the New York Protocol.⁶⁶

Comparable with the TFEU, the EU Charter makes also references to the Geneva Convention concerning the right to asylum.⁶⁷ However, the right to asylum in the Charter may be interpreted differently. Reason for this is the fact that the right to asylum is considered as an individual right instead of as a right for everyone. In this view, a person has the right to an individual assessment on granting asylum and admission on a state territory.⁶⁸ Furthermore, the EU Charter gives more obligations to the member states of the European Union, by explicitly mentioning the right to asylum as opposed to the Geneva Convention and ECHR.⁶⁹

In secondary legislation falls the right to asylum within the framework for a Common European Asylum System (CEAS), perceived as a set of Directives and Regulations with the aim to create common standards and to ensure cooperation in the European Union.⁷⁰ Despite the common framework, most elements consist of Directives with the result that differences may exist between the EU member states.

Part of the CEAS is the Qualification Directive, which sets the standards for granting international protection. Based on this Directive, the EU member states assess whether an individual applicant can be granted with a refugee status or with a status of subsidiary protection. Such status can

⁶³ ECtHR 30696/09, *M.S.S. v Belgium and Greece*, paras 250-254.

⁶⁴ *Ibidem*, paras 359-360.

⁶⁵ A. Pijnenburg, 'J.R. and Others v Greece: what does the Court (not) say about the EU-Turkey Statement?', <https://strasbourgobservers.com/2018/02/21/jr-and-others-v-greece-what-does-the-court-not-say-about-the-eu-turkey-statement/>, accessed on 23 May 2018.

⁶⁶ TFEU, art. 78(1).

⁶⁷ EU Charter, art. 18.

⁶⁸ M.T. Gil-Bazo, p. 37.

⁶⁹ L.M. Langford, pp. 229-230.

⁷⁰ European Commission, 'A Common European Asylum System', https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/docs/ceas-fact-sheets/ceas_factsheet_en.pdf, accessed on 19 May 2018.

be granted in cases when the applicant faces a risk of serious harm or persecution in the form of mental or physical violence, discriminatory measures, disproportionate punishment or prosecution, punishment or prosecution for denial of performing military services or child-specific or gender-specific nature.⁷¹ However, a person can be excluded from granting a status. Not only exclusions can be justified on grounds of a previously committed serious crime, but also when the applicant used false documents or gave misinformation that was crucial for granting a status.⁷²

Besides, the standards for asylum procedures are also laid down in EU law.⁷³ A central point in asylum procedures is the right to remain in the European Union whilst the application for asylum is being examined.⁷⁴ Besides, the examination of an application should be taken as soon as possible on an objective, individual and impartially basis while taking information from human rights organisations into account.⁷⁵ In addition, the applicant has the right to be heard in a personal interview for explaining the grounds of application and the applicant shall be provided with information concerning the status of the application.⁷⁶ Nonetheless, an application is perceived as inadmissible when the applicant flows from a safe third country or from a first country of asylum.⁷⁷

Furthermore, the Reception Conditions Directive sets the minimum standards of living conditions for the refugees. This indicates that the provisions of refugees in Greece should contain a minimum level although it may retain more favourable. The standard provisions for refugees ensure food, accommodation, clothing, family unity, education, medical screening, health care and employment.⁷⁸ Nevertheless, the form in which certain conditions are provided may differ per member state and situation. With regards to the clothing and food, the provision could exist of an expense allowance or vouchers.⁷⁹ An important factor of this Directive is the fact that the person has to submit an application for asylum. Therefore, persons who do not want to apply for asylum in that specific member state do not fall under this Directive and can be reduced with material reception conditions.⁸⁰ The importance of reception conditions is reviewed in the case of *Cimade and GISTI*, in which Advocate General Sharpston opines that a disqualification of the reception conditions has the consequence that the efficacy of the right to asylum is limited, in particular the submission of an asylum claim.⁸¹ The

⁷¹ Directive 2011/95/EU, art. 9.

⁷² Directive 2011/95/EU, artt. 14 and 17.

⁷³ Directive 2013/32/EU.

⁷⁴ *Ibidem*, art. (1).

⁷⁵ *Ibidem*, art. 10.

⁷⁶ *Ibidem*, artt. 14 – 19.

⁷⁷ *Ibidem*, art. Article 33 (2)(B)(C), art. 35 and art. 38.

⁷⁸ Directive 2013/33/EU, artt. 12-19.

⁷⁹ *Ibidem*, art. 2(g). See also: D. Chalmers, G. Davies and G. Monti, p. 558.

⁸⁰ Directive 2013/32/EU, art. 20(2).

⁸¹ CJEU C-179/11, *Cimade en Groupe d'information et de soutien des immigrés (GISTI) v Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration*, Opinion of AG Sharpston, para 56.

minimum standards must furthermore protect and ensure a prevention of inhuman or degrading treatment in order to guarantee the right to asylum.⁸²

4.3 Right to asylum in the EU – Turkey Statement

As described in the Statement, national authorities assess the asylum applications on an individual basis for granting a refugee status or a status for subsidiary protection. Persons who do not meet the criteria for such status or persons who are unwilling to apply for asylum in Greece are considered as irregular migrants.⁸³ Although this is conform international and European law, also refugees who want to apply for asylum in another EU member state fall under the definition of an irregular migrant. For example: a Syrian refugee who entered the EU in Greece and is willing to apply for asylum in the United Kingdom, cannot be granted with a status and shall consequently be considered as an irregular migrant.

Due to the lack of capacity for processing and registering asylum claims in Greece, not every migrant has had the possibility to apply for asylum. Therefore, persons might face a risk for resettlement under the EU – Turkey Statement even though these persons are not irregular and do want to apply for asylum in Greece.⁸⁴ Nonetheless, the procedure for lodging an asylum application has been slow down as a consequence of the administrative burden due to the surge of migratory flows and gives no guarantee that a person is not expelled to Turkey prior to the asylum claim is properly examined.⁸⁵ For example, ten Syrian asylum seekers were transferred from Greece towards Turkey although their asylum application had not been properly examined yet.⁸⁶ Furthermore, persons are restricted from applying for asylum in Greece because they are intercepted in the Mediterranean Sea and pushed back by Turkish authorities. As a result, these persons are considered as irregular and are obliged to stay in Turkey, although they might fall under the scope of a refugee.

Asylum applications may be perceived as inadmissible in cases when a person flows from a safe third country or a safe country of origin. As a consequence, these asylum applicants can therefore not be granted with the status of a refugee nor the status of subsidiary protection in the EU.⁸⁷ This stresses the importance of analysing whether Turkey is considered as a safe third country with regards the 1:1 resettlement scheme. If Turkey is considered as a safe third country, persons flowing from Turkey (for those who is Turkey a safe third country) are not eligible for granting asylum and receiving the status of a refugee in the European Union.

⁸² CJEU C-179/11, *Cimade en Groupe d'information et de soutien des immigrés (GISTI) v Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration*, para 56.

⁸³ European Council, 'EU – Turkey Statement, 18 March 2016', <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>, accessed on 18 May 2018.

⁸⁴ UNHCR, 'UNHCR recommendations for Greece in 2017', February 2017.

⁸⁵ Human Rights Watch, 'Greece: Asylum-Seeking Women Detained with Men', <https://www.hrw.org/news/2018/06/07/greece-asylum-seeking-women-detained-men>, accessed on 13 June 2018.

⁸⁶ UNHCR, 'UNHCR concern over the return of 10 Syrian asylum-seekers from Greece', <http://www.unhcr.org/news/briefing/2016/10/5809e78d4/unhcr-concern-return-10-syrian-asylum-seekers-greece.html>, accessed on 17 May 2018.

⁸⁷ Directive 2013/32/EU, art. 33(2)(c).

Moreover, in the Statement is adopted that only Syrians are resettled from Turkey towards the EU under the 1:1 relocation scheme, while Turkey hosts refugees from different nationalities.⁸⁸ The fact that only Syrians will be relocated in Europe, indicates that a distinction is made on nationality for granting asylum in Europe and not on grounds of necessity. Due to this distinction, the Statement does not respect article 21(2) of the EU Charter, which prohibits discrimination for reasons of nationality.⁸⁹

Under the EU – Turkey Statement, Greece shall provide the asylum seekers with the minimum standards of reception, such as clothes, shelter and food. These minimum standards also apply when persons are relocated from Turkey to Greece under the 1:1 relocation scheme. However, the reception conditions can be limited. In this regards are irregular migrants and migrants who are unwilling to apply for asylum in Greece excluded from receiving these minimum standards. This also includes persons who are unwilling to apply in Greece in order to apply for asylum in another member state of the European Union.⁹⁰ Nonetheless, the reception and living conditions of asylum seekers in Greece have been subject to criticism. Argued is that Greece does not fulfil the minimum standards of Directive 2013/33/EU. Although tents are provided in order to provide shelter, this form of accommodation is not suitable during cold winters.⁹¹ Besides, refugees have limited access to health care and basic services.⁹² The cases of *M.S.S. v Greece* and *Hirsi Jamaa v Italy* have shown that the minimum standards were not met under normal circumstances before the migration crisis.

However, the time period of closing the EU – Turkey Agreement does not fall under normal circumstances. In the case of *J.R. and others v Greece*, the ECtHR acknowledged the poor living conditions and overcrowding. Despite these poor living conditions, the Court ruled that these conditions did not meet the threshold of severity concerning degrading and inhuman treatment within the meaning of article 3 ECHR. Furthermore, the Court emphasised the importance to bear in mind the fact that the exceptional and high rise of migration flows has led to logistical, structural and organisational difficulties in Greece.⁹³ In my opinion, it is remarkable that the Strasbourg Court ruled that the threshold of the absolute right to the absence of inhumane and degrading treatment was not met in this case. This assumes that the living conditions in the case of *J.R. and others* were better than the conditions in the cases of *M.S.S.* and *Hirsi Jamaa*, despite the exceptional circumstances and substantial increase of migrants.

Albeit the ECtHR ruled that article 3 ECHR is not infringed in the case of *J.R. and others v Greece*, the Court might rule differently in other cases consisting of a more recent date or a different place in Greece. As indicated previously, since the EU – Turkey Statement there has been a decrease of

⁸⁸ G.F. Arribas, p. 1102.

⁸⁹ EU Charter, art. 21(2).

⁹⁰ Directive 2013/32/EU, art. 20.

⁹¹ A. Dimitriadi, working paper ‘The impact of the EU – Turkey Statement on Protection and Reception: The Case of Greece’, *Global Turkey in Europe*, number 15 (2016), p. 8.

⁹² International Rescue Committee, Norwegian Refugee Council and Oxfam Novib, ‘The Reality of the EU – Turkey Statement’, <https://data2.unhcr.org/en/documents/download/54850>, accessed on 4 June 2018.

⁹³ ECtHR 22696/16, *J.R. and Others v Greece*, para 138.

migratory flows towards Greece⁹⁴ with the result that an exceptional high rise of these flows is no longer in place when ruling on a present case. Nonetheless, a key fact to remember is the fact that asylum seekers on the Greek islands are forbidden to move to the mainland of Greece during the examination of their asylum claim.⁹⁵ Overcrowding is therefore still possible in the refugee camps on the islands because the duration of the asylum examination could either take a few months or a few years.

⁹⁴ T. Spijkerboer, 'Fact Check: Heeft de EU – Turkije deal het aantal migranten en grensdoden naar beneden gebracht', *Internationale Spectator*, issue 4 (2016), pp. 2-3.

⁹⁵ M.J. Alpes, S. Tunaboynu and I. van Liempt, 'Human Rights Violations by Design: EU-Turkey Statement Prioritises Returns from Greece Over Access to Asylum', *Policy Brief for Robert Schuman Centre for Advanced Studies, European University Institute*, p. 5.

CHAPTER FIVE: The principle of non-refoulement

As described in the previous chapter, the right to asylum examines the application of an asylum seeker or refugee and contains minimum standards of the reception of these persons. In order to ensure that persons are not expelled to a territory that would constitute harm, the principle of non-refoulement is adopted in international as well as European law. This indicates that the persons under the EU – Turkey Statement shall not face a fear for a serious risk or harm when expelled towards Turkey. In this chapter is analysed whether the EU – Turkey Statement is in accordance with the principle of non-refoulement.

5.1 Non-refoulement in international law

Comparable to the right to asylum, the principle of non-refoulement is adopted in the Geneva Convention. Article 33(1) states that a refugee shall not be returned to a territory in which the life of this person is being threatened for reasons of religion, race, political opinion, member of a particular group or nationality.⁹⁶ This prohibition of return is not only limited to the country of origin of the refugee, but also other territories that could constitute a serious risk for the refugee.⁹⁷ The importance of the rights deriving from this article demonstrates that article 33(1) of the Geneva Convention is considered as the cornerstone of the protection of refugees.⁹⁸ Although the article refers to the term refugee, the principle of non-refoulement is also applicable for asylum seekers who have not been granted yet with the status of a refugee. In contrast, persons considered as irregular migrants are excluded from this right under the Geneva Convention since the Convention is not applicable for these persons.⁹⁹ Besides, the Geneva Convention limits non-refoulement in cases when a person forms a threat to security or has committed a particularly serious crime.¹⁰⁰

Not only direct refoulement would violate international law but also ‘chain’ and ‘indirect’ refoulement are prohibited in the Geneva Convention due to the adoption of the words “any manner whatsoever”¹⁰¹. For this reason, Greece is not allowed to expel a refugee to Turkey when there are grounds to assume that Turkey will send this person back to a territory where the dignity of this person is being threatened. Due to the fact that refoulement might threaten the life of a person, the examination

⁹⁶ UNHCR, Convention and Protocol relating to the status of refugees, article 33(1).

⁹⁷ C.W. Wouters, p. 134.

⁹⁸ Fundamental Rights Agency, ‘Handbook on European Law relating to asylum, borders and immigration’, December 2013, p. 61.

⁹⁹ R. Mungianu, p. 95.

¹⁰⁰ UNHCR, Convention and Protocol relating to the status of refugees, art. 33(2).

¹⁰¹ Ibidem, art. 33(1). See also: the other Eurocrisis, pp. 226-227.

of this principle takes place on an individual basis.¹⁰² Nonetheless, general information on the country of origin or safe third country has to be taken into account, although the examination should not rely too heavily on these general assumptions.¹⁰³

Also the European Convention on Human Rights enshrines the principle of non-refoulement. Comparable to human dignity and the right to asylum, non-refoulement is not explicitly mentioned and falls as well under article 3 ECHR. The risk of torture and degrading or inhuman treatment forms the criteria for examining whether a person can be expelled.¹⁰⁴ An example in which the ECtHR places the principle of non-refoulement under article 3 ECHR is the case of *Sufi and Elmi*.¹⁰⁵ Nevertheless, article 3 is in general used in conjunction with other articles of the Convention with regards to non-refoulement. For example: article 2 (right to life), article 7 (no punishment without the law), article 4 of Protocol No 4 (collective expulsion) and article 1 of Protocol No 13 (abolition of death penalty).

The ECHR affords wider protection for refugees, asylum seekers and irregular migrants than the Geneva Convention since article 3 ECHR is absolute. Therefore, no limitations of non-refoulement are justifiable. This absolute character is seen in the case of *Soering*. Soering (a German national) committed a crime in the United States but was arrested in the United Kingdom. In order to prosecute Soering, the United States urged for the extradition of the applicant. When brought to the ECtHR, the Court argued that an extradition would violate article 3 ECHR because of the fact that Soering would risk facing the death penalty when extradited.¹⁰⁶

Indirect and chain refoulement are also prohibited within the meaning of the European Convention, as indicated in the case of *Ilias and Ahmed v Hungary*. In this case, the Bangladeshi applicants applied for asylum in Hungary after transiting through Serbia, Macedonia and Greece. The Hungarian authorities found the application inadmissible conform the Asylum Procedures Directive because Serbia was perceived as a safe third country. As a consequence, the applicants were expelled to Serbia although was claimed that the expulsion exposed them to the risk of chain refoulement from Serbia to Greece. The ECtHR ruled that the Hungarian authorities did not undertake individual assessments with regards to the risk of chain-refoulement and thus the risk for degrading or inhumane treatment in Greece.¹⁰⁷

The case of *Ilias and Ahmed* has furthermore shown that the fact that a third country is party of the European Convention does not automatically mean that this country is safe for a specific person and that his person constitutes no risk of (indirect) refoulement. National authorities are therefore bound by

¹⁰² D. Chalmers, G. Davies and G. Monti, p. 537.

¹⁰³ Fundamental Rights Agency, 'Handbook on European Law relating to asylum, borders and immigration', December 2013, p. 73.

¹⁰⁴ M. den Heijer, 'Whose Rights and Which Rights? The Continuing Story of Non-refoulement under the European Convention on Human Rights', *European Journal of Migration Law*, issue 10 (2008), pp. 277-278.

¹⁰⁵ ECtHR 8319/07 and 11449/07, *Sufi and Elmi v the United Kingdom*, para 199.

¹⁰⁶ ECtHR 14038/88, *Soering v the United Kingdom*, para 126.

¹⁰⁷ ECtHR 47287/15, *Ilias and Ahmed v Hungary*, paras 121-125.

article 3 ECHR to assess the expulsion of a person to a third country on a case-by-case basis. In addition, the third country must not only ensure non-refoulement but must also provide the possibility to seek asylum.¹⁰⁸ However, this possibility does not guarantee the right to a residence permit within the meaning of the ECHR. Reason for this is the fact that no provisions regarding a residence permit are adopted in the Convention nor the Protocols.¹⁰⁹

5.2 Non-refoulement in EU law

In contrast to the ECHR, the principle of non-refoulement is explicitly mentioned in EU law. In article 78(1) TFEU is adopted that the law and legislation of the European Union shall comply with the Geneva Convention and other international treaties with regards to the prevention of direct, indirect and chain refoulement.¹¹⁰

The principle of non-refoulement forms additionally part of the EU Charter, in which is written:

“No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment”.¹¹¹

This quotation indicates that the non-refoulement principle is applicable to all persons, including irregular migrants. Therefore, irregular migrants are also protected against refoulement to a state that constitutes serious risks for these persons. In this regards, also persons who do not want to apply for asylum in Greece must not face the risk of (indirect or chain) refoulement when relocated towards Turkey.

Besides, non-refoulement is interrelated with other rights of the EU Charter, such as the right to life, degrading or inhuman punishment or treatment and collective expulsion.¹¹² Since the case law of the ECtHR is incorporated in the EU Charter, the right of non-refoulement is to be considered as an absolute right. Judgements of the cases of *Soering* and *Ahmed v Austria* are therefore integrated into EU law. The compatibility between the ECHR and non-refoulement in EU law was ruled by the Court in the case of *Elgafaji* by stating that article 3 ECHR and the case law of the ECtHR are taken into account when interpreting non-refoulement as a general principle of EU law.¹¹³

The individual examination of non-refoulement aims to prevent collective expulsion. In this respect, it is against the law to expulse all persons containing the same nationality.¹¹⁴ Decisions

¹⁰⁸ C.W. Wouters, p. 323.

¹⁰⁹ ECtHR 10154/04, *Bonger v the Netherlands*.

¹¹⁰ TFEU, art. 78(1).

¹¹¹ EU Charter, art. 19(2).

¹¹² Ibidem, artt. 2, 4 and 19(1).

¹¹³ ECJ C-465/07, *Elgafaji v Staatssecretaris van Justitie*, para 28.

¹¹⁴ EU Charter, art. 19(1) and explanation.

concerning expulsion shall therefore not be based solely on the nationality of a person or the country of origin but shall consist of an assessment of the individual circumstances of the person.

Non-refoulement is adopted in secondary legislation since it forms an integral part of the Returns Directive as well as the Qualification Directive. The latter Directive reflects the protection of refoulement for persons who are qualified as refugees or seekers of international protection. Interesting is the fact that article 21(2) of this Directive sets reasoned grounds for refoulement, for example in cases when the person forms a threat to the community of the state, as long as the refoulement is not prohibited by international obligations.¹¹⁵ However, the ECHR prohibits any refoulement by stating that the principle is absolute. As a result, refoulement is prohibited by an international obligation and article 21(2) shall not be enforced.

The principle of non-refoulement continues to apply in cases when the residence permit of a refugee is revoked, for example as a consequence of criminal activities. This was reasoned by the CJEU in the case of *H.T. v Land Baden-Württemberg* in which a Turkish refugee was convicted for participation in the PKK movement.¹¹⁶ As a result of this conviction, the German authorities made an expulsion order on which the CJEU made a preliminary ruling:

The consequences, for the refugee, of revoking his residence permit pursuant to article 24(1) of Directive 2004/83 are therefore less onerous, in so far as that measure cannot lead to the revocation of his refugee status and, even less, to his refoulement within the meaning of article 22(2) of that directive.¹¹⁷

This quotation indicates that non-refoulement cannot be balanced with other rights or threats, endorsing the absolute character of this principle. Although the absolute character protects against refoulement, it does not protect against an expulsion to a safe third country. As long as a third country respects the non-refoulement principle and is considered as safe for the applicant, the expulsion of an irregular migrant or asylum seeker to this specific third country is in compliance with EU law.

The legal basis for the return of irregular migrants to a third country is adopted in article 33 of the Asylum Procedures Directive. This article does not only apply to denied applications, but also to inadmissible applications. However, the return to a third country is only justifiable if the country respects the principle of non-refoulement and can be perceived as a safe third country.¹¹⁸ In other words, the removal or relocation of an irregular migrant is postponed when a return infringes the right to non-refoulement.

¹¹⁵ Directive 2011/95/EU, art. 21.

¹¹⁶ CJEU C-373/13, *H.T. v Land Baden-Württemberg*.

¹¹⁷ *Ibidem*, para 74.

¹¹⁸ Directive 2012/32/EU, art. 33.

5.3 Non-refoulement in the EU – Turkey Statement

In the EU - Turkey Statement, the heads of states or governments have indicated that the returns of irregular migrants to Turkey are enforced with full respect of the principle of non-refoulement.¹¹⁹ This expression indicates that the Statement is not only in accordance with the Geneva Convention but also complies with other international treaties as the European Convention on Human Rights. Furthermore, the Statement assumes that the non-refoulement principle is also respected in Turkey in order to prevent ‘chain’ or indirect refoulement by the EU member states.

Apart from the fact that the principle of non-refoulement is absolute and cannot be balanced with other rights, the relocation of irregular migrants take place on an individual basis and individual examination. In the Statement is adopted that only irregular migrants are expelled to Turkey in cases when an asylum application has been rejected or when the migrant has not applied for asylum.¹²⁰ Data from the UNHCR shows that 47% of all resettled persons did not apply, were unwilling to apply for asylum in Greece or withdrew their claim for asylum. Another 38% has been returned due to a rejection of their asylum claim.¹²¹ Even though migrants are considered as irregular, the absolute character of non-refoulement indicates that non-refoulement is also applicable for irregular migrants who are expelled from Greece towards Turkey. In this view, these persons must not face a fear for inhuman or degrading treatment in Turkey since this forms part of the non-refoulement principle. When Turkey cannot safeguard this right, the relocation of an irregular migrant towards Turkey under the Statement is in breach with EU law.

Nevertheless, NGO’s claim that not all expelled migrants fall under the definition of an irregular migrant.¹²² On 20 October 2016, eight Syrian nationals were expelled to south-eastern Turkey despite their claim that the Greek authorities were in possession of signed copies and formal documents in which their will to seek asylum was explicitly mentioned. However, the authorities of Greece denied that the resettled migrants are still pending a decision of their asylum application.¹²³ As a consequence, the expelled Syrian migrants could be subject to a serious risk of chain-refoulement by the Greek authorities

¹¹⁹ European Council, ‘EU – Turkey Statement, 18 March 2016’, <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>, accessed on 18 May 2018.

¹²⁰ Ibidem.

¹²¹ UNHCR, ‘Returns from Greece to Turkey’, <https://data2.unhcr.org/en/documents/download/62508>, accessed on 31 May 2018.

¹²² Human Rights Watch, ‘EU policies put refugees at risk, an agenda to restore protection’, <https://www.hrw.org/news/2016/11/23/eu-policies-put-refugees-risk>, accessed on 17 May 2018. See also: Amnesty International, ‘Greece: Evidence points to illegal forced returns of Syrian refugees to Turkey’, <https://www.amnesty.org/en/latest/news/2016/10/greece-evidence-points-to-illegal-forced-returns-of-syrian-refugees-to-turkey/>, accessed on 17 May 2018 and UNHCR, ‘UNHCR concern over the return of 10 Syrian asylum-seekers from Greece’, <http://www.unhcr.org/news/briefing/2016/10/5809e78d4/unhcr-concern-illegal-return-10-syrian-nationals-greece.html>, accessed on 17 May 2018.

¹²³ Amnesty International, ‘Greece: Evidence points to illegal forced returns of Syrians refugees to Turkey’, <https://www.amnesty.org/en/latest/news/2016/10/greece-evidence-points-to-illegal-forced-returns-of-syrian-refugees-to-turkey/>, accessed on 17 May 2018.

and to a risk of inhuman or degrading treatment.¹²⁴

In order to determine whether the EU – Turkey Statement complies with the principle of non-refoulement, Turkey forms thus an important factor. Reason for this is the fact that the European Union facilitates indirect or chain-refoulement when the non-refoulement principle is not respected by the third country. Besides, Turkey must provide the expelled persons with the opportunity to apply for asylum in the country. In this respect, non-refoulement shall be respected by Turkey in order to prevent a breach of this principle in the EU – Turkey Statement. As long as Turkey is a safe third country that guarantees effective protection and admission for all, the EU – Turkey Statement does not violate the principle of non-refoulement. Hence, the remaining question is: Can Turkey be considered as a safe third country?

¹²⁴ UNHCR, ‘UNHCR concern over the return of 10 Syrian asylum-seekers from Greece’, <http://www.unhcr.org/news/briefing/2016/10/5809e78d4/unhcr-concern-illegal-return-10-syrian-nationals-greece.html>, accessed on 17 May 2018.

CHAPTER SIX: Turkey as a safe third country

Previous chapters indicated that not only irregular migrants are resettled from Greece towards Turkey, but also seekers of international protection. In this regards, it is of importance to analyse whether Turkey complies with the safe third country concept. The concept of a safe third country is interrelated with other human rights, such as the right to human dignity, the right to request asylum and the principle of non-refoulement. Despite the Statement, concerns have been raised that Turkey is not a safe third country. A violation of the safe third country concept would not only mean that Turkey infringes international human rights but would also mean that the EU – Turkey Statement is in violation of EU law. To that end, this chapter will examine whether Turkey fulfils all criteria of a safe third country.

6.1 Safe third country in international law

The concept of a safe third country derives from the UNHCR EXCOM Conclusion of 1989.¹²⁵ This Conclusion sets out the phenomenon of asylum seekers or refugees who move irregular from a country, in which they have already been granted with protection, towards another country for permanent resettlement or to seek asylum. Although the term safe third country was not explicitly mentioned and the secondary movements of refugees needed to be discussed in more detail, the adoption of the Conclusion embarked the will for international cooperation on this field.¹²⁶

Despite the adoption of this Conclusion, international human rights law does not provide the UNHCR with a legal basis on the concept of a safe third country. However, returns on grounds of this concept are accepted by the UNHCR as long as the returned person has the possibility to apply for asylum in the third country and the principle of non-refoulement is respected.¹²⁷

Although the safe third country concept is not explicitly adopted in the ECHR, the ECtHR respects this concept and puts emphasis on the case-by-case approach for determining a safe third country. Besides, jurisprudence has shown that applicants for asylum shall have the possibility to rebut and challenge the belief that a particular country is safe for him or her.¹²⁸

Rulings of the ECtHR show furthermore that membership of the European Convention does not

¹²⁵ UNHCR EXCOM Conclusion No. 58(XL) 'Problem of refugees and asylum-seekers who move in an irregular manner from a country in which they had already found protection'.

¹²⁶ M.T. Gil-Bazo, pp. 47-49.

¹²⁷ J. Poon, p. 1199-1200.

¹²⁸ ECtHR 30696/09, *M.S.S. v Belgium and Greece*, paras 351-352.

automatically mean that a country is safe and that the safe country concept is to be applied on a case-by-case basis. This is seen in the case of *Ilias and Ahmed v Hungary* in which the applicants faced a risk for indirect refoulement to Greece when removed to Serbia. Although Serbia is a member of the ECHR and is included on the Hungarian list of safe third countries, the country was not safe for the applicants.¹²⁹

6.2 Safe third country in EU law

Despite the absence in international human rights and refugee law, the concept of a safe third country forms part of European Union law. The first notion in EU law concerning the return of a person to a third country is the Dublin Regulation. In this Regulation is adopted that the responsible member state for examining the asylum application “takes and enforces the necessary measures for the alien to return to his country of origin or to another country which he may lawfully enter”¹³⁰. Furthermore, member states have the right to send an asylum seeker to a third country as long as it is in compliance with the Geneva Convention and the amended Protocols.¹³¹ However, the notion of a safe third country was not explicitly adopted in the Dublin Regulation.

The concept of a safe third country is currently explicitly enshrined in the Asylum Procedures Directive and sets out the criteria of a third country. First of all, the country shall respect the principle of non-refoulement and the ban on removal. Moreover, the country shall ensure the absence of a threat to life and liberty, based on grounds of nationality, religion, race, political opinion or member of a particular group. A serious risk or harm is also prohibited and a person shall have the possibility to inquire the status of a refugee.¹³² With regards to the latter criteria, it is not necessary that the third country provides an efficient and fair asylum procedure as long as the possibility to request the status of a refugee is present.¹³³ The criteria are cumulative, meaning that a third country must fulfil all criteria in order to be considered as safe.

In addition, a third country is in the European Union considered as safe when it has fulfilled three other requirements: the third country shall contain a lawful asylum procedure, has ratified the European Convention and observes and has ratified the Geneva Convention without any geographical limitation.¹³⁴

Nonetheless, the above described general assumptions only reflect the situation of a country without examining the safety of an individual person in this state. Since individual circumstances differ, and thus the safety of a person in a country, member states of the European Union can only apply the concept of a safe third country on an individual basis. Therefore has to be examined by each person individually

¹²⁹ ECtHR 47287/15, *Ilias and Ahmed v Greece*, paras 118-120.

¹³⁰ Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities, art. 10(4).

¹³¹ *Ibidem*, art. 5(3).

¹³² Directive 2013/32/EU, art. 38.

¹³³ I.M. Borges, p. 136.

¹³⁴ Directive 2013/32/EU, art. 39.

whether a third country can be considered as safe. Reason for this is the fact that also the connection of the applicant with the third country has to be examined, including the aspects of a well-founded fear.¹³⁵ Only when a person has a coherent connection with the third country, this country can be considered as safe. The rules for establishing the connection are laid down in national law.¹³⁶ As a result, member states contain different rules, for example concerning the living conditions for the person in the third country or the difference between transiting a third country and residing in a third country. Reflecting this to the EU – Turkey Statement, a person relocated from Greece must contain a connection with Turkey in order to qualify Turkey as a safe third country.

In this regards, transiting the third country is not enough grounds for determining a connection. This was also ruled by the Greek Court of Appeals in which a Syrian national entered the country by transiting through Turkey. The asylum claim for the applicant was dismissed since national authorities claimed that Turkey would be a safe third country for the applicant. In the appeal, the applicant stated that he was in Turkey for a short period of time, has no relatives, did not want to seek international protection nor worked in the country. The Appeals Committee ruled that there was no coherent connection between the applicant and Turkey within the meaning of the Greek law and therefore recalled the decision of the Greek national authorities. As a result, Turkey is no safe third country for the applicant.¹³⁷

6.3 Safe third country concept applied to Turkey

One of the criteria of the concept of a safe third country is to be part of international conventions concerning human rights. The ECtHR has jurisdiction over Turkey since the country is a member of the European Convention. Turkey has also ratified the Geneva Convention, although with geographical limitations. This limitation indicates that this Convention is only applicable for European refugees and not for aliens originating from other countries, such as Syria. Because of this limitation, Turkey only recognises Europeans as refugees and restricts the rights of non-European refugees.¹³⁸ Within the meaning of the Asylum Procedures Directive is the absence of geographical limitations essential for considering a third country as safe.¹³⁹ This would mean that Turkey cannot be perceived as a safe third country within the meaning of the Asylum Procedures Directive.

As a result of this limitation, aliens from non-European countries are not perceived as refugees but as seekers of international protection. This indicates that these aliens do not have the possibility to request a refugee status in Turkey. In contrast, the Turkish Law on Foreigners and International Protection (LFIP) provides non-Europeans with the possibility to request subsidiary protection and to

¹³⁵ I.M. Borges, p. 135.

¹³⁶ Directive 2013/32/EU, art. 38(2)(a).

¹³⁷ 9th Appeals Committee, Decision 15602/2017, 29 September 2017.

¹³⁸ K. Rygiel, F. Baban and S. Ilcan, p. 317.

¹³⁹ Directive 2013/32/EU, art. 39.

receive the basic needs.¹⁴⁰ Exceptions are, however, Syrian asylum seekers since they are subject to the Temporary Protection Regulation (TPR) which grants Syrian nationals protection for a limited period of time.¹⁴¹ Hereby are Syrians bound by law to lodge an application for international protection under the TPR on grounds of nationality.¹⁴² Despite the fact that this would constitute a violation of the right to non-discrimination within the meaning of EU law, the absence of the possibility for Syrian refugees to request the status of a refugee is also contrary to the European Union's concept of a safe third country.

Turkey must ensure that aliens do not face a threat to life and liberty. Therefore, aspects of religion, race, nationality, member of a particular social group or political opinion are to be respected in the third country. A few months after the closure of the EU – Turkey Statement, an attempt of the *coup d'état* took place in Turkey. The Turkish government suspected the Gülen movement of this act and convicted members of this group. In the aftermath of the attempt were many accusations of violations of article 3 ECHR, in particular with regards to ill-treatment and torture.¹⁴³ Also, a high number of (foreign) journalists and lawyers were arrested on grounds of their political opinion and were accused for being a member of a terrorist organisation.¹⁴⁴ This shows that foreigners might face a threat because of their political thoughts. Because of the impact of the coup on the political situation and human rights, the Supreme Administrative Court of the Czech Republic stated that the situation has led to a change in fear for persecution in Turkey. The Court has therefore asked for a fresh decision on the asylum claim of the applicant, based on circumstances in Turkey after the coup.¹⁴⁵

Nevertheless, the situation of the *coup d'état* does not stand on its own since human rights violations were reported before the closure of the EU – Turkey Statement. The Turkish government has been accused of political persecutions and torture, killings and disappearances of political opponents in the period before and during the Coup.¹⁴⁶ In view of the aftermath of the coup, there are still serious concerns on the backslide of fundamental rights in Turkey.¹⁴⁷

A serious risk or harm can also consist of degrading or inhuman treatment or punishment. As part of this criteria, the living conditions for relocated persons has to be taken into account. The TPR and the LFIP provide the seekers of subsidiary protection in theory with services of education, health, social

¹⁴⁰ Turkish Law on Foreigners and International Protection, art. 63.

¹⁴¹ Turkish Temporary Protection Regulation, article 8.

¹⁴² D. Doğar, pp. 112-113.

¹⁴³ European Commission, 'Commission staff working document. Turkey 2016 Report, accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on EU Enlargement Policy', November 2016, p. 24.

¹⁴⁴ Ibidem, p. 72.

¹⁴⁵ Supreme Administrative Court, 5 AZS 4/2018 T.B. v Ministerstvo vnitro [2018].

¹⁴⁶ E. Roman, T. Baird and T. Radcliffe, 'Statewatch Analysis: Why Turkey is not a "safe country"', February 2016, pp. 15-16.

¹⁴⁷ European Commission, 'Commission staff working document. Turkey 2018 Report, accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on EU Enlargement Policy', pp. 29-34.

assistance, access to the labour market and interpretation.¹⁴⁸ For example, in the field of health have these persons the right to primary and secondary health, including counselling, immunisation programs and surveillance of pregnant women.¹⁴⁹ Despite the adoption of these services in national law, practice proves to be different. Asylum seekers still maintain a gap to access of health care, because a person has to be registered as a refugee or as a seeker for subsidiary protection in order to receive the services.¹⁵⁰ Besides, there is limited access to employment and over half of the Syrian school-aged children fail to attend school as a result of financial difficulties, language barriers or discrimination.¹⁵¹ However, since the closure of the Statement were efforts made for improving health care and education via the use of FRIT.¹⁵²

A basic need which is not provided by Turkish law is the provision of a shelter. Nonetheless, the Turkish government does provide shelter by opening up temporary accommodation camps and (former) detention centres. Despite these forms of housing, many asylum seekers and irregular migrants live in garages or unfinished buildings.¹⁵³

In order to perceive Turkey as a safe third country, also the principle of non-refoulement needs to be respected. In this regards, the LFIP lists circumstances in which a person shall not be removed.¹⁵⁴ Besides, non-refoulement forms also part of the TPR to assure that the persons under this Regulation do not face a fear for expulsion.¹⁵⁵ However, a Turkish Presidential Decree limits the right to non-refoulement by stating that refugees or asylum seekers can be expelled for membership of a terrorist organisation. This limitation does not need to be based on a court decision nor a formal procedure to assert a refugee or asylum seeker as a member of such group.¹⁵⁶ The right to non-refoulement is hence not absolute in Turkey in contrast to EU law and the European Convention. In addition, it also makes asylum seekers vulnerable to exposure to refoulement, especially when no formal procedures are required. It is therefore possible that persons are refouled without enough grounds for considering these persons as members of such organisation.

Nonetheless, the ECtHR has jurisdiction and ruled on refoulement by Turkey in the case of *Abdolkhani and Karimnia v Turkey*. The applicants of the case were ex-members of the People's

¹⁴⁸ Temporary Protection Regulation, artt. 26-32. See also: Turkish Law on Foreigners and International Protection, art. 89.

¹⁴⁹ P.E. Ekmekci, p. 1438.

¹⁵⁰ Ibidem, pp. 1437-1439.

¹⁵¹ K. Rygiel, F. Baban and S. Ilcan, p. 318.

¹⁵² European Commission, 'Commission staff working document. Turkey 2018 Report, accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on EU Enlargement Policy', p. 19.

¹⁵³ O. Ulusoy and H. Battjes, 'Situation of readmitted migrants and refugees from Greece to Turkey under the EU – Turkey Statement', *Working Paper VU Migration Law Series*, number 15 (2017), pp. 260-261.

¹⁵⁴ Turkish Law on Foreigners and International Protection, art. 55.

¹⁵⁵ Temporary Protection Regulation, art. 6.

¹⁵⁶ Presidential Decree no. 676. See also: M.J. Alpes, S. Tunaboğlu and I. van Liempt, 'Human Rights Violations by Design: EU-Turkey Statement Prioritises Returns from Greece Over Access to Asylum', *Policy Brief for Robert Schuman Centre for Advanced Studies, European University Institute*, p. 3.

Mojahedin Organisation in Iran, but the UNHCR recognised them as refugees on grounds of their political opinion. The Turkish authorities stated that the applicants formed a risk for national safety and security and wanted to expel the applicants to Iraq or Iran. The ECtHR ruled that Karimnia and Abdolkhani would face a serious risk of life and inhuman or degrading treatment when expelled to Iran or Iraq. Also, the removal to Iraq would possibly lead to ill-treatment for the applicants and would contain a high risk of being refouled to Iran.¹⁵⁷ The outcome of this case is regularly referred to by the ECtHR in cases with a similar grievance.¹⁵⁸ Research from Amnesty International has furthermore shown that also Syrian refugees have been forced to return to their country of origin prior and shortly after the closure of the EU-Turkey Statement on a nearly daily basis while facing inhuman or degrading treatment.¹⁵⁹ The violation of the principle of non-refoulement by Turkey has also been recognized by the European Commission.¹⁶⁰

Although the general provisions give an indication of Turkey safeguarding the criteria of a safe third country, the concept is foremost dependent on individual situations of persons returned from Greece towards Turkey. Each relocation under the 1:1 resettlement regime needs to be examined on a case-by-case basis in order to comply with the concept of a safe third country. Nevertheless, Turkey did not ratify the Geneva Convention without a geographical limitation. As a result, Turkey has to be considered as unsafe in all relocations within the meaning of the Asylum Procedures Directive. This indicates that all relocations to Turkey are illegal and that the heads of states or governments of the EU were violating EU law at the closure of the EU – Turkey Statement.

¹⁵⁷ ECtHR 30471/08, *Abdolkhani and Karimnia v Turkey*, para 89.

¹⁵⁸ ECtHR 15916/09, *Dbouba v Turkey*; ECtHR 33526/08, *D.B. v Turkey*; ECtHR 72754/11, *Musaev v Turkey*; ECtHR 23619/11, *Khaldarov v Turkey*.

¹⁵⁹ Amnesty International, 'Illegal mass returns of Syrian refugees expose fatal flaws in EU-Turkey Refugee deal', <https://www.amnesty.org/en/latest/news/2016/04/turkey-illegal-mass-returns-of-syrian-refugees-expose-fatal-flaws-in-eu-turkey-deal/>, accessed on 31 May 2018.

¹⁶⁰ European Commission, 'Commission staff working document. Turkey 2018 Report, accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on EU Enlargement Policy', p. 48.

CHAPTER SEVEN: Conclusion

Since the conduction of the EU – Turkey Statement on 18 March 2016, the numbers of arrivals in Greece have been decreased substantially. Besides, the numbers of migrant deaths in the Aegean Sea are significantly lower in comparison with 2015 and 2016. These givens indicate that the overall aim of the Statement has been accomplished. However, it is premature to conclude that this is the result of solely the Statement and not of other factors, such as the more stable circumstances in the countries of origin. Despite the lowering numbers, the rights of asylum seekers and refugees were put at stake with the closure of the EU – Turkey Statement.

Although all persons falling under the scope of the Statement shall be treated in accordance with respect to human dignity, allocations have been made that persons have been subject to inhumane and degrading treatment during their stay in Greece or Turkey and as part of the resettlement from Greece towards Turkey. The dignity of a person has therefore been harmed, in particular in conjunction with the right to asylum and non-refoulement. However, the Statement itself is in theory not in breach with the right to human dignity, although practices and case law prove otherwise. This is the result of the individual basis on which these rights are examined.

With regards to the right to asylum, the European Union has adopted several forms of secondary legislation under the framework of CEAS in order to set and safeguard minimum standards for qualification, procedures and reception conditions. The migrant influx has led to shortcomings in the Greek asylum system and the possibility to request for asylum. As a result, not all migrants have had the possibility to request asylum or have been resettled to Turkey without a proper and individual examination of their asylum claim. This indicates that persons were unjustifiably considered as irregular migrants and that the Asylum Procedures Directive was violated due to these relocations.

Also, the reception conditions for asylum seekers in Greece are poor and it is questionable whether all minimum standards are met. Albeit the ECtHR ruled in the case of *J.R. and others v Greece* that the poor living conditions were not degrading nor inhuman, emphasis was put on the exceptional circumstances as a result of the migratory flows. In this regards, it is interesting to follow the jurisdiction of the Court in the near future on cases in which the exceptional circumstances are no longer in force or in a different place. Especially when comparing the case with other cases prior to the migration crisis and without exceptional circumstances, for example *M.S.S. v Belgium and Greece*, in which the ECtHR stated that the reception conditions were degrading and inhuman. Nonetheless, this right shall be approached on a case-by-case basis of asylum seekers and irregular migrants.

As part of the 1:1 resettlement scheme, Syrian refugees are relocated from Turkey towards Greece for every Syrian returned to Turkey. This part of the EU – Turkey Statement violates human rights law in the field of non-discrimination. Reason for this is the fact that the relocated persons from Turkey towards Europe have been subject to a distinction based on nationality since only Syrians are eligible for resettlement in the European Union.

The EU – Turkey Statement has indicated that only irregular migrants and persons who do not want to apply for asylum are returned to Turkey. In order for legitimate resettlements, the relocations have to be in compliance with direct and indirect non-refoulement. Nonetheless, case law has shown that the principle of non-refoulement is in a number of cases not respected by Turkey prior to the EU – Turkey Statement. Greece is therefore at risk and responsible for indirect or chain refoulement when Turkey returns the irregular migrants to their country of origin or a third country which will return these persons. Furthermore, Greece has to ensure that Turkey can be considered as a safe third country for seekers of international protection and for irregular migrants in order to prevent a breach with the non-refoulement principle.

Applying the safe third country concept, Turkey does not fulfil all criteria of the European Union for being a safe third country. First of all, Turkey has ratified the Geneva Convention with a geographical limitation. The limitation has the consequence that non-European asylum seekers do not have the possibility to request the status of a refugee in Turkey. Besides, the country has regularly violated the principle of non-refoulement which should be a concern for the Greek authorities. Moreover, not all aspects of the right to asylum are respected in Turkey, leading to an inhuman and degrading treatment for the asylum seekers and irregular migrants. Hence, Turkey proves in general not to be a safe haven for persons seekers of international protection and irregular migrants, in particular with regards to the political climate and circumstances after the attempted coup.

Altogether, the EU – Turkey Statement is not in accordance with human rights in the European Union and Turkey cannot be considered as a safe third country within the meaning of EU law. The ambiguous wording in the Statement led to a lack of jurisdiction of both the CJEU and the ECtHR. Despite the fact that individuals may request a referral before the national, Strasbourg or Luxembourg court for a violation of their rights under the framework of the EU – Turkey Statement, the Courts do not have jurisdiction over the compliance of the Statement with human rights itself.

As a consequence, this Statement creates a blueprint for more human rights violations in agreements conducted in a political setting. Given the blueprint and the current political climate in the EU, it is likely that the heads of states or governments of the EU member states conduct similar agreements with countries as Libya, Tunisia or Egypt in the near future. In this regards, it is in my opinion highly recommendable to base further research on the effect of the EU – Turkey Statement on the cooperation with other non-EU countries in order to control migratory flows towards the European Union and to build further the fortress of Europe.

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