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**Legal Opinion**  
**on the admissibility under Union law**  
**of the European Council’s plan**  
**to treat Turkey like a**  
**“safe third state”**  
commissioned by  
**Pro Asyl**

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**A. Defining the problem**

For a long time now, whether or not to treat Turkey as a ‘safe third country’ has been a matter of much discussion in the European Union. On 17 and 18 March 2016, the heads of state or government of the Union Member States will meet to reach an agreement by which the Union will treat Turkey as a ‘safe third country’. Turkey is playing a central role in the struggle to find a solution to the crisis of European refugee law. Political measures must respect applicable Union law. For this reason, the following paper commissioned by Pro Asyl will examine whether applicable Union law allows European Union Member States to treat Turkey as a ‘safe third country’. If this is not the case, asylum seekers cannot be returned from Greece to Turkey or taken back to Turkey after interception at sea. Whether it is admissible for Turkey, at the wish of the Union, to prevent refugees from transiting through its territory (onward migration) is another issue, which will not be handled here.

**B. The role of Turkey in resolving the crisis of European asylum law**

At an informal meeting of the European Council on 23 September 2015, the EU heads of state or government decided to revive the dialogue with Turkey at all levels. Since then, intensive negotiations have taken place between the Union and Turkey. In the course of these negotiations the President of Turkey was invited to attend a meeting in Brussels with representatives of the European institutions on 5 October 2015. Subsequently a Joint Action Plan was drafted and adopted on 29 November 2015. According to this plan, the Union promised Turkey three billion euro in financial support for receiving refugees along with further support. In return, Turkey promised to step up its efforts to prevent the irregular onward migration of refugees to Europe and to readmit refugees from the Union. The action plan, and also the statement made by Turkey in this context, referred to the Readmission

Agreement between the European Union and Turkey. When this agreement went into force in October 2014 it initially committed Turkey to only readmitting its own nationals from the Union and was to be applied to third-country nationals as of October 2017. Both the Joint Action Plan and the Turkish statement concurred in bringing this part of the agreement forward, and to readmit third-country nationals one year earlier, i.e. from October 2016.

The discussion about treating Turkey as a ‘safe third country’ began with the statement by Diederik Samsom, leader of the Dutch Labour Party, that the number of refugees entering the Union from Turkey should be radically reduced. This proposal, called the Samsom Plan, met with the support of Mark Rutte, the Dutch prime minister, whose country holds the presidency of the European Union in the first half of 2016. A number of other Member States, including Germany, Austria and Sweden, supported the Dutch idea that the Member States admit between 150,000 and 250,000 refugees from Turkey every year. In return, Turkey undertook to readmit all the migrants and refugees who had crossed the border from Turkey into Greece. The political goal of the negotiations, plans and statements is to prevent a repeat of the refugee trek of autumn 2015, leading from Turkey across the Balkan route into the centre of the Union.

On 7 March the European Council met with the Turkish prime minister in Brussels. On that occasion, he reaffirmed his previous promise to implement the bilateral Greek-Turkish readmission agreement. This was to accept the rapid return of all migrants not needing international protection and having entered Greece from Turkey, along with all irregular migrants picked up in Turkish waters. At the same time, the participants at the EU summit underlined the importance of the NATO mission in the Aegean Sea that had started on 8 March 2016. They agreed to work towards returning to Turkey “*all new* irregular migrants crossing from Turkey into the Greek islands”; for each Syrian readmitted to Turkey from the Greek islands a Syrian from Turkey would be resettled to the EU Member States.<sup>1</sup> According to an AFP report of 9 March 2016, the Turkish prime minister told journalists during his flight back from Brussels that Turkey would house Syrian refugees returned from Greece in camps. Non-Syrians, by contrast, would be sent back to their respective countries of origin. The prime minister declared: “Non-Syrians we pick up in the Aegean will be sent back to their own countries.”

## **C. Framework conditions under Union law for the concept of ‘safe third country’**

### **I. The concept of ‘safe third country’ (art. 38 Directive 2013/32/EU)**

The Asylum Procedures Directive 2013/32/EU deals with different ways of dealing with third states. Art. 35 defines ‘first country of asylum’, art. 38 defines ‘safe third country’ and art. 39 defines ‘European safe third country’. The concept of ‘safe third country’ is to be distinguished from that of ‘first country of asylum’. The latter applies when the applicant is recognized as a refugee in the respective third country and can continue to claim this

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<sup>1</sup> Statement of the EU Heads of State or Government, 7 March 2016.

protection. Alternatively, it applies when sufficient protection is granted including *non-refoulement*, provided that he or she will be readmitted to that country. The applicant is allowed to challenge the application of the first asylum country concept to his or her circumstances (art. 35 in connection with art. 38(2)c) Directive 2013/32/EU). In short, the concept of ‘first country of asylum’ applies to refugees who have already *found protection* in a third country before entering the Union.

The concept of ‘first country of asylum’ is not dealt with here because it is not identical with ‘safe third country’ and practically does not arise in the relationship between the Union and Turkey. The concept of safe – European – third country refers to those refugees who *could have found protection* when transiting through a third state. It appears to require clarification as to whether and to what extent the Readmission Agreement between the Union and Turkey, which will apply to third-country nationals from October 2016, permits the return of asylum seekers and refugees from the Union to Turkey. The Readmission Agreement is a multilateral agreement between the Union and a third state. It is not an instrument for the Union to withdraw from binding commitments deriving from Union law. That applies equally to the Greek-Turkish readmission agreement, which according to plans by the Union and Turkey will constitute the central legal basis for the readmission of refugees from Greece to Turkey. That means that this agreement can only be put into practice if they do not conflict with secondary law, particular with the Asylum Procedures Directive 2013/32/EU.

Art. 38(1) Directive 2013/32/EU stipulates that the members states can only use the concept of ‘safe third country’ if the competent authorities have convinced themselves that someone seeking international protection in the relevant third state will be dealt with according to the following principles:

- a) Life and liberty are not threatened on grounds of race, religion, nationality, membership of a particular social group or political opinion.
- b) There is no risk of serious harm as defined in art. 15 Directive 2011/95/EU.
- c) The principle of *non-refoulement* in accordance with art. 33 of the 1951 Refugee Convention (‘CSR’) is respected.
- d) There is a prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment.
- e) The possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the CSR.

The concept of ‘safe third country’ does not presuppose a general declaration about the relevant third country by the respective Member State nor by the Union as such. Rather, by appealing to this concept, the directive obliges the Member States desiring to decide whether an asylum seeker may be removed to a third country to check certain criteria before doing so.

The central criterion is that the third country must respect *non-refoulement* (sub-paras c) and d), above). Sub-paragraph c) refers to *non-refoulement* under the CSR and 4) to international instruments, i.e. particularly art. 3 European Convention on Human Rights (ECHR) and art. 3(2) of the UN Convention against Torture (CAT). According to the case law of international courts, *non-refoulement* is also an indirect protection as it prohibits the removal from one country to another. Accordingly, a refugee may not be removed to a state if there is a risk of further removal to the country of origin. The Member State from whom protection has been requested must therefore consider information from expert sources, in particular the UNHCR, and carefully examine whether the relevant third country provides enough guarantees in its asylum procedure to prevent the refugee being directly or indirectly removed to his/her country of origin.<sup>2</sup> While art. 33(2) CSR allows exceptions to *non-refoulement*, the protection under art. 3 ECHR and art. 3(2) CAT is absolute, i.e. goes beyond art. 33 CSR and allows of no exception.<sup>3</sup>

Art. 38 Directive 2013/32/EU contains instructions for the individual case. It is not enough for the relevant third country to have ratified the conventions mentioned - it has to apply them effectively.<sup>4</sup> If this country's asylum system is overburdened that presents an obstacle to its being treated as a safe third country.<sup>5</sup> The number of refugees in Turkey is estimated at three million and this allows us to seriously doubt whether this third country may be treated as safe. Paragraph 2 c) explicitly calls for rules under national law that are compatible with international law, enabling – through **examining the individual case** – the establishment of whether the relevant third country is safe for certain applicants, and allowing them at least the opportunity of appealing against the concept of 'safe third country' on the grounds that the relevant state is not safe for them in their special situation. It follows that, before asylum seekers are removed to a certain third country, a procedure must be carried out in which they can present their concerns about being taken to this country. According to the directive, applicants also have the right to an effective remedy before a court if the decision is to their detriment (art. 46(1)). The Member State wishing to examine the possibility of *refoulement* to a certain third country, and to decide it at the border, must consider art. 38 (art. 43(1) in connection with art. 33(2)c)). Those examining an individual case must therefore first check whether the relevant third country is safe for the applicant. In addition, applicants are at least to be granted the opportunity to oppose the use of the concept of 'safe third country' on the grounds that the relevant third country is not safe for them in their special situation and to seek an effective remedy against the *refoulement* decision before a court (art. 46(1)).

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<sup>2</sup> ECtHR, NVwZ 2011, 413, 417 note 342 ff. – *M.S.S.*; ECtHR, NVwZ 2012, 809, 814 note 146 ff. - *Hirsi Jamaa*; UNHCR, Die Anwendung des Konzepts „sicheres Drittland“ und seine Auswirkungen auf den Umgang mit Massenfluchtbewegungen und auf den Flüchtlingsschutz, May 2001, see 2; BVerwGE 49, 202, 20 f. = EZAR 134 No. 1 = NJW 976, 490; BVerwGE 62, 206, 210 = EZAR 221 Nr. 7 = InfAuslR 1981, 214; BVerwGE 69, 323, 325 = EZAR 201 No. 8 = NJW 1984, 2782; Hungarian Supreme Court, judgment of 10 December 2012 – No. 2/2012 (XII.10) KMK.

<sup>3</sup> ECtHR, NVwZ 2008, 1330 (1332) note 139 – *Saadi*.

## II. Concept of ‘safe European third country’ (art. 39 Directive 2013/32/EU)

Art. 39(1) Directive 2013/32/EU allows Member States not to undertake a comprehensive examination in terms of international protection and the safety of the applicants in their specific situation if a competent authority has established, on the basis of the facts, that the applicant from a safe third country has tried to enter its territory unlawfully. The protection and safety of the applicants in their specific situations takes place if a competent authority has established, on the basis of the facts, that the applicant has unlawfully tried to enter its sovereign territory from a safe third country, or has already entered it. This differs from the concept of ‘safe third country’, when the competent authority has to examine in every case whether a certain third country is safe for the applicant and the person has the opportunity to express doubts about safety in terms of his/her personal situation. In the case of the safe European third country, Member States are allowed to substantively limit the safety examination in the third country or to entirely abandon it. The Court of Justice of the European Union has, however, stated that no Member State may establish an irrefutable assumption of safety in its national law.<sup>6</sup> That is why applicants – even using the concept of ‘safe European third country’ – are allowed to challenge this concept in their own case, on the argument that in their particular situation they are not safe (art. 39(3) Directive 2013/32/EU). The original Asylum Procedures Directive did not provide for this refutation option (art. 36 Directive 2005/85/EG). It was included in the recast directive probably in response to the judgment of the European Court of Justice.

Accordingly, the applicants in the asylum procedure of the Member States must be given the opportunity to present their doubts regarding their personal situation in spite of the assumption by the authorities that a certain third country is safe. They can seek effective remedy against a decision to their detriment (art. 46(1) a) iv) Directive 2013/32/EU). For the Constitutional Court of the Germany this means, due to the fact that EU law takes precedence over national law, that the irrefutable assumption of safety in a third country under art. 16a(2) Basic Law (GG)<sup>7</sup> is not in conformity with Union law.

The precondition for using the concept of ‘European safe third country’ is that it must be possible to consider the third country in question as a ‘safe third country’ according to the checklist of criteria in art. 39(2) Directive 2013/32/EU. The original provision was that the Council would adopt a joint list of third countries that were considered ‘safe’. Art. 39(4) Directive 2013/32/EU now leaves this decision up to the individual member states. The use of the concept of ‘European safe third country’ presupposes that the relevant third country has

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<sup>4</sup> Hungarian Supreme Court, judgment of 10 December 2012 – No. 2/2012 (XII.10) KMK.

<sup>5</sup> Hungarian Supreme Court, judgment of 10 December 2012 – No. 2/2012 (XII.10) KMK.

<sup>6</sup> ECJ, NVwZ 2012, 417, 421 note 102 ff. - *N.S.*

<sup>7</sup> According to article 16a(2) sentence 1 of the German constitution (Basic Law), countries designated by law as ‘safe third countries’ do not need to be checked in each individual case.

1. ratified the provisions of the CSR without any geographical limitations and particularly observes *non-refoulement* according to Art. 33,
2. put in place an asylum procedure prescribed by law
3. ratified the European Convention on Human Rights (ECHR) of 1951 and observes its provisions, including the standards relating to effective remedies.

It is striking that the criteria and guarantees for using the concept of ‘safe European third country’ have been lowered when compared to the concept of ‘safe third country’: there is no indication that there must be no threat to life and liberty relevant to refugees and nor of their not being in danger of suffering serious harm. In this context, the UNHCR criticizes that no minimum standards and procedural guarantees are given for using art. 39 by the Member States and that this might lead to their refusing the protection owing to a person in need of it and thereby to a violation of international law.<sup>8</sup>

By referring to art. 33 CSR and art. 3 ECHR, the directive wants to guarantee checks to ensure that absolute and comprehensive *non-refoulement* prevails in the third country. However, there is no indication that it must be possible to file an application according to the CSR for recognition of the status of refugee and also to receive this protection. It simply requires that an asylum procedure prescribed by law must be in place. Yet since one requirement is that the state must have ratified the CSR, its implementation serves as a statutory asylum procedure. The requirement that the CSR must have been ratified without any **geographic limitation** is rooted in art. 1 B CSR. At the time of signature, ratification or accession, the contracting state can declare that the Convention only applies to events that happened before 1 January 1951 in Europe. Independently of the time limit, that means excluding all asylum seekers who fled from events happening outside of Europe. All refugees from non-European countries of origin will then not be granted protection by the CSR.

Against this background, art. 39(2)a) Directive 2013/32/EU requires that the relevant third country must have ratified the CSR *without* this limitation. However, a contracting state that has not done so still cannot remove refugees from a non-European state to their country of origin because art. 33(1) CSR has at least the character of customary law. In Section IV of its final act, the Stateless Conference in 1954 established the principle that the standard expressed a generally recognized principle and thereby confirmed the prevalent opinion that *non-refoulement* had become a component of universal international law.<sup>9</sup> UNHCR reports go a step further and even ascribe to the principle of *non-refoulement* the character of *jus*

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<sup>8</sup> UNHCR, UNHCR comments on the European Commission's Amended Proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (Recast) COM (21011) 319 final, 29 f.

<sup>9</sup> *Kimminich*, AVR 1982, 369; *Hyndman*, The Australian LJ 1986, 153 f.; *Goodwin-Gill/McAdam*, The Refugee in international Law, 3<sup>rd</sup> ed., 206 ff.; *Weis*, AYIL 1954, 199; *Sexton*, VanderbuiltJTL 1985, 731,737; *Sinha*, Asylum and International Law, 1971, 160; *Grahl-Madsen*, AAPSS 1983, 14; *Stenberg*, Non-Expulsion and Non-Refoulement, 1989, 275 f.; more restrained *Kälin*, Das Prinzip des Non-Refoulement, 1982, 72.

*cogens*,<sup>10</sup> so that this principle can only be changed by a later standard of universal international law of the same legal nature (art. 53 Vienna Convention on the Law of Treaties - VCLT). The principle of *non-refoulement* is then an obligation for non-signatory states. In addition, the absolute *non-refoulement* of art. 3 ECHR must be observed.

### III. Extraterritorial application of the *non-refoulement* principle

As explained above, the Turkish prime minister stated that non-Syrian refugees picked up in the Aegean Sea would be removed to their countries of origin. He left it open whether that would also be practised if Turkish security ships picked up refugees outside its sovereign waters. If refugees are picked up by Turkish boats in national waters the problem of *non-refoulement* between the EU/Greece and Turkey does not arise. After all, *non-refoulement* presupposes that the refugee was to be taken from one state to another. However, the official Turkish practice of picking up refugees in Turkish waters and taking them straight back to their countries of origin may be important for the question of whether Turkey is allowed to be treated by the EU as a 'safe third country'. That is because a direct removal of refugees to their countries of origin violates *non-refoulement* and is already an obstacle to treating Turkey as a 'safe third country'. But this is not about the effect of *non-refoulement* on the high seas; it is a central test criterion for treating a third country as 'safe'. The question is whether Turkey observes *non-refoulement* towards the refugees' countries of origin. It is not clear whether the planned NATO mission will also involve picking up refugees by NATO ships and taking them back to Turkey. If this is the case, the question arises as to whether the NATO officers are bound to the *non-refoulement* principle. It appears that the main task of NATO in this mission is to put a stop to the commercial activity of the groups helping the refugees to flee. But they too may fulfil the preconditions of refugees and should therefore not be forcibly returned to their countries of origin.

The case law of the European Court of Human Rights has developed binding rules for the effectiveness and scope of application of *non-refoulement on the high seas*. If asylum seekers and refugees are picked up by a Member State on the high seas a check must be conducted before taking them to a third country as to whether this meets the criteria set out in Art. 38(1) Directive 2013/32/EU. Even then applicants must be given the opportunity to challenge the use of these criteria on grounds that the relevant third state is not safe for them in their particular situation. They must be permitted to apply for an effective legal remedy to a court (Art. 46 Abs. 1). Union law here takes account of a general development in international law. Art. 33(1) CSR and Art. 3 ECHR are today part of a development that seeks to guarantee optimum *extraterritorial protection* of human rights. The case law of the International Court of Justice sets the course in this regard. While state power is basically bound to its territory, exercising it outside national territory does not release the state from its commitment to human rights. States cannot get out of their international obligations when they exercise state

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<sup>10</sup> *UNHCR*, Report, UN Doc. E/1985/62, 1985, note 22 f.; *UNHCR*, Report, UN Doc. E/18989/64, 1989, note 24; also *Allain*, *IJRL* 2001, 533, 534.

power outside their territory.<sup>11</sup> The UN Human Rights Committee also regards contracting states on the basis of Art. 2(1) International Covenant on civil and political rights as obliged to observe and guarantee that all persons within their territory, and all persons subject to their state power, can enjoy these rights. The contracting states must guarantee that all persons in their power or under their effective control can enjoy them, even if they are not present within their territory.<sup>12</sup> The Committee against Torture also refers to *non-refoulement* according to Art. 3 CAT when the persons concerned are in the hands of the state on board its ships.<sup>13</sup> Moving border controls offshore or out to sea therefore does not suspend the state's obligations following from *non-refoulement*.

Of particular significance for the Member States and the Union as such are the obligations following from the ECHR (art. 6(3) TFEU). The European Court of Human Rights recognized the extraterritorial effect of the ECHR on board ships of the flag state.<sup>14</sup> A decade later it corroborated this position on the example of asylum seekers picked up on the Mediterranean by Italian border authorities and taken to Libya without being given the opportunity to file an application for asylum. Since there was a real risk of a violation of art. 3 ECHR Italy had violated this standard.<sup>15</sup> Therefore the place where the person and the state authorities exercising state power are located is not decisive. *Non-refoulement* thus applies in a comprehensive sense, either within national territory of the state being asked for protection, at its border or beyond. It applies even on the high seas.<sup>16</sup> According to art. 13 ECHR, refugees also have to be guaranteed the opportunity of an effective remedy before a court against the detrimental decision to take them back to the state from which they set out.<sup>17</sup> It is obvious that neither the examination under administrative law nor judicial investigations can take place on the rescue boat of the member state. This can only happen on its sovereign territory and on the one hand, Greece is hereby obliged to take rescued refugees to its national territory. On the other hand, the Union is prohibited from arranging with Turkey through an agreement or any other way that it will readmit these refugees picked up on the high seas without any prior examination of their safety in Turkey by the Member State concerned, i.e. Greece.

If refugees are picked up by Turkish boats on the high seas the problem of 'safe third country' does not arise, because it is not a question of removal to Turkey but of whether Turkey, if wanting to deport them to their home countries, is bound to *non-refoulement*. The answer is yes. Turkey is a signatory to the ECHR and thus bound by the case law of the European Court of Human Rights. If NATO ships pick up refugees the respective state responsible is also bound to *non-refoulement*. According to the ECHR, the national responsibility of

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<sup>11</sup> International Court of Justice, expert opinion "Legal consequences of the construction of a wall in the occupied Palestinian Territory", 09.07.2004, General List No. 131.

<sup>12</sup> Human Rights Committee, General Comment No. 31(80) 2Nature of the General Obligation imposed on State Parties to the Covenant", CCPR/C/21/Rev. 1/Add. 13, para. 10.

<sup>13</sup> CAT, IJRL 2010, 104, 111 note 8.2 – J.H.A.

<sup>14</sup> ECtHR, EuGRZ 2002 , 133, 139, note 73 – *Bankovic et. al. v. Belgium et. al.*

<sup>15</sup> ECtHR (Grand Chamber), NVwZ 2012, 809, 810 note 136 – *Hirsi Jamaa*.

<sup>16</sup> ECtHR (Grand Chamber), NVwZ 2012, 809, 812 note 122 – *Hirsi Jamaa*.



participating states is not suspended within a multilateral alliance like NATO. The European Court of Human Rights established on the example of the early Dublin Convention of 1990 that a contracting state cannot automatically appeal to the provisions of this convention. If states establish international organisations or international conventions in order to achieve cooperation in certain areas, this could result – according to the Court - in consequences for the protection of fundamental freedoms. It would be incompatible with the aims and objectives of the ECHR if the contracting states could liberate themselves from obligations following from it in a certain area of activity comprised by such agreements.<sup>18</sup>

In this connection, in *Bankovic*, the Court allowed the appeals by Yugoslav appellants against the bombing of a TV station in Belgrade by NATO during the Kosovo war in 1999 and treated the NATO states involved as individual states.<sup>19</sup> It follows from this case law that a participating NATO state that wants to deliver a refugee to Turkey, another NATO state, is not liberated from its obligations from the ECHR simply because Turkey is also a contracting state of the ECHR. As decided on the example of the Dublin Convention, the ECHR also applies between the contracting states of this convention and therefore also among the contracting states of the ECHR and also of NATO. Just because they take part in a collective alliance they are not liberated from their obligations from the ECHR.

#### **D. Application of Union law requirements to Turkey**

##### **I. Geographic limitation according to art. 1 B GFK**

Turkey is given credit for having improved the situation of asylum seekers through its law on Foreigners and International Protection of 4 April 2013.<sup>20</sup> However, when ratifying the CSR it made a declaration pursuant to art. 1 B CSR and thereby set a geographical limitation prejudicing asylum seekers from non-European countries of origin. Art. 61 of the above law expressly limits the concept of refugee to refugees from European countries. Turkey is today the only contracting state of the Council of Europe that continues to uphold this limitation. Almost all refugees living in Turkey are of non-European origin and can therefore not receive protection under the CSR. According to art. 62, they are conceded only a “**conditional refugee status**” under Turkish law. They are thereby granted fewer rights than CSR refugees and, in particular, not the right to family reunification.<sup>21</sup> Non-European refugees can be treated as mandate refugees by the UNHCR and this is the precondition for admission by Member States. However, this is not a state procedure and does not remove the barrier under Union-law to treating Turkey as a safe third country. The UNHCR accordingly points out that the only lasting prospect for non-European refugees consists in onward migration.<sup>22</sup> The European Commission does not regard the differences between refugee status and limited

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<sup>17</sup> ECtHR (Grand Chamber), NVwZ 2012, 809, 816 note 187 ff. – *Hirsi Jamaa*.

<sup>18</sup> ECtHR, InfAusIR 2000, 321 (323) = NVwZ 2001, 301 = EZAR 933 Nr. 8 – *T.I.*

<sup>19</sup> ECtHR, EuGRZ 2002 133 – *Bankovic et. al. v. Belgium et. al.*

<sup>20</sup> See ZAR 2013, 1 ff.

<sup>21</sup> *European Council on Refugees and Exiles*, Country Report: Turkey, December 2015, 17 ff.

<sup>22</sup> *UNHCR*, The Republic of Turkey, 4 June 2014, 4.

refugee status as serious and so the European Stability Initiative sees no obstacle in treating Turkey as a ‘safe third country’.<sup>23</sup> However, there has been no engagement with Union law. An essential precondition is lacking for the application of the two concepts of ‘safe third country’ – the ratification of the CSR without a geographic limitation. On that ground, Turkey cannot be treated like a ‘safe third country’ (art. 38(1) c), art. 39(2)a Directive 2013/32/EU).<sup>24</sup>

## II. Respecting the principle of *non-refoulement*

According to article 4 of the Turkish Law on Foreigners and International Protection, a foreigner must not be removed to a state in which there is real danger of torture or inhuman or degrading treatment or punishment, or in which his/her life and liberty is endangered on grounds of race, religion, nationality, membership of a certain social group or political opinion. Turkey has thereby transposed *non-refoulement* into national law both according to art. 3 ECHR and art. 33(1) CSR. However, the law does not contain a prohibition of turning refugees away. By contrast, art. 33(1) lays down a state obligation to refrain, and therefore prohibits all state measures leading to asylum seekers being exposed to the grip of persecutors.<sup>25</sup> This is the interpretation commonly given to art. 33 CSR today in international law.<sup>26</sup> Consequently, an interpretation of art. 33(1) CSR in terms of its grammar, purpose and international practice (art. 31(3) b) VCLT) must include the **prohibition of turning away** in its scope of protection,<sup>27</sup> as do numerous international and regional statements and treaties. The state practice of the last nearly six decades proves that this is generally recognized today. Art. 21 Directive 2011/95/EU expressly uses the concept “principle of *non-refoulement*”, which complies with international law. Likewise art. 5 Directive 2008/115/EC uses the concept “principle of *non-refoulement*”. The principle of *non-refoulement* therefore prohibits removing refugees from national territory and also turning them away at the border of the contracting states.<sup>28</sup> Art. 43 Directive 2013/32/EU thus provides that asylum applications may be dealt with at the border. German law recognizes with the reference in §15(2) sentence 1 to §60(1) Residence Law that *non-refoulement* also means not turning refugees away.

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<sup>23</sup> *European Stability Initiative*, Background Document. Turkey as a “Safe Third Country” for Greece, 17 October 2015, 5.

<sup>24</sup> *European Council on Refugees and Exiles*, Dutch plan to return asylum seekers from Greece to Turkey violates international law, 20 January 2016; *Statwatch*, Why Turkey is not a “Safe Country”, February 2016, 18; *Elitok/Straubhaar*, Turkey, Migration and the EU: Potentials, Challenges and Opportunities, Hamburger Institut für Weltwirtschaft (ed.) no date, 64; left open *Evangelical Church in Germany, Brussels office, representative of the Council*, Note: Turkey’s reservation regarding the Geneva Convention, 13 October 2015.

<sup>25</sup> *Goodwin-Gill*, VirginiaJIL 1986, 897, 902 f.

<sup>26</sup> *Sexton*, Vanderbilt JTL 1985, 731, 739 f.

<sup>27</sup> *Kälin*, Grundriss des Asylverfahrens, 1990, 219; ders., Das Prinzip des Non-Refoulement, 1982, 105 f. *Sinha*, Asylum and International Law, 1971, 110 f.; *Goodwin-Gill/McAdam*, The Refugee in International Law, 3. Aufl., 2007, 206 ff.; *Perluss/Hartman*, VirginiaJIL 1986, 551, 599 f.; *Sexton*, Vanderbilt JTL 1985, 731, 739 f.; *Hailbronner*, ZAR 1987, 1, 5; *Crawford/Hyndman*, IJRL 1989, 157; *Helton*, IJRL 1990 (Special Issue), 119, 123; *Hathaway*, The Law of Refugee Status, 1990, 26 f.; *Sternberg*, Non-Expulsion and Non-Refoulement, 1989, 253, 257, 261.

<sup>28</sup> *Goodwin-Gill/Jane McAdam*, The Refugee in international Law, 3<sup>rd</sup> ed., 2007, 208.

It is clear that Turkey has not sufficiently transposed *non-refoulement*, which is binding under international law, and that Turkish law does not prohibit turning away refugees seeking protection at the border. Since the concept of safe – European – third country exists under Union law, Union law also applies with respect to the relevant third country, in this case primarily Greece. Art. 38(1)c Directive 2013/32/EU expressly names the principle of *non-refoulement*. Art. 39(2) of the Directive does not name *non-refoulement* directly, but requires that the provisions of the CSR and the ECHR be observed, including the standards relating to effective remedies in the relevant third country. As set out above, the *non-refoulement* of art. 33(1) CSR also covers the prohibition of removal and, in connection with picking up and returning people on the high seas, the European Court of Justice referred expressly to the effective legal remedy according to art. 13 ECHR. It follows that the two instruments include the prohibition on turning away and also for that reason Turkey cannot be treated as a ‘safe third country’.

Die *European Stability Initiative* claims that Turkey effectively observes the prohibition of removal according to art. 4 of the Law on Foreigners and International Protection. It admits that there have been reports of some violations of the *non-refoulement* principle in the past. Yet members of the European Commission are reported to have declared in an interview in September 2015 that they knew of no contravention of this principle in Turkey. UNHCR is said to have told the US government that between January and November 2014 only seven people had been taken back to their country of origin where they were possibly likely to be at risk. The European Stability Initiative quotes Turkish authorities as stating that Syrian refugees were not taken back to Syria and so Turkey is observing the *non-refoulement* principle.<sup>29</sup>

By contrast, the British non-governmental organization *Statewatch* says that a number of reports prove that Turkey regularly violates the *non-refoulement* principle. Turkey has a long history of such violations in the case of non-European refugees, it states. There are reports that, in the years after 2000, Greece and Turkey – in the form of police cooperation – systematically turned away refugees on the Aegean and the Greek-Turkish border. Recent reports from 2015 prove that Turkish authorities turned away Syrian refugees at the Turkish-Syrian border with the direct use of force and detention.<sup>30</sup>

*Human Rights Watch* reports in this context that, in November 2015, 51 Syrian refugees were interviewed in Antakya and Istanbul within two weeks. Most of them had again crossed the border to Turkey only a few hours or days before. Six of them reported that they had previously been forcibly returned back to Syria. Three of them stated that Turkish authorities had picked them up immediately after they crossed the border, detained them in military facilities over night and then returned them to Syria. Three others announced that they had been returned to Syria immediately after crossing the border together with dozens of other

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<sup>29</sup> *European Stability Initiative*, Background Document. Turkey as a “Safe Third Country” for Greece, 17 October 2015, 7 f.

<sup>30</sup> *Statewatch*, Why Turkey is not a “Safe Country”, February 2016, 17 f.; also footnote 27.

refugees. Four of them reported being ill-treated by Turkish authorities. Four other refugees from Syria said they had seen Turkish border police turn away dozens of people from Syria. Human Rights Watch reports on more incidents of this kind. According to information from sources in Turkey with intensive knowledge of Turkish border policy, from March 2015 only two groups of Syrian refugees had been allowed to enter Turkey: first, seriously ill individuals who could not obtain any medical care in Syria and, second, Syrians, registered with Turkish aid organizations. About 25,000 people who in mid-2015 had wanted to flee to Turkey to escape the fighting at the border city of Tal Abyad had been forced to break through border fences after first being hindered from crossing by Turkish border authorities firing warning shots and using water cannon.<sup>31</sup>

*Amnesty International* reports that, according to corresponding reports by refugees and asylum seekers, Turkish authorities in September 2015 began to take the people who had irregularly crossed the border to Turkey to isolated detention centres over 1000 kilometres away in the South and East of the country. The detainees had no access to the outside world, their mobile phones were confiscated and they were prevented from contacting their relatives. The detention lasted for several weeks, on average about two months, with some being physically ill-treated. Detainees were not told why they had been detained. Amnesty International fears that these reports are only the tip of the iceberg. On 26 November 2015 it received reports that over sixty Kurds from Iran and Iraq had been detained and deported. Finally, Amnesty International notes that according to reliable and corresponding reports the practice of unlawful detention has been followed by forced deportation to Syria and Iraq. According to research by Amnesty International, Turkish authorities deported over a hundred people in the second half of 2015 despite the risk of serious human rights violations awaiting them in Syria and Iraq. Unconfirmed reports indicated that the number of such deportations was far higher.<sup>32</sup>

To sum up, Turkey does not observe *non-refoulement* as a prohibition of both turning away and deporting refugees. The fact that the European Commission in September 2015 claimed not to know of any violations of this prohibition is insufficient to question the reliability of reports compiled by NGOs on the basis of interviews with the refugees concerned, describing numerous cases of refugees being turned away. It is neither known whether the Commission conducted appropriate investigations nor from what sources it gained its information. The credibility of the Commission's claims is particularly questionable in that it does not seem to know that since March 2015 only two groups of Syrian refugees have been allowed to enter Turkey and the others have been turned away.

The Asylum Procedures Directive focuses solely on the question of whether *non-refoulement* is observed in the relevant third country. Whether the Turkish authorities receive the refugees admitted by Greece and, in particular, do not deport them to their country of origin, cannot be

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<sup>31</sup> *Human Rights Watch*, Turkey: Syrians Pushed Back at the Border, November 23, 2015.

<sup>32</sup> Amnesty International, Europe's Gatekeeper: Unlawful detention & deportation of refugees from Turkey, 2015.

relevant here. Moreover, the Turkish prime minister only made such a promise with respect to Syrian refugees. With regard to all other refugees he clearly announced that he would deport them to their home countries. Art. 38(2)c) and d) and also art. 39(2)a) and c) Directive 2013/32/EU focus on the general practice of the relevant third country. Even if it respects *non-refoulement* in some cases, this alone is not enough to be treated as a ‘safe third country’. On the contrary, as long as this prohibition is violated, it cannot be treated as a ‘safe third country’. In the case of Turkey there is a further exacerbating factor, in that the authorities there systematically turn refugees away and ill-treat them in connection with nature remediation programmes. And the Turkish prime minister has announced that he proposes to violate the *non-refoulement* principle for all refugees with the exception of Syrians.

With respect to its human rights record, such a third country must be estimated to be particularly unsafe, and thus also with respect to observing the obligations following from human rights and international law required for treatment as a ‘safe third country’. This estimation is reinforced by the fact that the Turkish authorities, i.e. the military and the courts, in 2015 stepped up the use of excessive violence against demonstrators. They tortured and ill-treated those arrested, detained and prosecuted critical journalists and imposed curfews on Kurdish cities in the southeast of the country, also cutting off water and power supplies for the population.<sup>33</sup>

#### **E. Prohibition of collective expulsion (art. 19(1) CFR)**

The plan presented according to the statement released by the European Council of 8 March 2016 that “*all new* irregular migrants” would be taken back to Turkey violates art. 19(1) Charter of Fundamental Rights of the European Union (CFR). Even if Greece is not a state party to Protocol No 4 of the ECHR, which prohibits collective expulsions, it is still bound to art. 9(1) CFR (art. 6(1) TEU). If states party to Protocol No 4 carry out collective expulsions during NATO missions they are, if they are EU Member States, not only bound to art. 19(1) CFR but also to this Protocol. The European Court of Human Rights found that Protocol No 4 also applied on the high seas. If the authorities return aliens after intercepting them at sea that is in exercising their sovereign powers. Stopping migrants from reaching the borders of the state in order to remove them to another state is an expression of sovereign power by authorities pursuant to art. 1 ECHR. If, on the high seas, the migrants are individually deprived of the right to present arguments against their ‘expulsion’ these are prohibited collective expulsions.<sup>34</sup>

The concept of ‘expulsion’ used here must not be confused with the concept of expulsion (*Ausweisung*) under German law (§53ff Residence Law). In the language of treaties it means the forcible transporting of persons to another state. This is also underlined by the case law of the European Court of Human Rights. Since the fundamental rights of the ECHR are as general principles part of Union law (art. 6(3) TEU) and the Court of Justice of the European Union is oriented in its regular case law by that of the European Court of Human Rights, the

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<sup>33</sup> Amnesty International Report 2015/16: Turkey.

<sup>34</sup> ECtHR (Grand Chamber), NVwZ 2012, 809, 816 note 180 ff. – *Hirsi Jamaa*.

latter's case law on Protocol No. 4 must also be adduced to interpret and apply art. 19(1) CFR. Thereby Greece, although it has not ratified the protocol, is prohibited by art. 19(1) CFR from deporting or expelling refugees without an individual examination of their arguments against removal to Turkey.

## **F. Result**

The European Union and the Member States must not treat Turkey as a 'safe third country'. The very fact of its having declared a geographic limitation according to art. 1 B CSR prevents this contracting state from being treated as a 'safe third country'. Admittedly, only art. 39(2)a Directive 2013/32/EU requires the unconditional ratification of the CSR. But art. 38(2)c Directive 2013/32/EU also provides for the observance of the *non-refoulement* principle according to art. 33(1) CSR, enabling asylum seekers to file an application for recognition of refugee status and, if recognized, to gain protection under the CSR. This presupposes the unconditional ratification of the CSR and its application to all refugees, regardless of their national origin.

There is another reason why Turkey cannot be treated as a 'safe third country' under Union law. It is not guaranteed that the *non-refoulement* required by art. 33(1) CSR and art. 3 ECHR and art. 3(2) CAT are applied effectively. While art. 61 of the Turkish Law on Foreigners and International Protection of 2013 contains a prohibition of deportation pursuant to art. 33(1) CSR and art. 3 ECHR the corresponding prohibition of turning refugees away has not been incorporated into Turkish law. International NGO reports prove that violations of *non-refoulement* by the Turkish authorities cannot be called occasional incidents. Rather, the Turkish government pursues a systematic policy of stopping Syrian and Iraqi refugees from entering Turkish territory and using direct violence against them including detention. In some cases the refugees are also physically ill-treated. In view of this extensive research by several NGOs, Turkey cannot be treated as a safe third country under Union law. Neither art. 38 nor art. 39 of the Asylum Procedures Directive 2013/32/EU allow Member States and the Union as such to forcibly deport asylum seekers and refugees to Turkey, or to pick them up on the high seas and ship them to Turkey, or to conclude an agreement with Turkey to that effect. This violates Protocol No 4 of the ECHR and art. 19(1) CFR.

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