



Analysis

Why Turkey is Not a “Safe Country”

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Introduction

The term ‘safe country’ has been applied to countries which can be considered either as being non-refugee-producing or as being countries in which people fleeing persecution can enjoy asylum (UNHCR 1991: para. 3). The ‘safe country’ concept in European law has multiple meanings related to the process of asylum seeking and refugee protection: the concepts of ‘safe country of origin’, ‘safe third country’, ‘first country of asylum’, and ‘European safe third country’, all appear in the Procedures Directive, which establishes the common legal standards and guarantees for how to apply for asylum in EU Member States.[1] This article scrutinizes the concepts of ‘safe country of origin’ and ‘safe third country’ as applied to current developments in Turkey.

Since the summer of 2015 the European Union (EU) has been struggling to cope with the so-called ‘refugee crisis’, a mass influx of mainly (but not exclusively) Syrian, Iraqi, and Afghan asylum seekers along the Eastern Mediterranean and Western Balkan routes into Europe. Besides representing a serious humanitarian crisis affecting hundreds of thousands of human beings, this migration flow has challenged the fragile geopolitical balance of the region and raised concerns about the future of the borderless Schengen area.

Member States have shown limited capacity to agree on a common strategy to deal with the crisis and reluctance in implementing measures which were not unanimously approved (i.e. ‘hotspots’ and the relocation plan). One of the few points all European leaders seem to agree upon, however, is the need to enhance migration cooperation with Turkey, with the aim to reduce the flow of migrants and asylum seekers moving from or through the country to the EU.

¹ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, OJ L 180, 29.6.2013 (Procedures Directive).

Against this background, the European institutions and Member States have taken decisive steps to obtain cooperation from Turkey in the field of migration and asylum. The Commission presented a proposal to introduce a European common list of safe countries of origin which includes Turkey and the European Council negotiated with Turkey an action plan which implicitly assumes Turkey is a safe third country. As a recent development, a Dutch political leader presented a further proposal, called ‘the Samsom Plan’, to return all migrants and asylum seekers arriving in Greece from Turkey, based on the explicit recognition of Turkey as a safe third country. However, these initiatives must be critically attended to, given the country’s general political and legal situation with regards to persecution and providing international protection.

This article explores the legal requirements to be considered either a safe country of origin (SCO) or safe third country (STC) and examines the evidence on whether or not Turkey complies with these requirements. Based on our examination of the empirical evidence, we suggest that Turkey is neither a safe country of origin nor a safe third country. In light of strong evidence that Turkey does not comply with the legal requirements to be considered a ‘safe country’ in general, we urge the Commission, the Council, and Member States to reconsider: a) the proposal to designate Turkey a safe country of origin, and b) the plan to strengthen cooperation on migration with Turkey based on the assumption that Turkey is a safe third country.

The paper is outlined as follows: Section 1 analyses the legal notion of ‘safe country of origin’ and the Commission’s proposal to establish a common list of safe countries of origin. Section 2 considers the concept of ‘safe third country’ under international and EU law and discusses the EU-Turkey Action Plan and the Samsom Plan. Section 3 investigates whether, based on empirical evidence, Turkey fulfils the legal requirements to be considered a SCO and/or a STC.

1. Is Turkey a safe country of origin?

1.1. The safe country of origin concept

Although the notion of a ‘safe country of origin’ is not regulated in the 1951 Convention Relating to the Status of Refugees (Refugee Convention),^[2] it is not a new concept on the international playing field. It can theoretically refer to the automatic exclusion of nationals originating in safe countries of origin from refugee status, or it can raise a presumption of safety that those nationals must rebut (UNHCR 1991: para. 4). Many state actors worldwide operate within an informal system of the safe country of origin concept based on common knowledge of a country’s situation (UNHCR 1991: para. 8), while others have composed extensive lists of such countries (UNHCR 2001).

² Note that in EU law, the 1951 Refugee Convention is called the Geneva Convention.

The 1992 London Resolutions provided non-binding guidelines for Member States on the adoption of safe country of origin practices.[3] States could be considered safe countries of origin if it could “clearly be shown, in an objective and verifiable way” that the state does not produce refugees.[4] However, due partly to incongruous application of the concept, the European Commission suggested abandonment of the concept in 2000.[5] Nevertheless, the concept is enshrined in current EU law.

According to Articles 36 and 37 of the Procedures Directive, Member States may individually designate third countries as safe countries of origin if the criteria listed in Annex I of the Procedures Directive are met. As such, third countries can be considered safe if there is evidence that “there is *generally and consistently* no persecution, no torture or inhuman or degrading treatment or punishment and no threat by reason of indiscriminate violence in situations of international or internal armed conflict” [emphasis added].[6] The Member State must assess the country’s situation on the basis of the extent to which protection is provided by the relevant laws and the way in which they are applied, the observance of fundamental rights and freedoms, the respect for *non-refoulement* and the provision for a system of effective remedies against human rights violations.[7]

To be clear, the designation of ‘safe country of origin’ does not mean that applications from these countries will – without review – be denied. What it does mean is that an application from this country will be accelerated if the applicant does not submit any serious grounds calling into question the safety of the country in the applicant’s personal situation.[8] As such, a heavy burden of proof is shifted to the asylum seeker. As contended in AIDA’s (2015d: 9-10) report on safe countries of origin, this burden of proof is no easy feat to overcome as good legal assistance is necessary but difficult to obtain, especially in the context of extremely restrictive time limits.[9] Although data is scarce, EASO (2015: 91) has reported that in 2014, 89.3% of accelerated applications were denied.

The notion of ‘safe country of origin’ is at odds with a meaningful evaluation of an asylum application. As is pointed out by AIDA (2015d), it is precisely the unique characteristics of an applicant that must be evaluated in ascertaining whether he or she qualifies for refugee status: race, religion, nationality, membership of a particular social group, or political opinion.[10] Furthermore, UNCHR points out such a concept would be in contradiction to Article 3 of the

³ Council of the European Communities, Conclusions of the Ministers Responsible for Immigration, Conclusions on Countries in which there is Generally No Persecution, London, 30 November-1 December 1992.

⁴ Ibid.

⁵ European Commission, Communication from the Commission to the Council and the European Parliament: Towards a common asylum procedure and a uniform status, valid throughout the Union, for persons granted asylum, COM(2000) 755 final, Brussels, 22.11.2000.

⁶ Annex I in conjunction with Article 37(1) Procedures Directive.

⁷ Annex I in conjunction with Article 37(1) Procedures Directive.

⁸ Article 36(1) Procedures Directive.

⁹ AIDA reports that this is 5 working days in Belgium and 3 calendar days in Hungary, for example.

¹⁰ Article 1A Refugee Convention and Article 2(d) Directive 2011/95/EU on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (Qualification Directive).

Refugee Convention which lays out a prohibition on discrimination based on country of origin, and “runs counter to broadly based international opinion, as reflected in Executive Committee conclusions, in favour of application of the Convention without geographic restrictions” (UNHCR 1991: para. 5).

Indeed, as many scholars remind us, a state that is safe 99% of the time and for 99% of the population must not detract from the requirement to offer international protection to those falling outside the ‘norm’ (Van Selm 2001: 36). Van Hear and Crisp (1998: 14) further suggest that the ‘safe country of origin’ concept is susceptible to political manipulation and that “the world’s more affluent states may be tempted to include their closest allies and most important trading partners” on their ‘safe’ lists. In the following section this suggestion will be explored at greater length within the context of the European Commission proposal for establishing a common list of safe countries of origin.

1.2. The Commission’s proposal to include Turkey on a European common list of safe countries of origin

As part of a larger European Agenda on Migration,[11] the European Commission has put forth a proposal for establishing a common list of safe countries of origin to be used in assessing asylum applications of applicants originating from these countries.[12] The proposed safe countries for the common EU list include: Albania, Bosnia and Herzegovina, the Former Yugoslav Republic of Macedonia, Kosovo, Montenegro, Serbia and Turkey. In justifying their designation, the European Commission makes reference to the number of human rights violations as ruled by the European Court of Human Rights, and the percentage of successful asylum applications in the EU. All of these states (with the exception of Kosovo and Bosnia and Herzegovina) are candidates for joining the European Union, and many have a decreasing number of human rights violations as well as decreasing asylum success rates ostensibly pointing to a trend in improvement of the human rights situations in each respective country.

¹¹ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European Agenda on Migration, COM(2015) 240 final, Brussels, 13.5.2015. This communication has the aim to improve migration management in the EU on the basis of four pillars: (a) Reducing the incentives for irregular migration, (b) A strong asylum policy, (c) Saving lives and securing the external borders, (d) A new policy on legal migration.

¹² European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing an EU common list of safe countries of origin for the purposes of Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection, and amending Directive 2013/32/EU, COM(2015) 452 final, Brussels, 9.9.2015.

Table 1: Proposed ‘safe countries of origin’ in numbers

Country	ECHR violations in 2014[13]	Asylum success rate in 2014	Number of MS considering state ‘safe country of origin’[14]
Albania	4/150 (2.7%)	7.8%	8
Bosnia-Herzegovina	5/1196 (0.4%)	4.6%	9
Macedonia	6/502 (1.2%)	0.9%	8
Kosovo	Not applicable	6.3%	7
Montenegro	1/447 (0.2%)	3.0%	9
Serbia	16/11490 (0.1%)	1.8%	9
Turkey	94/2899 (3.2%)	23.1%	0[15]

Sources: (AIDA 2015a: 78; European Commission 2015). Note that the Commission proposal is the source only for the 1st and 2nd column, while the numbers on the 3rd column are taken from AIDA’s Annual Report 2014/2015.

In states where the successful application rate is very low, it is somewhat understandable that a balance must be struck between efficiency and a thorough asylum procedure. However, in a state with a 23.1% asylum success rate, as is the case in Turkey, a reputation for human rights infractions, and an ongoing conflict with a minority population within its borders, an accelerated process and a high burden of proof placed upon the asylum seeker is not justifiable. Furthermore, considering the fact that no Member States at present have chosen to place Turkey on its own safe country of origin list, whereas the other proposed safe countries of origin are deemed safe by multiple Member States, it is apparent that Turkey remains an outlier in the Commission’s proposal.

Why then has the EU chosen to include Turkey on this list? Turkey is a candidate country to the EU and has been in accession negotiations since 2005. As such, there have been efforts on both sides to enhance dialogue and cooperation with the aim of setting Turkey on the right path toward meeting the requirements for accession.[16] Interestingly, in its 1991 note, the UNHCR (1991: para. 6) warned states against using the safe country of origin practice as a way of encouraging “normalization” and “democratization,” and deemed this practice “inappropriate” in its politicization of a humanitarian procedure. Another incentive for the EU to place Turkey on

¹³ These numbers are based on applications made to the European Court of Human Rights against the named country.

¹⁴ It should be noted that some Member States adopt less formal practices of designating safe countries of origin. The numbers listed in this column include only the Member States that currently provide Safe Country of Origin lists in accordance with Articles 36 and 37 of the Procedures Directive, i.e. Austria, Belgium, Denmark, Germany, France, Hungary, Malta, the UK, Switzerland, as stated in AIDA (2015a: 78). Furthermore, the figures listed in this column differ slightly from the figures reported in the Commission’s proposal.

¹⁵ Although the EU has claimed that Bulgaria has placed Turkey on their own safe country of origin list, Bulgaria has not had such a list since 2007, according to the 2015 AIDA country report on Bulgaria (AIDA 2015b).

¹⁶ For a detailed report on the accession progression of Turkey, see European Commission, Staff Working Document: Turkey 2015 Report, SWD(2015) 216 final, 10 November 2015, available online at:

http://ec.europa.eu/enlargement/countries/package/index_en.htm.

this list is their ongoing negotiations regarding the ways in which the large influx of migrants and asylum seekers streaming through Turkey into Europe can be stemmed. Various deals have been put forth by the EU (including the Action Plan which will be discussed at length in the following section) in its attempt to sweeten the deal for Turkey and coerce the state into cooperating to reduce the migrant flow, a form of ‘political manipulation’ (after the critique from van Hear and Crisp 1998: 14).

2. Is Turkey a safe third country?

2.1. The safe third country concept

A ‘safe third country’ is a state through which a person fleeing from his or her country of origin has passed and where he or she could have found protection, but has not done so. If this person applies for asylum in another state, the latter might consider his or her claim inadmissible and could decide to return the applicant to the ‘safe third country’ he or she had previously passed through. Therefore, the ‘safe third country’ concept implies that asylum seekers should claim asylum in the first ‘safe country’ they are able to reach. This concept is based on a narrow interpretation of Article 31(1) of the Refugee Convention, which states that asylum seekers may enter the territory of a state illegally “*coming directly* from a territory where their life or freedom was threatened [emphasis added]” and cannot be penalised for this.[17]

However, scholars highlight that such an interpretation contradicts the text and undermines the primary purpose of Article 31 (Byrne and Shacknove 1996: 189-190; Costello 2005: 40). Moreover, the Refugee Convention does not contain any express ‘safe third country’ rule in the provisions on the definition of refugee nor on the cessation or exclusion from being a refugee.[18] According to Steve Peers (2015), “there are some *indirect* suggestions in the Convention that the number of countries which a refugee has crossed through might be relevant.” However, based on the letter of Article 31(1), the impact of such “indirect suggestions” would be limited to the rule on non-prosecution for a breach of immigration law, and would not affect the provisions on definition and exclusion of refugees.

According to scholars and the UNCHR, in international law there is no absolute rule imposing asylum seekers to always claim asylum in the first safe third country they are able to reach: indeed the practical consequences of such a provision would be disproportionately negative for countries neighbouring a conflict zone (Van Selm 2001: 34). However, states may decide whether to apply the safe third country notion and they actually retain a certain degree of flexibility in doing this (S. Peers 2015; UNHCR 1991). Thus, with the purpose of fostering effective mechanisms of international ‘burden sharing’ and avoiding phenomena such as multiple asylum applications or ‘forum shopping’, reasonable arrangements for the transfer of asylum seekers based on the safe third country concept are internationally accepted, provided that asylum seekers are always guaranteed access to protection in line with the Refugee Convention (UNHCR 1991).

¹⁷ Article 31(1) Refugee Convention.

¹⁸ Articles 1.A to 1.F Refugee Convention.

EU law incorporated and developed the safe third country concept in the Procedures Directive.^[19] According to Article 33(2)(c), a Member State may deem an application for international protection inadmissible if it considers a non-EU country to be a ‘safe third country’ for the applicant. The EU law definition of safe third country is enshrined in Article 38(1) of the Procedures Directive. In order for a third country to be considered ‘safe’ for asylum seekers, a number of requirements needs to be met: life and liberty shall not be threatened on account of race, religion, nationality, membership of a particular social group or political opinion; there shall be no risk of serious harm;^[20] the principle of *non-refoulement* shall be respected; and the possibility shall exist for the applicant to claim refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention.^[21]

According to Article 38(2), Members States have to lay down in their national legislations rules for establishing when a connection between an applicant and the third country concerned exists “on the basis of which it would be reasonable for that person to go to that country.”^[22] Member States must also establish rules on the methodology for assessing this and rules for assessing the safety of a third country. In any case, the safety of a third country must be assessed on a case-by-case basis in order to check whether the notion is applicable to the particular circumstances of the individual applicant concerned. Moreover, the applicant must be guaranteed the right to challenge the application of the safe third country concept to his or her case, based on the fact that that country may not be safe in his or her particular circumstances.^[23]

The Procedures Directive’s notion of safe third country has been criticized, in particular because it does not require that the third country guarantees access to a fair and efficient asylum procedure, whereas the mere existence of the possibility to claim refugee status is deemed sufficient. Moreover, the application of the concept is largely left to national legislation, ensuring Member States a significant degree of discretion as to the modalities of its implementation (El-Enany 2006: 8).^[24] Recently, there has been a debate between academics (Steve Peers and Daniel Thym in particular) as to whether the Procedures Directive’s notion of safe third country requires the third country has ratified and applies the Refugee Convention without geographic limitations. It emerges from this discussion that there is no agreement on this crucial point.

¹⁹ The safe third country concept is also referred to in Article 3(3) of Regulation 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States (Dublin III Regulation).

²⁰ According to Article 15 of the Qualification Directive, “serious harm may consist of: (a) the death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment of an applicant; or (c) serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict”.

²¹ Article 38(1) Procedures Directive.

²² Article 38(2)(a) Procedures Directive.

²³ Article 38(2)(b) and (c) Procedures Directive.

²⁴ This means, for instance, that each Member State is free to determine how long and under what circumstances an asylum seeker has stayed in a third country before that country can be considered responsible for examining their asylum application. In this respect, a crucial question is whether the mere transit would represent a sufficient reason for applying the safe third country concept. Moreover, it is up to Member States to establish also the presumed safety of any third country and the principles laid down in Article 38(1) may leave space for ambiguity and divergent interpretations. For instance, it is unclear what safeguards should be considered sufficient to prove that the principle of *non-refoulement* is respected.

However, the authors of this article agree with Peers' interpretation that Article 38(1)(e) can only refer to countries that have ratified and fully apply the Refugee Convention (see Annex I in Peers and Roman(2016)). Although the incorporation of the concept into Member States' national law and its actual implementation in practice have been so far very limited,[25] the fact that the safe third country notion is part of EU law allows for a more widespread application of the concept in the future.[26]

2.2. The EU-Turkey Joint Action Plan: implicitly considering Turkey a safe third country

During the informal European Council meeting of 23 September 2015, European leaders decided to “reinforce the dialogue with Turkey at all levels ... in order to strengthen our cooperation on stemming and managing the migratory flows.”[27] Starting from that moment, an intense negotiation phase was launched between European and Turkish diplomacies, whereby the EU and its Member States played the role of ‘the weak party’, i.e. the ones more in need of the other party's cooperation, and therefore more ready to accept compromises.

Turkish President Erdoğan was invited to Brussels to discuss the issue of migration with the representatives of the European institutions on 5 October 2015, and the outcome of the meeting was a first draft action plan “stepping up EU-Turkey cooperation on support of refugees and migration management in view of the situation in Syria and Iraq.”[28] A slightly modified joint version of the action plan was agreed *ad referendum* on 15 October 2015,[29] and was finally activated following the extraordinary meeting of the European Council and Turkey which took place in Brussels on 29 November 2015.[30]

On the basis of the agreement reached by the EU and Turkey, the EU has committed to provide humanitarian assistance and financial support to Turkey (3 billion euro under the EU Refugee Facility for Turkey), [31] in order to support Syrians under temporary protection and help host

²⁵ European Commission, and European Migration Network, Ad-Hoc Query on safe countries of origin and safe third countries, Requested by the BG EMN NCP on 10 October 2014, Compilation produced on 22 December 2014, available at: [http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/ad-hoc-queries/return/2014.615_emn_ahq_list_of_safe_countries_of_origin_\(wider_diss\).pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/ad-hoc-queries/return/2014.615_emn_ahq_list_of_safe_countries_of_origin_(wider_diss).pdf).

²⁶ In fact, in its Communication of 10 February 2016, the Commission encouraged Member States to include the safe third country notion in their national legislations and apply it when the conditions set by the Procedures Directive are met. See: European Commission, Communication from the Commission to the European Parliament and the Council on the State of Play of Implementation of the Priority Actions under the European Agenda on Migration, COM(2016) 85 final, Brussels, 10.2.2016.

²⁷ Informal meeting of EU heads of state or government on migration, 23 September 2015 – Statement, available at: http://www.consilium.europa.eu/en/press/press-releases/2015/09/23-statement-informal-meeting/?utm_source=dsms-auto&utm_medium=email&utm_campaign=Informal+meeting+of+EU+heads+of+state+or+government+on+migration+%2c+23+September+2015+-+statement.

²⁸ Draft Action Plan: Stepping up EU-Turkey cooperation on support of refugees and migration management in view of the situation in Syria and Iraq, MEMO/15/5777, Brussels, 6 October 2015, available at: http://europa.eu/rapid/press-release_MEMO-15-5777_en.htm.

²⁹ EU-Turkey Joint Action Plan, MEMO/15/5860, Brussels, 15 October 2015, available at: http://europa.eu/rapid/press-release_MEMO-15-5860_en.htm.

³⁰ Meeting of heads of state or government with Turkey - EU-Turkey statement, Brussels, 29 November 2015, available at: <http://www.consilium.europa.eu/en/press/press-releases/2015/11/29-eu-turkey-meeting-statement/>.

³¹ Commission Decision on the coordination of the actions of the Union and of the Member States through a

communities (with the purpose to weaken push factors in Turkey). In return, Turkey has committed to strengthen its efforts to control irregular migration towards Europe, by both preventing onward travel to EU countries and taking back people found not to be in need of international protection. However, the EU put on the table much more than technical and financial assistance to ensure Turkish cooperation. As part of the deal, the EU committed to accelerate negotiations on visa liberalization for Turkish nationals (with a view to achieving a deal by October 2016) and to reactivate the process for Turkey's accession to the EU.

The content and structure of the Joint Action Plan, in conjunction with the EU-Turkey Statement of November 29, are revealing of the European approach to the refugee crisis: cooperation with Turkey is primarily aimed at reducing the number of asylum seekers and migrants reaching the EU. And apparently, the EU was willing to play its best cards in order to achieve its intended outcome.

Significantly, as noted by Farcy (2015), in the first section of the Action Plan dealing with Syrians in Turkey, the migration crisis is depicted as a refugee issue, while in the second section dealing with irregular migrants trying to enter the EU from Turkey, the same crisis is described as an irregular migration problem. The Action Plan overlooks the fact that a vast majority of those 'irregular migrants' mentioned under Part II are actually asylum seekers from Syria. The overlapping of two distinct legal categories appears to serve the purpose of promoting migration control measures, which would affect not only migrants who are not in need of protection, but also (and according to figures, mainly) asylum seekers and refugees who *are* in need of protection.

Thus, the EU-Turkey Action Plan seems to rely on the implicit assumption that Turkey is a safe third country, because it suggests that not only irregular migrants and rejected asylum seekers can be returned to Turkey, but also Syrians under temporary protection and other asylum seekers can safely stay and find protection in the country.

Finally, both the Action Plan and the EU-Turkey Statement make explicit reference to the EU-Turkey readmission agreement and to bilateral readmission provisions as tools in the fight against irregular migration.[32] When the EU-Turkey readmission agreement entered into force in October 2014 its application had been limited to Turkish nationals only, whilst it would apply to third-country nationals starting from October 2017. However, the 29 November Statement moves this deadline up of more than one year, by establishing that "the EU-Turkey readmission agreement would become fully applicable from June 2016." This means that, starting from June 2016, any third-country national who has entered the EU coming from Turkey and is considered

coordination mechanism - the Refugee Facility for Turkey, C(2015) 9500 final, Strasbourg, 24 November 2015, available at: <http://ec.europa.eu/news/2015/docs/c-2015-9500-final-complet.pdf>.

³² Readmission agreements are instruments that facilitate the return of unauthorised migrants (including rejected asylum seekers) by establishing reciprocal obligations and procedures between the States parties. Readmission agreements may be bilateral or European. EU readmission agreements are negotiated by the European Commission on the mandate of the Council and apply to all EU Member States (with the usual exceptions of the UK, Ireland and Denmark).

as not being in need of international protection could be returned to Turkey in application of the EU-Turkey readmission agreement.

Here, it is worth noting that the combined implementation of the EU-Turkey Action Plan and the EU-Turkey readmission agreement could result in an increased risk of human rights violations for refugees and migrants. In the period during and following the finalization of the EU-Turkey deal, an increase in push-backs at the maritime border with Greece, arrests and detention of people (mainly asylum seekers) waiting to embark for Greece, and episodes of *refoulement* of Syrians at the Turkish-Syrian border has been denounced by NGOs (Amnesty International 2015; Human Rights Watch 2015d). In addition, there may be a risk of ‘deportation chains’, when rejected asylum seekers are transferred from state to state based on readmission agreements back towards their country of origin (eventually amounting to a ‘*refoulement* chain’).[33]

2.3. The Samsom Plan: explicitly considering Turkey a safe third country

On 28 January 2016, Diederik Samsom, leader of the Dutch Labour Party, announced in an interview with the newspaper *De Volkskrant* a Dutch proposal for a new plan to radically reduce the number of migrants and asylum seekers entering the EU from Turkey.[34] The proposal was immediately baptised ‘the Samsom Plan’.

The plan would have the support of Dutch PM Mark Rutte and would also receive support by a number of Member States, among which Germany, Austria and Sweden. The idea is to offer Turkey the resettlement of 150,000 to 250,000 refugees per year from Turkey to the EU countries that voluntarily agree with the plan.[35] In exchange for this, Turkey would have to accept the return of all migrants and asylum seekers who cross the Greek-Turkish border irregularly. According to Mr Samsom, these people would have to be very rapidly returned from Greece to Turkey by ferry-boat, and it would be Turkey’s responsibility to deal with their reception and asylum application, based on the fact that Turkey would be recognized as a safe third country.[36]

³³ This risk emerges from the Action Plan, where the EU commits to support cooperation on preventing irregular migration between Turkey and the countries of the “Silk Route’s Partnership for migration,” namely Afghanistan, Pakistan, Iraq, Iran and Bangladesh. Most of them are considered to be refugee-producing countries.

³⁴ An English translation of the interview with Mr Samsom is available at the following link: <http://www.esiweb.org/rumeliobserver/2016/01/29/interview-with-diederich-samsom-on-his-plan-translated-28-january/>. The original article in Dutch is available at the following link: <http://www.volkskrant.nl/politiek/nederland-wil-vluchtelingen-per-kerende-veerboot-terugsturen-naar-turkije-a4233530/>.

³⁵ According to Mr Samsom, approximately ten countries would be sufficient. Besides Germany, Austria and Sweden, he mentioned the need to involve France (which has appeared reluctant so far), Spain, Portugal, Italy and the UK.

³⁶ However, the Samsom Plan does not come from Mr Samsom’s mind. The European Stability Initiative (ESI), a think tank specialised in Southeast Europe, presented a very similar proposal in October 2015. The original plan, based on the fundamental idea of considering Turkey a safe third country, was called the ‘Merkel Plan’, because initially Germany alone would have the main role in the resettlement scheme with Turkey (ESI 2015a, 2015b). The original plan was then further developed and a ‘coalition of the willing’ (including the Netherlands) was gathered around Germany. From October 2015 to January 2016 the ESI presented this proposal in different countries across Europe, but it was only following Mr Samsom’s interview, that the now renamed Samsom Plan burst into the public debate.

This new plan differs from the EU-Turkey Action Plan because it explicitly targets not only irregular migrants but also asylum seekers, and it is based on the explicit assumption that Turkey can be considered a safe third country. If Greece applied the Procedures Directive's concept of safe third country to Turkey, then it would theoretically be able to declare inadmissible the asylum claims of applicants coming from Turkey. These asylum seekers could then be returned to Turkey.

Section 3 will analyse in details why, based on empirical evidence, it is doubtful that Turkey complies with the requirements laid down by Article 38(1) of the Procedures Directive for a third country to be considered 'safe' for asylum seekers. Here it is worth recalling that, besides the substantial issue of Turkey fulfilling or not the criteria to be considered a safe third country, Article 38(2) of the Procedures Directive establishes a set of procedural guarantees which must be respected when applying the safe third country concept (see section 2.1 above). In particular, it seems unlikely that an extremely rapid procedure as the one envisaged by Mr Samsom, would allow for a case-by-case examination of the individual circumstances of each asylum seeker arriving from Turkey, as prescribed by Article 38(2).

A further, more practical, question concerns who would be responsible for these procedures. Considering the difficulties faced by the Greek authorities in managing the current migrant flow and the established deficiencies of the Greek asylum system, it is hard to believe that the Greek authorities (despite the assistance provided by Frontex and EASO) would be able to implement a systematic readmission plan as the one foreseen by Mr Samsom.

In addition, according to Article 46 of the Procedures Directive, asylum seekers have the right to refer to a national court the decision to consider their application inadmissible. However, it is even more doubtful that Mr Samsom's accelerated procedure would allow for asylum seekers to challenge the decision to return them to Turkey in front of a Greek judicial authority and in the respect of all due procedural safeguards under the Directive and the ECHR.

Despite this, Greece agreed on the recognition of Turkey as a safe third country, as stated by the Greek Minister of Interior Kouroubilis on 5 February 2016 in the press conference which followed a meeting with his French and German counterparts .[37] On the other hand, Turkey seems rather reluctant to accept any plans based on a 'resettlement for readmission approach'. Selim Yenel, Turkey's ambassador to the EU, interviewed by the Guardian, dismissed such plans as "unacceptable" and "unfeasible." [38]

The Commission, on its part, jumped on the issue in its recent Communication on the State of Play of Implementation of the Priority Actions under the European Agenda on Migration, published on 10 February 2016. Here the Commission provides indication on how the

³⁷ Ekathimerini (2016) "Hot spot work intensifies as Greece agrees to recognize Turkey as 'safe' country," ekathimerini.com, 05.02.2016. Available online at: <http://www.ekathimerini.com/205708/article/ekathimerini/news/hot-spot-work-intensifies-as-greece-agrees-to-recognize-turkey-as-safe-country>.

³⁸ Traynor, I. and J. Rankin (2016) "Turkey dismisses EU plan to resettle refugees in return for sealing sea route," *The Guardian*, 10.02.2016. Available online at: <http://www.theguardian.com/world/2016/feb/10/turkey-dismisses-eu-plan-to-resettle-refugees-in-return-for-sealing-sea-route>.

Procedures Directive's concept of safe third country should be interpreted: in its own words, "[the concept] requires that the possibility exists to receive protection in accordance with the Geneva Convention, but does not require that the safe third country has ratified that Convention without geographical reservation."^[39] This statement evidently refers to Turkey, and it suggests that the condition under letter (e) of Article 38(1) does not preclude Turkey (which ratified the Geneva Convention *with* a geographical limitation) is considered a safe third country.

However, the Commission's statement is misleading because it deliberately omits to quote the entire text of Article 38(1)(e), which reads: "the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention". The question is: how can a Syrian, Iraqi or Afghan asylum seeker 'request refugee status', be 'found to be a refugee' and 'receive protection in accordance with the Geneva Convention' in a country which applies the Geneva Convention only to European asylum seekers?^[40] Under section 3.4, we will further discuss why, based on empirical evidence, Turkey does not comply with the requirement set by Article 38(1)(e).

3. Examining why Turkey is not a 'safe country'

In general, "[h]uman rights and the rule of law in Turkey are at the worst level I've seen in the 12 years I've worked on Turkey's human rights," according to Emma Sinclair-Webb, senior Turkey researcher for Human Rights Watch (Sinclair-Webb 2015a). Turkey is at risk of more prolonged internal conflict due to ongoing clashes between security forces and the Kurdistan Workers' Party (PKK) in the southeast region of the country, increasing social and political tensions, including a bombing of a peaceful rally leading up to the November 2015 elections, and the recent bombing of Sultanahmet Square in Istanbul on 12 January 2016. Since the beginning of 'security operations' in summer 2015, the Kurdistan region has been subjected to intensified state violence in urban districts, with consistent evidence of civilian deaths, leading to renewed population displacement in the region (Human Rights Watch 2015b). Academics who have signed a petition for peace have been targeted by the government, accused of 'terrorist propaganda' and 'insulting the Turkish Republic'. Turkey is host to around 2 million displaced Syrians, and has maintained a temporary protection regime which limits rights of Syrians (see below), as well as cooperated with the EU to prevent the secondary displacement of Syrians towards Europe (see below), with the most recent announcement from 11 February declaring the deployment of NATO ships to the Aegean Sea.^[41] In February 2016, a Syrian government offensive (backed by Russia) on Aleppo led to tens of thousands to flee towards Turkey, but Turkey maintained a closed border for most, only allowing in the seriously injured, assisting the

³⁹ European Commission, Communication from the Commission to the European Parliament and the Council on the State of Play of Implementation of the Priority Actions under the European Agenda on Migration, COM(2016) 85 final, Brussels, 10.2.2016, p. 18.

⁴⁰ Thanks to Steve Peers for this point. Personal email communication.

⁴¹ Today's Zaman (2016) "NATO ships ordered into Aegean Sea to curb migrant smuggling," *Today's Zaman*, 11.02.2016. Available online at: http://www.todayszaman.com/diplomacy_nato-ships-ordered-into-aegean-sea-to-curb-migrant-smuggling_412021.html

rest in camps across the Syrian border.[42] It has recently begun to allow in around 10,000 of the 50,000 waiting at the border ‘in a controlled fashion’ after calls from the UN to open the borders.[43] The further displacement across the Aegean Sea has led to at least 806 deaths in 2015 and 320 in January and February 2016.[44] Furthermore, there has been an intense media crackdown including – but certainly not limited to – frequent raids on opposition newspaper headquarters, the firing of opposition journalists in popular news outlets, and the jailing and deportation of international journalists (Jackson, Letsch, and Rawlinson 2015; Sinclair-Webb 2015b; Today’s Zaman 2015; Yackley 2015). As Sinclair-Webb points out, this crackdown is especially troubling amidst the escalating violence, considering the dire need for the population and for observers to know of fundamental rights abuses.

Unsettlingly, the aforementioned developments call into question whether the ‘safe country of origin’ and ‘safe third country’ requirements are being met, as provided in the Procedures Directive. As such, this section examines the empirical evidence in Turkey according to the legal requirements set in Annex 1 and Art. 38(1) of the Procedures Directive, based on the overlapping themes identified in Table 2. The evidence demonstrates that Turkey does not fulfil many of the requirements for designation as either a safe country of origin (SCO) or a safe third country (STC). Therefore we argue that the Commission and Member States must seriously reconsider designating Turkey as either SCO or STC.

Table 2: Themes and associated legal requirements for the concept of ‘safe country’ identified in the Procedures Directive

Themes	Safe country of origin (Annex 1 Procedures Directive)	Safe third country (Art. 38(1) Procedures Directive)
3.1 No risk of persecution	Generally and consistently no persecution	Life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion
3.2 No risk of serious harm (including both torture/inhuman treatment and threat by reason of indiscriminate violence due to conflict)	No torture or inhuman or degrading treatment or punishment	No risk of serious harm (definition Art. 15 Qualification Directive)
	No threat by reason of indiscriminate violence in situations of international or internal armed conflict	No risk of serious harm
3.3	Respect for the <i>non-refoulement</i>	Respect for the <i>non-</i>

⁴² AP (2016) “Ergogan fires back at UN over demand to open border,” *Today’s Zaman*, 10.02.2016. Available online at: http://www.todayszaman.com/diplomacy_erdogan-fires-back-at-un-over-demand-to-open-border_411951.html

⁴³ Today’s Zaman (2016) “Turkey slowly accepts Syrian migrants amid UN calls,” *Today’s Zaman*. 09.02.2016. Available online at: http://www.todayszaman.com/diplomacy_turkey-slowly-accepts-syrian-migrants-amid-un-calls_411878.html

⁴⁴ IOM, Missing Migrants Project, Mediterranean: <http://missingmigrants.iom.int/mediterranean>

Respect for the <i>non-refoulement</i> principle	principle	<i>refoulement</i> principle
3.4 Access to asylum and content of protection granted		Possibility to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention
3.5 Protection provided by relevant national law (and the way it is implemented), observance of international human rights obligations and the general political situation	Protection provided by relevant laws and regulations and the manner they are applied	
	Observance of rights and freedom laid down in ECHR, ICCPR and UNCAT	
	Effective remedies against violations of those rights and freedoms	
	The [general] legal situation, the application of the law within a democratic system and the general political circumstances	

Source: Adapted by authors from the Procedures Directive

3.1. No risk of persecution (for Turkish nationals) [45]

Within the European context, ‘acts of persecution’ can take the form of:[46]

- physical or mental violence;
- legal, administrative, police and/or judicial measures which are discriminatory or implemented in a discriminatory way;
- discriminatory prosecution or punishment;
- denial of judicial redress resulting in disproportionate or discriminatory punishment;
- prosecution or punishment for refusal to perform military service;
- and acts of a gender-specific or child-specific nature.

The acts must be sufficiently serious in nature or repetition to constitute a severe breach of basic human rights *or* must be an accumulation of various measures that result in a severe breach of basic human rights.[47] The European definition provides a good framework for assessing persecution in Turkey, given that those persecuted within Turkish borders under this definition should, in theory, have the right to seek asylum in Europe.

Turkey has a turbulent history of political conflict involving repression and persecution of minorities and dissidents, which continues today. Numerous cases of persecution conforming to

⁴⁵ Note that Turkey as STC is not fully evaluated in this section.

⁴⁶ Article 9(2) Qualification Directive.

⁴⁷ Article 9(1) Qualification Directive.

the definition above have been well documented in rulings by the European Court of Human Rights (ECtHR).[48] Religious minorities frequently experience discrimination or attacks on individuals or places of worship, and the state has failed to guarantee religious freedom for religious minorities.[49] Turkey has also failed to address issues of violence against LGBTs (UN News Service 2015). Academics who have signed a peace petition against state violence in Kurdistan have become subject to investigation, detention, and persecution.[50]

The current tense environment in the southeast and increasing authoritarianism of the government are leading to increased political and ethnic tensions, particularly among Kurdish and left-wing activists (CGVS/CGRA 2015). These tensions may lead to the need to seek political asylum outside of Turkey, and Turkish asylum applicants should have cases examined thoroughly, without the shortcuts that would be imposed should Turkey be considered a safe country of origin. As of December 2014, there are 63,975 refugees and 11,202 asylum seekers originating from Turkey residing across the world, the majority of whom reside in Germany, representing a decrease from the violent 1990s, but still signalling that Turkey remains a refugee-producing country and will likely remain so (UNHCR 2015).[51]

It has been forcefully argued that political asylum cases originating from Turkey are likely to increase under the current government's attacks on opponents and critics (Bozkurt 2015). The evidence suggests that there is consistent persecution of Turkish nationals, with life and liberty threatened for membership in particular social groups or for their political opinions. The Commission and Member States should seriously consider that Turkey is not a safe country of origin. By extension, based on the same evidence, we suggest that Turkey may persecute non-nationals as well, making it, as well, unsuitable as a safe third country.

3.2. No risk of serious harm

According to Article 15 of the Qualification Directive, 'serious harm' consists of:

- death penalty or execution;[52]
- torture or inhuman or degrading treatment or punishment of an applicant in the country of origin;
- serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

Such a definition provides an important framework for assessing serious harm in Turkey, which has a history of engaging in such practices (Reppell 2015).[53]

⁴⁸ European Court of Human Rights (2015) "Press country profile," *European Court of Human Rights*, Press Unit, December 2015. Available online at: http://www.echr.coe.int/Documents/CP_Turkey_ENG.pdf

⁴⁹ European Commission (2014) "Turkey Progress Report," *European Commission*, October 2014, pg. 15. Available online at: http://ec.europa.eu/enlargement/pdf/key_documents/2014/20141008-turkey-progress-report_en.pdf

⁵⁰ Amnesty International (2016) "Turkey: Detention of academics intensifies crackdown on freedom of expression," 15 January 2016. Available online at: <https://www.amnesty.org/en/latest/news/2016/01/turkey-detention-of-academics-intensifies-crackdown-on-freedom-of-expression/>

⁵¹ See also the UNHCR Population Statistics Database, available online at: <http://popstats.unhcr.org/>.

⁵² Note that execution conditions are not reviewed here.

The ruling Justice and Development Party (AK Party) has consistently antagonized and repressed political criticism or opposition and public protest, encouraging a climate of police and judicial impunity (Baird 2014; Roth 2014). Extrajudicial killings, torture, and enforced disappearances by security forces of political opponents or dissidents are commonplace and although on the decline compared to earlier periods, remain a significant concern, especially in the south-east (Amnesty International 2002; CPT 2015; European Commission 2014: 15; Salinsky 1998). The perpetrators of such actions are rarely held accountable by law (Human Rights Watch 2015c).

The recent assassination of Tahir Elci, a prominent human rights lawyer who has spoken out against government persecution, underscores that Turkey remains unsafe for vocal defenders of the human rights of those subject to violence by the security forces (Human Rights Watch 2015a). Persecution of political opponents has grown during the AK Party's tenure, with detention of dissidents and journalists on the rise, and is likely to continue as the climate of impunity remains (Human Rights Watch 2014; Uzum 2015). Thus, according to the evidence there remains the risk of serious harm of Turkish nationals as referred to in Article 15(b) of the Qualification Directive.

Migrants in Turkey, especially asylum seekers and irregular migrants, face a number of obstacles which may increase their risk of serious harm. For these reasons, we suggest that Turkey should not be considered a safe third country. We review three of the main reasons here.

First, asylum seekers and refugees face uncertainty regarding their legal situation, and Turkey does not grant full legal status to refugees who come from outside of Europe or who fall under the temporary protection regime (primarily Syrians).[54] Access to basic services such as healthcare, education, social assistance, or employment is constrained, and while such limitations do not constitute serious harm, may exacerbate vulnerability and contribute to the hostile climate for human rights in the country. While Turkey granted Syrians the right to work in mid-January 2016, very few have actually obtained work permits, and most who do find work are employed in the informal economy.[55] Furthermore, an environment of xenophobia towards Syrian refugees may exacerbate violence, as confusion over the position of Syrians in the country has contributed to demonstrations and attacks (Chatty 2015: 4; Idiz 2015).

Second, Turkey has a record of treating asylum seekers and refugees harshly in detention.[56] Registered asylum seekers can be placed in detention for failing to comply with the parallel procedures for non-European asylum seekers (see section 3.4 below), leaving assigned 'satellite cities' without permission, or attempting to enter Greece irregularly (Global Detention

⁵³ See also European Court of Human Rights (2015) "Press country profile," European Court of Human Rights, Press Unit, December 2015. Available online at: http://www.echr.coe.int/Documents/CP_Turkey_ENG.pdf.

⁵⁴ See section 3.4.

⁵⁵ Cetingulec, M. (2016) "Turkey grants Syrians right to work, but is it too little, too late?" *Al Monitor*, Turkey Pulse. 25.01.2016. Available online at: <http://www.al-monitor.com/pulse/originals/2016/01/turkey-syrian-refugees-granted-right-to-work.html#>

⁵⁶ *Abdolkhani and Karimnia v. Turkey* (no. 2), Application no. 50213/08, ECtHR, 27 July 2010, Final Judgment; *S.A. v. Turkey*, Application no. 74535/10, ECtHR, 15 December 2015, Final Judgment.

Project 2014). Migrants also routinely find themselves in detention for irregular entry or exit, and are routinely denied access to the asylum procedures (see section 3.4 below). Furthermore, detention conditions in Turkey regularly amount to inhuman or degrading treatment (Amnesty International 2015; Global Detention Project 2014).[57]

Third, with reference to serious harm as indiscriminate violence in a situation of conflict,[58] the conflict between the state and the Kurdish rebels may pose threats to the lives of asylum seekers and refugees in the region. Conflict is spreading in the southeast of the country with the recent breakdown of the Kurdish peace process, and involves tense street fighting between Kurdish rebels and government forces (German Federal Office for Migration and Asylum 2015: 3). Such a tense environment poses serious risks of harm for migrants and asylum seekers living in or nearby such districts. As internal armed conflict spreads in Turkey, the Commission should seriously consider that Turkey is not a safe third country for migrants and refugees.

3.3. Respect for the non-refoulement principle

Under European and international human rights law Turkey must respect the principle of *non-refoulement*, which is a prohibition on returning someone to a place where they face a risk of persecution, torture, or inhuman and degrading treatment, thus prohibiting Turkey from rejection of asylum seekers at the border through push-backs. Nevertheless, a number of reports suggest that Turkey regularly engages in *refoulement*, and the recent announcement that NATO boats will be deployed to the Aegean heightens concerns over push-backs and ‘mass refoulement’.[59]

Turkey has a history of *refoulement* of non-European asylum seekers. In the 1990s, asylum seekers who entered the country clandestinely who did not comply with requirements to register within five days were liable to immediate return without consideration of asylum claims, such as the forcible return of 72 Iraqi refugees and 66 Iranian refugees in 1996 (Amnesty International 1997). In March 1997, 23 Iranians were arrested in house raids and deported the following day to northern Iraq, one example of a number of large scale arrests and deportations which have taken place (Amnesty International 1997). Interventions and requests by both UNHCR and Amnesty International to end perfunctory return practices were ignored, and the practices received wide-spread condemnation and criticism of Turkey’s asylum policies at the time (Frelick 1997).

Reports from throughout the 2000s have suggested that both Greece and Turkey systematically engage in push-backs in the Aegean Sea and at the Turkish-Greek land border, raising serious concerns about police cooperation between Turkey and Greece in the domain of migration and border management as such practices result in violations of fundamental rights and/or death (Pro Asyl 2013; Topak 2014). Recent reports in 2015 from the southern borders with Syria

⁵⁷ See also regular reports from the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT).

⁵⁸ Article 15(c) Qualification Directive.

⁵⁹ On ‘mass refoulement’ see Statewatch ‘Refugee crisis: latest news from across Europe’, 11.02.2016: <http://statewatch.org/news/2016/feb/eu-med-crisis-news-11-2-16.htm>

indicate that Turkey is pushing back Syrians as they try to cross, with allegations of the use of physical force, cursory detention, and summary expulsion (Human Rights Watch 2015d).

As mentioned under section 2.2., the recent Joint Action Plan between the EU and Turkey requires Turkey to take back individuals who are not considered in need of international protection. The Samsom plan would require Turkey to take back asylum seekers (see section 2.3). There are serious concerns that the EU-Turkey Joint Action Plan (and the Samsom Plan, if implemented) may result in an increased risk of *refoulement* (ECRE 2015, 2016). For these reasons, Turkey is likely to continue to contribute to *refoulement* of non-nationals, and with the high numbers of new arrivals of asylum seekers in the country, the numbers of push-backs and summary deportations may increase. Thus, we cannot make a strong claim that Turkey respects the principle of *non-refoulement*.

3.4 Access to asylum and content of protection granted (for third-country nationals in Turkey)

Turkey ratified the Refugee Convention and its 1967 Protocol, but maintains a geographical limitation for non-European asylum seekers, thus recognizing refugees originating only from Europe (i.e. from countries which are members of the Council of Europe). Amnesty International has criticized the limitation in Turkey, claiming it forces “most [asylum seekers to] live in destitution and/or work illegally in exploitative conditions” (Killig 2014). The geographical limitation thus provides the first barrier to accessing asylum in the country.

Syrians arriving *en masse* were at first received as ‘guests’ and then subject to a temporary protection regime, formalized by a Regulation on Temporary Protection from October 2014.[60] UNHCR does not partake in the registration procedure for temporary protection of Syrians, as it is managed solely by the new Directorate General of Migration Management (DGMM). Individual (non-Syrian) asylum seekers are registered in a parallel process according to the new Law on Foreigners and International Protection entering into force from April 2014, whereby applicants apply to both the Directorate General of Migration Management (DGMM, which conducts the status determination procedure) and UNHCR (which conducts a parallel status determination and recommendations for resettlement, although the UNHCR decisions do not carry legal effect, but are included in the DGMM’s assessment).

With the temporary protection regime Syrians have no right to apply for refugee status. The idea of the temporary protection regime is to hold Syrians until the conflict in Syria is over, to keep them ‘frozen’ - so to speak - in Turkey and to allow them to return to Syria when the situation resolves. As such, they have limited rights in the country compared to asylum seekers in the parallel procedure, and do not have access to refugee protection in its full sense, as enshrined in the Refugee Convention. Thus the procedural rules and protection standards are different for Syrians or other third-country nationals, introducing inequalities in access to protection and

⁶⁰ For more details see Association for Solidarity with Asylum Seekers and Migrants (SGDD) (n.d.) “The Temporary Protection Directive Has Been Published,” ASAM/SGDD, Available online at: <http://www.sgdd.org.tr/en/The-Temporary-Protection-Directive-has-been-published-i74>

content of protection (For more information and details on restricted rights see AIDA 2015c: 15-24).

The large majority of asylum seekers in Turkey are non-European, and a number of cases at the ECtHR have highlighted a number of deficiencies of the parallel procedures, including important divergences between Turkey and UNHCR: when Turkey says ‘yes’, and UNHCR says ‘no’, Turkish authorities are likely to accept UNHCR’s negative decision, while when Turkey says ‘no’ and UNHCR says ‘yes’, Turkish authorities are not likely to defer to UNHCR (Zieck 2010). Such evidence raises serious questions about Turkey’s obligations to grant refugee protection.

Furthermore, strong evidence demonstrates that asylum seekers are limited in their abilities to access procedural rights, particularly in detention, including lack of information about the asylum procedure, refusal by authorities to accept asylum applications, being barred from applying in airport transit zones, and facing indifference or aggression when approaching authorities (Helsinki Citizens’ Assembly 2007b). Sporadic access to legal aid, interpreters, extended detention periods, and inequalities to access the parallel application procedures across the country lend credibility to the claim that there are a number of important deficiencies in accessing asylum and gaining protection for third-country nationals in Turkey (Helsinki Citizens’ Assembly 2007a).

3.5. Protection provided by relevant national law, observance of international human rights obligations, and the general political system

Turkey has an uneven record of observing and protecting the human rights of citizens and non-citizens alike. Turkey’s record of violations ascertained by the European Court of Human Rights shows that it has received the highest number of judgments between 1959 to present (over 3,000, or 18% of the total), surpassing all other state parties to the ECHR (Reppell 2015). Turkey also suffers from delays in resolution of cases and compliance with ECtHR judgments, and although Turkish officials show a strong desire to resolve judgments and comply, Turkey can be criticized for stalling on complying with ECtHR norms (Reppell 2015). Given Turkey’s consistent record of rights violations, it is unclear whether Turkey is in strict observance of the rights laid down in the ECHR, or whether Turkey provides effective remedies for violations of such rights in national law and practice. Although there has been much progress, there remains much to be done to apply human rights law consistently in Turkey.

In 2004, Article 90 of the Turkish Constitution was amended to give precedence to international human rights treaties over national law which, in turn, gave authority to the ECtHR case law over Turkish case law (Reppell 2015). In 2013, Turkish Constitutional Court (TCC) began accepting human rights applications directly (Reppell 2015).[61] In practice, an applicant who disagrees with a TCC ruling can then go to the ECtHR if they remain unsatisfied with the ruling,

⁶¹ In order for the ECtHR to consider a case, all domestic remedies must be exhausted (article 35(1) ECHR) which means that there has been a large decline in ECtHR cases.

which theoretically means protection from both TCC and/or ECtHR. However, there remain many implementation fears:

- a) TCC case load: approximately 32,000 cases have been filed and 16,000 finalized by January 2015. ECtHR also has a backlog. In July 2014 that number had reached 84,000 (technically a drop) (Donald 2014);
- b) There is no binding legislative requirement for lower courts to follow TCC rulings (Reppell 2015);
- c) Judicial independence: “The Constitutional Court has recently been targeted by the government over its rulings on individual complaints” (Hürriyet Daily News 2015). Speculation is rife that the TCC’s claim to independence could be curtailed through pressure from the government (Idiz 2014);
- d) Delays in compliance: According to the database of the Council of Europe’s Committee of Ministers, the body charged with overseeing states’ compliance with ECtHR judgments, Turkey has more than 1,500 cases waiting to be fully implemented.

While there is undoubtedly a delay in compliance, Turkey’s record on speed of implementation is not uniquely bad among state parties (Reppell 2015). Thus, the question of whether the TCC can rule impartially remains.

The general political situation is characterized by police violence and impunity, an increasing shift towards an authoritarian mode of governance, a politically biased and partial judicial system, persecution of political opponents of the ruling AK party, a resurgence of internal conflict between the state and Kurds, ongoing tensions between ethnic minorities, tensions over large displacements of migrants (primarily Syrians), and an increased potential for geopolitical conflict in the region.

In addition to Turkey’s history of conflict and persecution, the Commission and the European leaders should bear in mind that the current conditions in Turkey may not be ‘safe’ according to the conditions laid down in EU law or on the ground. Based on the evidence presented, we can claim that it is not clear that Turkey is able to comply with its international human rights obligations, as it suffers from a politically biased and partial judicial system, has recently shifted towards a more authoritarian mode of governance, and it is unclear whether citizens or non-citizens will benefit from rights protections or effective remedies when violations do occur.

Conclusion

In sum, the empirical evidence demonstrates that Turkey does not fulfil many of the requirements for designation as a ‘safe country’ under the Procedures Directive. Therefore, Turkey should not qualify as either a safe country of origin or a safe third country. We urge the Commission, the Council and the Member States to seriously reconsider designation of Turkey as a ‘safe country’ and to recognize that Turkey remains a refugee-producing country with a number of limitations to implementing and respecting human rights norms.

Although it is remarkable that Turkey adopted new asylum legislation and is a state party to major human rights conventions, such as the European Convention on Human Rights, the 1951 Refugee Convention and the Convention against Torture, the way it has so far implemented its international human rights obligations is still faulty. The right to asylum in Turkey cannot be considered as ‘fully established’, especially because of the existing inequalities in the protection system, which at the present moment are affecting Syrian refugees in particular.[62]

Moreover, the existence of Turkish national asylum seekers is an issue which should not be dismissed by the EU in exchange for Turkish cooperation on migration control. 3 billion euros worth of financing for Turkey from the EU has been made conditional on coordinating border control operations between the EU and Turkey, with Erdogan even threatening to allow migrants to pass to the EU if the money is not delivered.[63] Making humanitarian aid conditional on border security cooperation is incompatible with protections of fundamental rights, and in the case of Turkey is contributing to the authoritarian tendencies of the ruling party. In paying Turkey to play a more proactive role in the management of migrant and refugee flows into Europe, the EU and its Member States are bargaining with the rights of both Turkish nationals and non-nationals, including asylum seekers fleeing conflicts and persecution. Rights protections should never be traded for more control. The danger is that the authoritarian tendencies of the Turkish government will be strengthened at the expense of the fundamental rights of Turkish nationals and forced migrants.

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⁶² Although in this article we highlight flaws in the Turkish asylum system and problems in the content of protection granted, we must always keep in mind that Turkey (together with other countries in the region) is currently hosting large numbers of Syrian refugees, while the EU is closing its borders to them. Therefore, when criticizing the severe conditions suffered by certain asylum seekers in Turkey, we do not mean in any way that Europe would treat them better. Our main critique is exactly against those European policies aimed at preventing asylum seekers from entering the EU and/or gaining protection in its territory. The common list of safe countries of origin, the EU-Turkey Action Plan and the Samsom Plan are examples of such policies.

⁶³ Today’s Zaman (2016) “Erdogan: Turkey may open gates to send migrants away,” *Today’s Zaman*. 11.02.2016. Available online at: http://www.todayszaman.com/diplomacy_erdogan-turkey-may-open-gates-to-send-migrants-away_412028.html

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