



**Written Submission by the Office of the United Nations High Commissioner
for Refugees in the Case *Abdolkhani and Karimnia v. Turkey*
(Application No. 30471/08)***

1. Introduction^o

1.1. By letter of 9 December 2008, the European Court of Human Rights invited the Office of the United Nations High Commissioner for Refugees (“UNHCR” or “the Office”) to submit a written intervention as a third party in the case of *Abdolkhani and Karimnia v. Turkey* (Application No. 30471/08). The European Court of Human Rights (“the Court”) specifically requested that UNHCR’s submission deal with:

- The procedural rules and principles governing the UNHCR’s refugee status determination, in particular information as to how UNHCR in Turkey proceeds with the asylum applications in Turkey, information on re-examination of asylum applications and the number of refugees submitted to resettlement in 2006, 2007 and 2008 in Turkey;
- The situation and legal status of asylum-seekers and refugees in Turkey;
- The relationship between UNHCR in Turkey and the Turkish national authorities (information on the legal basis of the co-operation as well as the actual situation).

In addition, UNHCR was requested to submit written comments in reply to the Turkish Government’s letter of 17 November 2008.

1.2. UNHCR welcomes the opportunity to make written submissions in respect of the present case, which raises a number of legal issues relating to refugee protection. UNHCR has been entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with Governments, to seek permanent solutions to the problem of refugees.¹ Paragraph 8 of its Statute² and Article 35 of the 1951 Convention relating to the Status of Refugees (“the 1951 Convention”)³ confer UNHCR with the responsibility to supervise the application of the provisions of the 1951 Convention.

1.3. Parts 2 to 4 of this submission address the three specific questions posed by the Court, whereas Part 5 provides further comments on the questions submitted by the Court to the Government of the Republic of Turkey. The submission does not address the merits of the case.

* This is a slightly edited version of the document originally submitted to the European Court on 20 January 2009.

^o This submission does not constitute a waiver, express or implied, of any privilege or immunity which UNHCR and its staff enjoy under applicable international legal instruments and recognized principles of international law.

¹ *Statute of the Office of the United Nations High Commissioner for Refugees*, UN General Assembly Resolution 428(V), Annex, U.N. Doc A/1775, 1950, para. 1, <http://www.unhcr.org/refworld/docid/3ae6b3628.html>.

² *Ibid.*, para. 8(a).

³ The 1951 Convention relating to the Status of Refugees, 189 U.N.T.S. 137, <http://www.unhcr.org/refworld/docid/3be01b964.html>, entered into force on 22 April 1954.

2. The Procedural Rules and Principles Governing UNHCR's Refugee Status Determination

2.1. Refugees are persons who meet the definitions of the 1951 Convention and the 1967 Protocol⁴ relating to the Status of Refugees and UNHCR's Statute,⁵ as complemented by subsequent General Assembly resolutions.⁶ Although the grant of refugee status is of a declaratory, rather than a constitutive nature,⁷ in order for States to apply the Convention and for UNHCR to carry out its statutory obligations, refugees must be identified as such. Hence, refugee status determination ("RSD") is a critical step to ensure international protection and seek appropriate solutions for refugees. It is also one of UNHCR's core protection functions.

2.2. In principle, States parties to the 1951 Convention and the 1967 Protocol should establish national procedures to determine refugee status. Although 146 States have become parties to one or both of these international instruments, only 102 have established a national procedure, often with UNHCR involvement in an advisory capacity, pursuant to its mandated supervisory role.

2.3. Where States have not yet acceded to the international refugee instruments or, if domestic procedures have not yet been established or are not yet effective, UNHCR has to exercise its mandated responsibilities to fill any gaps, including undertaking individual RSD. UNHCR does so in order to protect refugees from *refoulement*, detention or other violations of their human rights and/or to facilitate a durable solution, for instance by organizing resettlement to third countries.

2.4. The Republic of Turkey acceded to the 1951 Convention and the 1967 Protocol, but maintains the geographical limitation pursuant to Article 1 B of this Convention by which the State assumes the obligation to provide protection only to refugees originating from Europe.⁸ While formally excluded from the protection of the 1951 Convention, non-European asylum-seekers may apply to the Turkish Government for "temporary asylum-seeker status" under the 1994 Asylum Regulation,⁹ pending UNHCR's efforts to secure a solution for

⁴ The 1967 Protocol relating to the Status of Refugees, 606 U.N.T.S. 267, <http://www.unhcr.org/refworld/docid/3ae6b3ae4.html>, entered into force on 4 October 1967.

⁵ See UNHCR's Statute (*supra* footnote 1), paras. 6-7.

⁶ The competence of the Office has been enlarged by successive General Assembly and ECOSOC resolutions since the elaboration of the mandate in the Statute in 1950. For an elaborated view and references to the resolutions, please see the article by Volker Türk, "The role of UNHCR in the development of international refugee law", in *Refugee Rights and Realities: Evolving International Concepts and Regimes*, Cambridge University Press, ed. Frances Nicholson and Patrick Twomey, 1999, pages 153ff.

⁷ See UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, <http://www.unhcr.org/refworld/docid/3ae6b3314.html>, para. 28: "A person is a refugee within the meaning of the 1951 Convention as soon as he or she fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his/her refugee status is formally determined." See also: ExCom Conclusion No. 6 (XXVIII) – 1977 on *Non-Refoulement*, para. c), <http://www.unhcr.org/excom/EXCOM/3ae68c43ac.html> (hereafter "ExCom Conclusion").

⁸ The 1951 Convention was ratified by Turkey in 1961, Law No. 10898, published in the Official Gazette of the Republic of Turkey on 5 October 1961. Upon ratification, Turkey has made the following declaration:

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

See also: Declarations and Reservations to the 1951 Convention relating to the Status of Refugees as of 1 March 2006, Declarations under section B of article 1 of the Convention, <http://www.unhcr.org/refworld/docid/3be01b964.html>.

⁹ *Regulation No. 94/6169 of 30 November 1994 on the procedures and principles related to population movements and aliens arriving in Turkey either as individuals or in groups wishing to seek asylum either from Turkey or requesting residence permits in order to seek asylum from another country*, published in the Official Gazette of the Republic of Turkey on 30 November 1994 ("1994 Asylum Regulation"). A consolidated text of the Regulation, as amended in 2006 (Official Gazette of the Republic of Turkey of 27 January 2006), is available at: <http://www.unhcr.org/refworld/docid/49746cc62.html>.

them elsewhere. In order to decide on their durable solution needs and to intervene to minimize protection risks, including the risk of *refoulement*, UNHCR must verify whether such persons are of concern to the Office. It therefore conducts RSD under its mandate for non-European asylum-seekers in parallel to the domestic procedure for temporary asylum.

2.5. When conducting RSD under its mandate, UNHCR follows the “*Procedural Standards for Refugee Status Determination under UNHCR’s Mandate*” issued by the UNHCR Department of International Protection in September 2003.¹⁰ UNHCR in Turkey has developed specific standard operating procedures adapted to the context in which the Office conducts RSD in that country.

2.6. In Turkey, UNHCR registers non-European asylum-seekers in its offices in Ankara and Van. Additionally, the offices in Istanbul and Silopi provide counsel to those non-European persons expressing their will to apply for refugee status in Turkey, who are then referred to the offices in Ankara or Van for registration and further processing purposes. At the time of registration with UNHCR, all applicants are informed of the procedures to seek temporary asylum in Turkey and are referred to the authorities to register in the city designated by the Ministry of Interior pursuant to the 1994 Asylum Regulation.¹¹

2.7. RSD interviews have been conducted by UNHCR staff either in Ankara or Van since the mid 1980s. In the absence of a standard referral mechanism, when UNHCR becomes aware of persons detained owing to illegal entry or stay in Turkey, the Office has to request the agreement of the Ministry of Foreign Affairs and the Ministry of Interior to conduct the interview. Only when the competent authorities agree to allow UNHCR access can the Office interview the applicant in the detention facility. As described in Part 3, in most cases access is not granted.

2.8. Once UNHCR has conducted the RSD interview, the claim is assessed in light of the evidence submitted by the applicant, relevant country of origin information, and pertinent criteria. Necessary attention is given to the special characteristics of the applicant (vulnerability factors such as age, mental and physical health, and possible effects of trauma). On the basis of this information an assessment report is drafted and submitted to a Reviewing Officer who reviews the recommendation contained in the assessment report and who is responsible for issuing a decision.

2.9. If the UNHCR’s decision is to recognize the applicant as a refugee under UNHCR’s mandate,¹² a refugee certificate is issued by UNHCR to the person and his/her file is transferred to UNHCR Ankara’s Resettlement and Repatriation Unit to examine durable solution options. In the absence of other prospects – voluntary return or local integration – the durable solution is invariably resettlement to a country willing to accept the case. Pending resettlement, UNHCR expects that refugees are not forcibly removed from Turkish territory.

¹⁰ Available at: <http://www.unhcr.org/refworld/docid/42d66dd84.html>.

¹¹ The Regulation requires that

“Individual aliens who are either seeking asylum from Turkey or requesting residence permission in order to seek asylum from a third country shall apply within ten days to [any] local governorate if they entered the country legally; and if they entered illegally, shall apply within ten days to the governorate of the province where they entered the country. In case it is deemed necessary in terms of national security, the above-mentioned period can be shortened upon consultation with the Ministry of Foreign Affairs”.

See Regulation No. 94/6169, Part Two, Article 4 (*supra*, footnote 9). Also refer to “*Basic Information for the Asylum-Seekers in Turkey*”, published by the Republic of Turkey, Ministry of Interior, General Directorate for Security, available at: [http://www.unhcr.org.tr/MEP/FTPRoot/HTML/Editor/File/LEAFLETS/by MOI/LEAFLET_english_revised_unhcr.doc](http://www.unhcr.org.tr/MEP/FTPRoot/HTML/Editor/File/LEAFLETS/by%20MOI/LEAFLET_english_revised_unhcr.doc), or “*Information for Non-European Nationals seeking Asylum in Turkey*”, published by UNHCR in several languages, available at: <http://www.unhcr.org.tr/MEP/index.aspx?pageId=219>.

¹² UNHCR operates on the basis of the refugee definition contained in paragraph 6 of its Statute (see *supra* footnote 1). Aside from minor differences, this definition corresponds with the refugee definition contained in Article 1 of the 1951 Convention. Once established that a person is not a refugee, UNHCR does not pronounce itself whether the individual is entitled to protection from removal under international or regional human rights law, as this would fall beyond UNHCR’s mandated responsibility.

2.10. In order to resettle a refugee, UNHCR submits the file to potential resettlement countries that assess submissions on an individual basis and in accordance to their established national criteria.¹³ The time period for case submissions, interviews by consular or immigration staff of resettlement countries and acceptance, including security verifications, varies from country to country. On average the resettlement process may take between 4 to 10 months after mandate recognition by UNHCR. At times this process may take longer, particularly for cases that have been rejected by one country and have to be resubmitted to another. Some individuals may be rejected by all resettlement countries and thus not be resettled at all. They may be forced by circumstances to move on, in an irregular manner, to seek effective protection elsewhere.

2.11. If the claim for refugee status is rejected by UNHCR, the asylum-seeker is informed in writing of the reasons for the rejection, as well as of the right and procedure to appeal against the negative decision. Appeal reviews are conducted by a separate Appeals Unit within the Office. If the appeal results in the person being recognized as a refugee under the mandate, certification is issued and the case is forwarded to the Resettlement and Repatriation Unit as described above in paragraph 2.9. If, following the appeal review, the application is rejected, the applicant is informed and the case is closed by UNHCR.

2.12. In exceptional circumstances, the “*Procedural Standards for Refugee Status Determination under UNHCR’s Mandate*”¹⁴ foresee the possibility of re-opening a file that has been closed after rejection on appeal. This may occur when there is reliable evidence of a significant change in the personal circumstances of the applicant or in the conditions in the applicant’s country of origin that may substantially affect the eligibility for refugee status; when UNHCR receives reliable and material new evidence indicating that the claim may have been improperly decided; and when there is a serious reason to believe that the claim was improperly decided and/or that grounds for eligibility for refugee status were not adequately examined or addressed.

2.13. If a refugee already recognized under the mandate of the High Commissioner by a UNHCR office in another country, approaches UNHCR in Turkey, the Office does not undertake a new refugee status determination. A determination that a person is a refugee by one UNHCR field office means that the person is of concern to the Organization as a whole. When reliable and credible information emerges that the initial decision was taken in error, a case can exceptionally be re-opened for possible cancellation of refugee status.¹⁵

2.14. The average time between the registration of an asylum-seeker and a first instance decision, is currently 5 months, whereas the average time between a rejection in first instance and a decision on the appeal is 13 months. Every week, UNHCR shares with the Ministry of Foreign Affairs and the Ministry of Interior a list of all new applications registered with UNHCR; of the final decisions taken (recognition of refugee status or closure of files after appeal); and of applicants whose cases are still under review by UNHCR. The list also includes any re-opening owing to one of the aforementioned circumstances.

2.15. Asylum-seekers and refugees registered by UNHCR originate from over 50 countries. In 2008, citizens of Iraq represented 46 %, Iranians 24 %, Afghans 17 %, and Somalis 7 % of the caseload. The following table summarizes the number of asylum applicants with UNHCR Turkey, the number of persons granted refugee status, the number rejected in the first and second instances, as well as the total number of refugees resettled in the last three years.

Years	Applications	Recognitions	Rejections First Instance	Rejections Appeal	Resettlement
2006	4,553	1,895	512	169	1,609
2007	7,646	7,066	385	121	2,667
2008	12,978	8,576	487	174	3,832

¹³ From 1994 – 2007 inclusive, UNHCR resettled 30,002 refugees from Turkey to a third country.

¹⁴ See *supra*, footnote 10.

¹⁵ For more details, see UNHCR, *Note on the Cancellation of Refugee Status*, 22 November 2004, <http://www.unhcr.org/refworld/docid/41a5dfd94.html>.

3. The Situation and Legal Status of Asylum-Seekers and Refugees in Turkey

3.1. Turkey maintains the “geographic limitation” restricting its obligations under the 1951 Convention and its 1967 Protocol to persons who fear persecution as a result of events occurring in Europe.¹⁶ Under the 1994 Asylum Regulation,¹⁷ European asylum-seekers may apply to the Government for refugee status under the 1951 Convention. Few Europeans seek protection in Turkey,¹⁸ and the Government’s practice has been to treat persons in need of international protection originating from Europe within the framework of the aliens law, either (i) granting them residence status with privileged access to the labour market and to social rights; (ii) allowing their stay in the country with extended tourist visa; or (iii) simply refraining from implementing removal measures, *de facto* tolerating their illegal presence.

3.2. The 1994 Asylum Regulation allows non-European refugees to apply for temporary asylum-seeker status which permits them to remain temporarily in Turkey until a resettlement or repatriation solution has been found. Non-European asylum-seekers, entering Turkey legally, generally have access to the domestic procedure for temporary asylum, on the condition that they approach the competent authorities without delay and duly register. Those crossing the border in an irregular manner are admitted to the procedure, unless they are apprehended before registering with UNHCR in Van or Ankara. Although among the large number of foreigners who are apprehended every year owing to illegal entry or stay, a considerable portion originates from refugee-producing countries, such as Afghanistan, Iran, Somalia or Iraq, in 2008, only in one instance did the authorities refer a group of asylum-seekers to UNHCR.

3.3. The Government generally views applications by individuals who claim asylum after having been arrested for their illegal entry, presence or attempted departure from Turkey, as having been made in bad faith, in order to circumvent removal under applicable aliens regulations. These individuals are subject to detention and regularly denied access to the domestic temporary asylum procedure for non-European asylum-seekers. UNHCR is not aware of cases apprehended for illegal entry or stay in 2008 that were referred to the domestic procedure for temporary asylum. UNHCR’s access to arrested individuals is subject to approval by the Ministry of Foreign Affairs and Ministry of Interior. In 2008, in Turkey, UNHCR intervened in 393 incidents, involving 3,351 undocumented foreigners among whom many wished to seek asylum. UNHCR was given permission to see only 72 individuals. Access to all others was denied. In the absence of a functioning referral system to the temporary asylum procedure, UNHCR assumes that most of them were removed from Turkey without an adequate assessment of their need for international protection.

3.4. In some instances, access has also been denied to persons already recognized as refugees. This has repeatedly been the case with regard to former members of the *People’s Mujahedin Organization in Iran* (“PMOI”) from Iran, who had been recognized as refugees under UNHCR’s mandate in Iraq. In 2008, UNHCR officially intervened and requested access to 14 individuals from this group, but was only permitted to see two of them, Mr. Abdolkhani and Mr. Karimnia. The Office is not aware whether or not the others were given the opportunity to lodge an application in the domestic temporary asylum procedure.

3.5. Individuals formally admitted into the domestic procedure for temporary asylum, are generally protected from *refoulement*. Persons seeking temporary asylum, as well as those to whom it is granted, are obliged to reside in one of the 30 designated cities. Their movements to other cities are subject to prior authorization and they have a regular reporting duty with the Foreigners Section of the Police in the designated city. In order to legalize their stay, they have to obtain residence permits, for which they need to pay the equivalent of 177 Euro per person every six months. This constitutes a heavy burden on the individuals concerned. Failure to pay results in loss of legal status in Turkey and prevents those refugees accepted for resettlement by third countries from obtaining the necessary exit authorization from the Ministry of Interior.

¹⁶ See *supra*, footnote 8.

¹⁷ See *supra*, footnote 9, Article 4.

¹⁸ Although no official statistics are available to UNHCR, the Office is only aware of a negligible number of European asylum-seekers who were granted refugee status by the Government of Turkey under the 1951 Convention.

3.6. Turkey currently does not maintain reception centres for asylum-seekers or refugees, although limited State facilities are available for separated and unaccompanied children. The Government, however, is working to expand shelter capacity for other vulnerable individuals, particularly victims of trafficking and women fleeing other situations of abuse.

3.7. Persons who apply for temporary asylum and those to whom it has been granted, may send their children to Turkish primary schools; but those without legal status (e.g. for failure to pay the required fee), as well as those residing without permission by the authorities in areas other than the 30 designated cities, may face practical difficulties with enrolment or in obtaining certificates.

3.8. Government assistance to persons seeking or granted temporary asylum, is limited. Existing schemes vary from one designated city to the other. In many provinces, the Government offers primary health care free of charge in State facilities (public clinics). However, treatment for serious illnesses is likely to be insufficient and the cost of medication is not covered. Provincial and municipal authorities provide some *ad hoc* support from social welfare funds.

3.9. Persons seeking or granted temporary asylum may obtain legal employment in Turkey. However, there are practical difficulties in obtaining a work permit that make this right largely theoretical. Many refugees find informal jobs. The need to work illegally increases their vulnerability and exposes them to exploitation.

3.10. Within budgetary limits, UNHCR contributes toward meeting the basic humanitarian needs of non-European asylum-seekers and refugees in Turkey, by providing emergency assistance, medical care, and education and travel expenses for extremely vulnerable individuals.¹⁹

4. The Relationship Between UNHCR Turkey and the Turkish National Authorities (Legal Basis for Cooperation)

4.1. UNHCR established a presence in the Republic of Turkey in 1960, following a decision by the Office of the Prime Ministry of the Republic of Turkey on 21 July 1960.²⁰ Through correspondence dated 20 October 1960,²¹ the Prime Ministry of the Republic of Turkey instructed the Ministry of Foreign Affairs to allow UNHCR to fulfill its duties and assist refugees pursuant to the 1951 Convention.

4.2. The status of UNHCR in the Republic of Turkey is governed by the *Revised Standard Agreement between the United Nations and the Government of Turkey* of 21 October 1965, which refers to the *Convention on the Privileges and Immunities of the United Nations* of 13 February 1946.²² The Standard Agreement does not stipulate the scope of the operations and programmes of UNHCR in Turkey and regulates mainly issues of privileges and immunities.

4.3. Since the mid 1980s, UNHCR has conducted RSD in Turkey pursuant to its mandate, in order to provide protection to refugees and to find durable solutions through resettlement or voluntary repatriation. RSD by UNHCR is seen by the authorities as a measure of burden sharing by the international community. Since 1994, RSD by UNHCR has been implicitly recognized in the 1994 Asylum Regulation which foresees a “resettlement” and “assistance” role for UNHCR.²³

¹⁹ UNHCR Turkey made 31,457 social support interventions in 2008 which comprise 22,464 one-time or regular assistance interventions for extremely vulnerable asylum-seekers and refugees, 2,605 medical support assistance, 229 accommodation assistance, and 880 education assistance in a total volume of USD 1,468,408.

²⁰ Prime Ministry, Laws and Resolution Investigation Department, No. 112-29/1727 of 21 July 1960.

²¹ Letter by Prime Ministry to Ministry of Foreign Affairs, dated 20 October 1960, No. 2562, available with UNHCR.

²² Ratified by the Turkish Grand National Assembly under the Law No. 5598 on 15 March 1950; see: Official Gazette of the Republic of Turkey, 21 March 1950, No. 7462.

²³ Regulation No. 94/6169 of 30 November 1994, *supra*, footnote 9, Article 7:

“Institutions with which co-operation is to be carried out - In proceedings regarding individual aliens who either seek asylum from Turkey or request residence permission in order to seek asylum from a third country, there shall in principle

4.4. Turkey has not yet established a single central authority with responsibility for examining requests for refugee status and taking a decision in the first instance. UNHCR cooperates closely with the authorities in order to develop a fair and efficient asylum system in Turkey through a variety of capacity-building and training activities. Despite the absence of a formalized agreement, the Government considers UNHCR as the primary “service provider” in relation to protection, assistance, training, and capacity building activities within the framework of Turkey’s accession to achieve international and European Community Standards on asylum matters. Turkey’s candidacy for European Union (EU) membership has introduced clear benchmarks and a general timeframe for the development of an asylum system, with a detailed *National Action Plan for the Adoption of the EU Acquis in the Field of Migration and Asylum* approved by the Prime Minister in March 2005.²⁴

4.5. Although cooperation with regard to RSD conducted by UNHCR has never been formalized, a common practice has evolved. Usually, the Turkish authorities wait until UNHCR has reviewed a case before taking a decision on whether or not to grant temporary asylum: The Turkish authorities generally agree to grant temporary asylum to persons UNHCR considers to be refugees. Occasionally, the authorities do not grant temporary asylum to persons recognized as refugees by UNHCR. The reasons for this are unknown to UNHCR as the Office does not have access to individual files held by the authorities.²⁵ UNHCR has, however, observed that refusal of “temporary asylum” concerns mainly cases which are re-opened after rejection; applications of persons whose claims are considered to be in “bad faith” by the authorities, such as those submitted at the time of arrest for lack of legal status in Turkey; persons applying for asylum at international airports; persons who were recognized by UNHCR as mandate refugees outside of Turkey; and persons whose stay is considered a threat to national security.

5. Comments on the Questions Submitted by the Court to the Government of the Republic of Turkey

5.1. The need for a general policy of refraining, for the time being, from issuing removal directions in respect of persons who have refugee status under the mandate of UNHCR and whose asylum requests are being considered by UNHCR

5.1.1. According to Article 29 of the 1994 Asylum Regulation, Europeans granted refugee status and non-Europeans granted temporary asylum status, can only be removed from the territory of Turkey under the terms of the 1951 Convention or for reasons of national security and public order.²⁶ However, the 1994 Asylum Regulation also foresees in its Article 28 the requirement to leave the country if an alien, accepted under the

be co-operation through the Ministry of Foreign Affairs with the United Nations High Commissioner for Refugees and other concerned international organisations, especially on aspects such as the giving of food and shelter, transport, resettlement, passport and visa problems regarding a third country. There shall also be co-operation with the International Organisation for Migration, particularly on aspects regarding the transportation of aliens.”

²⁴ National Action Plan 2005, signed by the Prime Minister in 2005 and published under the Circular No. 05.1.EGM.0.13.03.02. The Republic of Turkey’s National Programme for the Adoption of the EU Acquis has been published in the Official Gazette of 24 July 2008.

²⁵ UNHCR’s access to files and decisions that may be taken by the authorities on individual asylum-seekers, is a precondition for the Office to make representations to Governments and other relevant actors on the situation of asylum-seekers and refugees. The exercise of this supervisory function is generally accepted by States. See: *Summary Conclusions: supervisory responsibility* (adopted at expert roundtable organized by UNHCR and the Lauterpacht Research Center for International Law, University of Cambridge, UK, 9-10 July 2001), paras. 4-5, <http://www.unhcr.org/refworld/docid/470a33c0d.html>. See also: Walter Kälin, “Supervising the 1951 Convention Relating to the Status of Refugees: Article 35 and beyond”, in: *Refugee Protection in International Law*, UNHCR’s Global Consultations on International Protection, ed. by Feller, Türk and Nicholson, 2003, p. 662, <http://www.unhcr.org/refworld/docid/470a33c00.html>.

²⁶ Deportation – Article 29:

“A refugee or an asylum seeker who is residing in Turkey legally can only be deported by the Ministry of Interior under the terms of the 1951 Geneva Condition relating to the Status of Refugees or for reasons of national security or public order.”

temporary asylum scheme, is unable to go to a third country.²⁷ In instances of larger population movements, the 1994 Asylum Regulation elaborates on measures to prevent the entry of asylum-seekers into the country.²⁸

5.1.2. The protection provided by the 1994 Asylum Regulation does not extend to persons who are not lawfully present in the country. While most asylum-seekers able to register with the Office, are given access to the domestic procedure for temporary asylum and are thus generally protected from removal from Turkish territory, UNHCR has observed that individuals who claim asylum after being arrested for illegal entry, presence or attempted departure from Turkey, face serious obstacles in accessing such domestic procedure. In most cases UNHCR is unable to register such persons or examine their claims, because the authorities deny UNHCR access to these persons.²⁹

5.1.3. Furthermore, the Government does not review cases initially rejected by UNHCR that were later reopened, based on UNHCR's Procedural Standards.³⁰ UNHCR is also concerned about the absence of any registration of persons requesting international protection at international airports in Turkey. UNHCR does not have access to asylum-seekers held in transit zones or airport facilities and cannot verify the extent to which persons returned to the previous airports of embarkation, were in need of international protection, including where such airports were in the country of origin.

5.1.4. Most of the protection shortfalls relate to the non-access of non-European asylum-seekers to the national temporary asylum system. However, there have been also instances of denial of protection to persons recognized as refugees under UNHCR's mandate. In 2007, five Iranian refugees recognized under the mandate of the High Commissioner, who were also registered in the Government's temporary asylum procedure, and who were in process of being resettled, were deported to Iraq, notwithstanding the fact that they had never been in Iraq before. The Turkish authorities invoked national security reasons that required their expulsion from the country. No further information was disclosed to UNHCR.

5.1.5. Moreover, individuals who seek protection in Turkey after they were recognized as refugees under UNHCR's mandate in countries of first asylum, notably Iraq, are denied access to the temporary asylum procedure for non-European asylum-seekers and are at risk of direct or indirect *refoulement* as they are subject to detention and to deportation either to the previous country of asylum, or to the country of origin. This has been particularly true of cases of former members of the PMOI who were recognized as refugees under UNHCR's mandate while staying at the Temporary Interview and Protection Facility in Iraq ("TIPF"),³¹ including Mr. Abdolkhani and Mr. Karimnia. According to information available to UNHCR, 24 Iranian

²⁷ Extension of Residence Permission – Article 28:

“Residence permission granted to individual aliens who seek residence permission in Turkey in order to seek asylum from another country may not be extended if after having been given reasonable time the aliens are still not able to go to a third country. Aliens in such situations shall be asked to leave the country.”

²⁸ See Part Three – Precautions to be taken against possible population movements and aliens arriving in Turkey in groups wishing to seek asylum; Precautions to be taken in the event of the beginning of a [population] movement for asylum and the arrival of aliens at our borders – Article 8:

“As long as there are no political decisions taken to the contrary, and provided that Turkey's obligations under international law are maintained, and taking into account its territorial interests, it is essential that population movements be stopped at the border, and that asylum seekers be prevented from crossing over into Turkey. Necessary and effective measures shall be taken by the relevant bodies on this matter.”

²⁹ The Executive Committee, in many of its Conclusions, has reaffirmed UNHCR's mandate to have prompt and unhindered access to asylum-seekers, refugees and returnees. See ExCom Conclusions No. 8 (XXVIII) – 1977, para. e(iv); No. 22 (XXXII) – 1981, para. III; No. 33 (XXXV) – 1984, para. h); No. 72 (XLIV) – 1993, para. b); No. 73 (XLV) – 1994, para. b(iii); No. 77 (XLVI) – 1995, para. q); No. 79 (XLVII) – 1996, para. p), all available at <http://www.unhcr.org/refworld/type/EXCONC.html>. For access to refugees and asylum-seekers in detention, see ExCom Conclusion No. 44 (XXXVII) – 1986, para. g), <http://www.unhcr.org/excom/EXCOM/3ae68c43c0.html>. See *supra*, paragraph 3.3., for an overview of UNHCR interventions in 2008.

³⁰ In 2007, UNHCR re-opened 36 cases. All of them approached the authorities to be registered for temporary asylum. None of them were given access to the domestic temporary asylum procedure. In 2008, UNHCR re-opened 31 cases, none of them were given access to the domestic temporary asylum procedure.

³¹ This closed facility was created by the United States for Camp Al-Ashraf residents wishing to leave the PMOI National Liberation Army.

refugees who were former members of the PMOI and were recognized in the TIPF in Iraq, were deported back to Iraq by Turkey, and three were directly removed to Iran in breach of the principle of *non-refoulement*.³²

5.1.6. Actual or attempted removals of members of this group of refugees have been carried out without taking into consideration the fact that these individuals had been recognized as refugees by UNHCR under its mandate. The Government of Turkey has informed UNHCR that it does not recognize UNHCR mandate recognition taken elsewhere. As indicated above in paragraph 2.13., a UNHCR determination is not limited in scope to the country in which it was made. While UNHCR's mandate recognition is not binding on States *per se*, it must be considered in good faith and should not be disregarded without proper justification. It should be accorded high persuasive authority in assessing the existence of a well-founded fear of persecution. In this context, UNHCR welcomes the jurisprudence of the Court with regard to the assessment of a real risk under Article 3 of the European Convention of Human Rights ("ECHR") whereby it "must give due weight to the UNHCR's conclusion on the applicant's claim in making its own assessment of the risk which the applicant would face if [his or] her deportation were to be implemented."³³

5.1.7. As regards removal to a first country of asylum, a prior assessment is required on whether the individual is protected there against *refoulement* and whether he or she is permitted to remain in that country and will be treated in accordance with recognized basic human standards until a durable solution is found.³⁴ As regards Iraq more specifically, it is neither Party to the 1951 Convention, nor to its 1967 Protocol. In view of the highly volatile security situation in Iraq, as well as of the continuing internal and external displacement of persons due to violence, there is a real risk of serious human rights violations if refugees are returned there.³⁵

5.1.8. In addition to being affected by the general conditions of insecurity prevailing in the country, Iranian refugees who are former PMOI members, face specific security risks as they are often perceived as having been affiliated with the former Saddam Hussein regime which protected them in the past. The small group of former PMOI refugees remaining in Iraq's Northern Kurdish Governorates, are not issued refugee cards by the competent authorities as is the case for other refugee groups; they are only granted temporary residence which has to be renewed on a monthly basis. They are also not included in the public ration system, thus threatening the basis for their survival. Their stay in Northern Iraq has been tolerated by the authorities on the assumption that UNHCR would resettle them to a third country. However, as resettlement prospects fade, so do the tolerant attitudes of the authorities in Northern Iraq.

5.1.9. Finally, in the absence of an effective national protection mechanism and the limitations to UNHCR's ability to exercise its mandated responsibilities described above, UNHCR would like to underline the importance of the protection afforded by Article 3 ECHR, which provides a wider scope of protection to individuals than Article 33 of the 1951 Convention. Article 33 para. 1 affirms that no one shall be refouled "in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened on

³² Please refer to the press release issued by UNHCR on 25 April 2008 describing one of the incidents of deportation that resulted in the death of one of the refugees concerned, available at: <http://www.unhcr.org/news/NEWS/4811e23c4.html>.

³³ *Jabari v. Turkey*, Application No. 40035/98, judgment of 11 July 2000, para. 41, <http://www.unhcr.org/refworld/docid/3ae6b6dac.html>. This conclusion was reaffirmed in *NA v. the United Kingdom*, Application No. 25904/07, judgment of 17 July 2008, para. 122, <http://www.unhcr.org/refworld/docid/487f578b2.html>.

³⁴ See also ExCom Conclusion No. 58 (XL) – 1989, *Problem of Refugees and Asylum-Seekers Who Move in an Irregular Manner from a Country in Which They Had Already Found Protection*, para. f), <http://www.unhcr.org/excom/EXCOM/3ae68c4380.html>.

³⁵ See UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum-seekers*, August 2007, <http://www.unhcr.org/refworld/docid/46deb05557.html>, as well as the *Addendum to UNHCR's Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum-Seekers*, December 2007, <http://www.unhcr.org/refworld/docid/4766a69d2.html>. In August 2008, UNHCR confirmed the volatile security assessment in a statement issued in the context of the request under the preliminary reference procedure to the Court of Justice of the European Communities from the German Federal Administrative Court regarding interpretation of Article 11(1) (e) and related provisions of the Qualification Directive. See: UNHCR, *Statement on the "Ceased Circumstances" Clause of the EC Qualification Directive*, August 2008, p. 11, <http://www.unhcr.org/refworld/docid/48a2f0782.html>.

account of his race, religion, nationality, membership of a particular social group or political opinion.” Article 3 ECHR is not so confined: the Contracting Parties are responsible to secure such right to “*everyone* within their jurisdiction.”³⁶ Irrespective of any findings under the 1951 Convention, it should be standard procedure that a separate examination under Article 3 ECHR, be carried out.

5.2. Allowing UNHCR to have free access to the aforementioned persons who are held in guesthouses and other places of detention

5.2.1. UNHCR does not have free access to all persons registered with the Office as asylum-seekers or recognized as refugees under the mandate who are detained in Turkish facilities. As indicated above in paragraph 3.3., obtaining access is particularly difficult for individuals who claimed asylum after having been arrested for their illegal entry, presence, or attempted departure from Turkey.

5.2.2. With respect to individuals who claim asylum after having been arrested for their illegal entry, presence or attempted departure from Turkey, the Government operates on the presumption that these persons are illegal migrants and are therefore not of concern to UNHCR. At the same time, it would appear that little consideration is given to assess international protection needs. In order to be granted access to these individuals, UNHCR must seek written authorization from the Ministry of Foreign Affairs and the Ministry of Interior. In spite of the duty of States to cooperate with UNHCR in the performance of its functions³⁷, this authorization is granted in a very limited number of cases. In cases where access is not granted, no reasons are given to UNHCR by the Government. As indicated above, in 2008, UNHCR was granted access to 72 individuals out of 3,351 persons whom the Office requested to see in order to verify whether they are in need of international protection.³⁸

5.2.3. Similarly, UNHCR has encountered serious difficulties in seeing detained refugees recognized under UNHCR’s mandate before they moved to Turkey, as well as to individuals whom Turkey considers to be a threat to national security. During a meeting, held on 14 October 2008, with representatives of the General Directorate for Security of the Ministry of Interior, UNHCR was informed that the Ministry of Interior had decided not to grant the Office access to asylum-seekers or to mandate refugees kept in detention, for whom the European Court of Human Rights had taken interim measures under Rule 39 of the Rules of the Court. This denial of access affects equally UNHCR, NGOs and often lawyers.

5.3. Allowing advocates having free access to persons who are held in guesthouses and other places of detention, both before and after powers of attorney are drawn up

5.3.1. Access to legal advice is paramount to a fair asylum procedure and often constitutes a prerequisite to ensure effective access to legal remedies.³⁹ In Turkey lawyers have *de jure* access to asylum-seekers but often face practical obstacles to attain unfettered access to these persons. While lawyers enjoy unimpeded access to asylum-seekers and refugees detained in Kumkapi guesthouse in Istanbul and in the guesthouse in Edirne,⁴⁰ access becomes problematic in cases where foreigners are kept in detention at the premises of the Foreigners Police in the different provinces, as well as in the Gaziosmanpasa detention facility in Kirklareli. Lawyers, as

³⁶ Article 1 ECHR.

³⁷ The duty of States to cooperate is reflected in General Assembly Resolution 428(V) on the Statute of UNHCR which called upon governments “to co-operate with the United Nations High Commissioner for Refugees in the performance of his functions” (see *supra*, footnote 1). For States Parties to the Convention such duty has been laid down in Article 35 of the 1951 Convention and Article II of the 1967 Protocol. See furthermore *supra* footnote 29, on the duty to cooperate with UNHCR by granting it access to person of concern.

³⁸ See *supra*, paragraph 3.3.

³⁹ See: UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, EC/GC/01/12, paras 22, 37, 43 and 45, <http://www.unhcr.org/refworld/docid/3b36f2fca.html>.

⁴⁰ Kumkapi and Edirne are the guesthouses with the largest number of foreigners kept in detention in Turkey. As explained in other sections of this document, UNHCR’s access to asylum-seekers and refugees kept in detention at the foreigners’ guesthouses and other places of detention must be authorized by the Ministry of Foreign Affairs and the Ministry of Interior.

well as UNHCR, have repeatedly faced difficulties meeting with asylum-seekers and refugees held in Kırklareli⁴¹ for whom the European Court of Human Rights has issued interim measures under Rule 39, to the Government of Turkey, staying deportation measures. Access to lawyers is generally denied for lack of power of attorney. Lawyers may apply thereafter to the Public Prosecutor's Office to authorize access, however, in many instances, by the time the Public Prosecutor intervenes, the asylum-seeker or refugee concerned has already been deported.

5.3.2. As detained foreigners are not always provided with formal deportation orders prior to their removal, it is frequently the case that the impending deportation cannot effectively be challenged before national courts, as no formal administrative act has been issued. The absence of effective remedies and the limited success of UNHCR interventions, result in an increased resort by lawyers to the European Court of Human Rights to prevent deportation.

6. Conclusion

6.1. In spite of considerable progress achieved, Turkey is still in the process of establishing an asylum system, including fair and efficient refugee status determination procedures. UNHCR remains ready to assist the Turkish authorities to implement its international obligations and set up adequate protection mechanisms. However, the maintenance of a geographic limitation as per Article 1 B of the 1951 Convention by the Turkish authorities relegates non-European refugees to an uncertain position and does not fully protect them from *refoulement*.

6.2. UNHCR has repeatedly underlined that the effective compliance with *non-refoulement* obligations under international refugee law and the ECHR, involves that:

- All non-European asylum-seekers should have effective access to the domestic temporary asylum procedure and to UNHCR RSD;
- When individuals – including non-European asylum-seekers and persons already recognized as refugees by UNHCR under its mandate – are detained upon arrest for illegal entry or stay and express a fear of return, UNHCR should be notified and granted access to them;
- Given that the evidentiary value of a mandate refugee recognition by UNHCR is not limited in scope to the country in which it was carried out, such recognition should, regardless of the individual's location, be given due weight and not be disregarded without proper justification when determining whether a person faces a real risk of serious human rights violations;
- Asylum-seekers and refugees should be treated in accordance with applicable international and regional human rights standards, including *non-refoulement* obligations deriving from international customary law, international refugee law as well as international and regional human rights law.

6.3. These criteria are critical in order to maintain the integrity of UNHCR RSD procedure and to ensure full respect for the principle of *non-refoulement* and the absolute prohibition on returning individuals to a country where they face a real risk of torture, inhuman or degrading treatment or punishment in violation of Article 3 ECHR.

UNHCR
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⁴¹ The Gaziosmanpasa Camp in Kırklareli is used as a removal centre by the Ministry of Interior. Persons for whom the European Court of Human Rights issues interim measures under Rule 39 are usually transferred to this facility.