



The EU-Turkey Deal

Analysis and Considerations

Jesuit Refugee Service Europe Policy Discussion Paper¹

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1. Introduction

The EU-Turkey deal represents not only the culmination of recent and ever closer EU relations with Turkey, but also a substantive and symbolic shift in the EU's international protection policies. The EU adopts a territorial notion of asylum and has used various devices (such as visa requirements, carrier sanctions, to name but a few) that create significant obstacles for forced migrants to access EU territory (and, consequently, access to asylum procedures). The audacity of the EU-Turkey deal is that it raises some of the most serious questions about its compatibility with international refugee law and human rights law, as well as European law. In the words of the PACE Report of the Council of Europe, it "at best strains and at worst exceeds the limits of what is possible under European and international law".² The extraordinary nature of the deal cannot be overstated.

This policy discussion paper is designed to give an overview of the legal and policy implications of the deal at the present time. This paper is not designed to be an exhaustive statement or exploration of all issues – rather, its purpose is to highlight the key policy and legal challenges which the EU-Turkey Deal has created at this early stage from the perspective of forced migrants.

Firstly, this paper recalls the context giving rise to the deal and the parallel policy developments towards Greece and the eventual closure of the Balkans route, highlighting also the unusual characteristics of the deal. Secondly, it proceeds to identify some key legal considerations of most concern to forced migrants: notably, the compatibility of return to Turkey with EU and international law; the interaction of the current Dublin Regulation and maintenance of family unity principles during the implementation of the deal; and the transformation of the hotspots into detention facilities. Thirdly, it examines the 'one-for-one' resettlement scheme and questions the moral justification and legal responsibilities of the scheme in light of the differing nature of resettlement and relocation. Fourthly, the paper reflects on the impact of the deal on reinforcing nationality as a key determinant in accessing international protection. Fifthly, it urges vigilance in the making of a 'safe zone' in Syria to ensure that more than lip service is paid to the principle of *non-refoulement*.

When looking at the cumulative challenges that the EU-Turkey deal amasses, it appears to be not only at high risk of failing the protection needs of the forcibly displaced but it also raises important questions about the rule of law and democratic accountability within the EU.

² Council of Europe (2016), "[The situation of refugees and migrants under the EU-Turkey Agreement of 18 March 2016](#)", Parliamentary Assembly, Committee on Migration, Refugees and Displaced Persons, Doc. 14028, 19 April, P.12.

2. Overview

From the analysis, the following points can be made:

Context

- The EU-Turkey deal represents the development of an ever-closer relationship between the EU and Turkey, particularly over the past six months. This relationship also parallels a policy focus on Greece and developments that led towards the closure of the Balkans route.

The Deal

- The deal takes the form of a statement. On one view, as a ‘statement’, it is *not* justiciable *per se* (that is, capable of being tested in court). On that view, the deal takes the form of a series of individual measures to be implemented by a range of actors (including Greece, the European Union and its agencies such as Frontex and EASO). On another view, the statement *does* constitute an agreement with a third country but in breach of Article 218 TFEU as the European Parliament has not been consulted raising serious rule of law and democratic accountability issues.
- The deal consists of three key elements:
 1. The return of all irregular migrants crossing from Turkey to the Greek Islands;
 2. Resettlement of Syrians from Turkey to the EU (the ‘one-for-one’ deal); and
 3. The prevention of departure from Turkey.
- Although the deal is said to be “temporary”, the actual duration of the arrangements is unknown. The concern is that “emergency” measures such as these are used to justify a derogation of human rights that may be more durable than “temporary” and which could provide a precedent in other contexts.
- The deal also equates asylum seekers with irregular migrants and makes little conceptual difference between the two. The admissibility procedures (to determine if a person can be returned to Turkey) are far from a formality and, in law and in practice, such admissibility procedures are far from straightforward. Much will depend on whether the individual will have effective access to protection.

Considerations

Return to Turkey

- At first glance, the objective of returning all irregular migrants that cross from Turkey to the Greek islands would amount to collective expulsion (which is prohibited by Article 19(1) EU Charter and Protocol 4 of the ECtHR). The deal purports that return “will take place in full accordance with EU and international law”. In order not to amount to collective expulsion, authorities will, at the bare minimum, have to ensure effective access to the Greek asylum procedure, an individualised consideration of an asylum seeker’s claim for protection and to ensure that Turkey is a safe country to which to return persons.
- Returning persons to Greece is possible under EU legislation if Turkey can be declared a ‘safe third country’ or a ‘first country of asylum’ as defined in EU legislation. These are two distinct concepts.
- The ‘safe third country’ concept is premised on the notion that an asylum seeker could have availed himself or herself of protection in a third country but has not done so or where an application was made for protection but not finally determined. The notion behind the ‘first country of asylum’ is to justify removal to a third country where a person has obtained international protection in that third country.
- Turkey currently has a geographic limitation on its accession to the Geneva Convention – it only applies to Europeans. Turkey does have other protection statuses such as conditional refugee status (non-European country of origin) and subsidiary protection status but they do not derive their status from the Geneva Convention. The Temporary Protection Regime operates for Syrians but this is not refugee status in accordance with the Geneva Convention and operates for an uncertain duration.
- Key to understanding the issue is whether Turkey can both confer refugee status *and* respects the principle of non-refoulement in accordance with the Geneva Convention. Although Turkey has

incorporated the principle of *non-refoulement* into its domestic law (including for Syrians under the Temporary Protection Regime), Turkey's geographic limitation of the Geneva Convention means that it cannot confer refugee status to non-Europeans. Accordingly, Syrians, Iraqis and Afghans (and many others) are excluded from receiving refugee status in accordance with the Geneva Convention.

- In addition, issues of whether Turkey has engaged in actual *refoulement*, the heightened risk of chain *refoulement* from Turkey, and whether individuals would be at risk of serious harm if returned are also factors which raise serious questions about whether Turkey would satisfy the 'safe third country' or 'first country of asylum' criteria.
- Other considerations include the extent to which procedural guarantees under EU secondary legislation could be guaranteed by Greece in a 'hotspot' environment - this relates not only to the quality of implementation of EU law (not examined in detail here), but also whether an individualised assessment is carried out, the degree of access to a legal advisor/counsellor and to an effective remedy.

Dublin and Family Considerations

- Recent research has shown that the profile of persons reaching Greece from Turkey includes a significant number of persons travelling with children. From September 2015 to March 2016 there has been a very significant jump in the number of women and children making the journey across the Aegean Sea.
- Greece needs to ensure that maintaining family unity and that the best interests of the child are applied during admissibility procedures in accordance with EU asylum legislation.
- There is a heightened risk that asylum seekers will not be reunited with family members already present in other Member States in accordance with the Dublin III Regulation if that assessment is not made prior to the outcome of the admissibility procedure. This risk also exists if the admissibility procedures are carried out so expeditiously that there is insufficient opportunity to determine whether another Member State is responsible for examining the asylum application due to the presence of other family members in another Member State.

Detention

- The hotspots have been transformed into detention centres resulting in the high-profile withdrawal of UNHCR based on its opposition to mandatory detention, as well as the withdrawal of the Norwegian Refugee Council, Oxfam and Medcins Sans Frontiers.
- The transformation of the hotspots into detention centres highlights the inadequacy of the detention provisions inserted into the second phase EU asylum legislation.
- The resort to detention is also closely linked to the issue of the inadequacy of reception capacity in Greece generally.

Resettlement from Greece to Turkey

- A core element of the EU-Turkey deal is the 'one-for-one' scheme. For every Syrian returned to Turkey from Greece, another completely different Syrian will be resettled in the EU.
- The one-for-one scheme is perverse in that it still relies on one Syrian risking their life and making the journey from Turkey to Greece in order for another completely different Syrian to be resettled in the EU. Claims that this scheme 'saves lives' ring hollow given that it is based on asylum seekers engaging in the very risk that it purports to avoid.
- The modesty of the 72,000 places identified for resettlement is low in the context of an EU population of 500 million and the size of refugee populations in Turkey, Lebanon and Jordan.
- The one-for-one scheme is to benefit Syrians and which may have the consequence of contributing to a nationality-based sense of legitimacy of protection needs.
- Resettlement (that is, from outside EU territory) and relocation (that is, from within EU territory) have been incorrectly analogised. Both have different legal obligations. Member States' primary legal obligation is to assess the asylum claims of those on its territory or over whom it exercises its jurisdiction.

The rising importance of nationality in accessing EU protection

- Using the nationality of asylum seekers as the basis for determining *prima facie* legitimacy of asylum claims has been a core part of the temporary relocation scheme.
- The discursive consequences of the EU-Turkey deal warrant further consideration.
- The concern here is that the focus on nationality may indirectly contribute to people being denied the opportunity to access (or effectively access) the asylum procedures based on their nationality alone.
- The situation of Syrians is well known and it is entirely appropriate to direct efforts towards advancing their circumstances. However, without referring to the needs of all refugees and the definition of refugee, firstly, a binary “deserving/undeserving” discourse based on nationality can emerge; and secondly, it may be contributing to a misguided view that nationality is a justifiable basis for discriminating amongst those asylum seekers seeking international protection on EU territory but which is also contrary to the non-discrimination provisions of the Geneva Convention. Care should be taken to ensure that the overall context of all refugees and the definition of refugee is communicated in order to avoid further compounding nationality as the basis for assessing the legitimacy of protection needs and accessing the asylum procedure.

Making a ‘safe zone’ in Syria

- The EU-Turkey deal also foreshadows joint cooperation to improve the humanitarian conditions in Syria “which would allow refugees [sic] to live in areas which will be more safe”.
- Establishing safety in Syria is a welcome and laudable objective.
- However, efforts in this regard should be closely monitored in conjunction with the monitoring of any returns by Turkey, other states or Member States to “safe zones” or other areas within Syria to ensure that more than mere lip service is paid to the principle of *non-refoulement*.

3. Context

The development of the EU's closer relations with Turkey and its culmination in the EU-Turkey deal parallels an EU policy focus on Greece and the closure of the Balkans route. From an outsider's perspective, the aggregate effect of these three developments might be described as a strategy of 'containment'.

A steadily closer relationship with Turkey

The months leading up to the EU-Turkey deal evidence an ever closer cooperation with Turkey. Turkey more recently came onto the policy radar when the Commission proposed it be included in a proposed regulation for a common list of safe countries of origin in September 2015.³ The subsequent months saw a steady series of developments involving Turkey. *Firstly*, the emergence of the EU-Turkey Action Plan⁴ (which, amongst other things, foreshadowed EU financial support to Turkey and for Turkey to accelerate the implementation of its readmission agreement); *secondly*, the establishment of a EUR3 billion refugee facility fund for Turkey (but directed only towards Syrians)⁵; *thirdly*, a commitment by Turkey to bring forward the full implementation of its readmission agreement to June 2016 and the possible completion of the visa liberalisation process for Turkish citizens;⁶ *fourthly*, a Commission recommendation for a voluntary humanitarian admission scheme with Turkey;⁷ *fifthly*, the final Member State approval of EUR3 billion refugee facility for Turkey;⁸ and *sixthly*, cooperation with, and readmissions to, Turkey were contemplated as part of the Commission's "*Back to Schengen – A Roadmap*" communication.⁹ Accordingly, the announcement on 7 March 2016 of the EU-Turkey deal and its 'one-for-one' principle¹⁰ (ultimately concluded at the European Council meeting on 18 March 2016)¹¹ can be seen as a culmination of consistently closer cooperation over the preceding months and far from an event in isolation.

A policy focus on Greece

Parallel to these developments was a policy focus on Greece. In September 2015, the Commission expressed its intention to recommend transfers back to Greece within 6 months¹² – a highly contentious proposal in light of the ECtHR's prohibition on such returns from its 2011 seminal judgment¹³ (and concordant CJEU decision¹⁴). This policy direction was further emphasised in a subsequent Commission communication that contemplated recommending Dublin transfers to Greece resume in December 2015 or

³ European Commission (2016), [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 the European Council on common procedures for granting and withdrawing international protection, and amending Directive 2013/32/EU, COM(2015)452 final, Brussels, 9 September.

⁴ European Commission (2015), [Fact Sheet](#) – EU-Turkey joint action plan, Brussels, 15 October; see also the implementation report of the Joint Action Plan: European Commission (2016), EU-Turkey Joint Action Plan: [Implementation Report](#), Brussels, February; European Commission (2016), [Report](#) from the Commission to the European Parliament and the Council – EU-Turkey Joint Action Plan – Third implementation report, COM(2016) 144 final, Brussels, 4 March.

⁵ [Agreement](#) between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation, OJ L 134/3, 7 May 2014.

⁶ European Council (2015), Meeting of the heads of state or government with Turkey – [EU-Turkey statement](#), Brussels, 29 November.

⁷ European Commission, [Commission Recommendation](#) of 15.12.2015 for a voluntary humanitarian admission scheme with Turkey, C(2015) 9490, Strasbourg, 15 December.

⁸ Council of the European Union (2016), [Refugee facility](#) for Turkey: Member states agree on details of financing, Brussels, 3 February.

⁹ European Commission (2016), Communication from the Commission to the European Parliament, the European Council and the Council, [Back to Schengen – A Roadmap](#), COM(2016) 12 Final, Brussels, 4 March, P.3 and P.9.

¹⁰ European Council (2016), [Statement of the EU Heads of State or Government 07/03/2016](#), 8 March.

¹¹ European Council (2016), [EU-Turkey statement, 18 March 2016](#), 18 March, to be read together with European Commission (2016), Communication from the Commission to the European Parliament, the European Council and the Council, [Next Operational Steps](#) in EU-Turkey Cooperation in the Field of Migration, COM(2016) 166 Final, Brussels, 16 March.

¹² European Commission (2015), [Managing the refugee crisis: immediate operational, budgetary and legal measures under the European Agenda on Migration](#), COM(2015) 490, Brussels, 23 September, Pp. 11-12.

¹³ *MSS v Belgium & Greece*, No. 30696/09, Judgment, Grand Chamber, 21 January 2011.

¹⁴ *Joined Cases C-411/10 and C-493/10 NS v Secretary of State for the Home Department and M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, Judgment, Grand Chamber, 21 December 2011.

March 2016 if conditions were met.¹⁵ The Commission then proposed to Greece measures it should take to enable returns to resume, including increasing the reception and asylum assessment capacity but, even by the Commission's own admission, Greece still needed to do more in order to comply with Union law, noting its insufficient reception capacity and deficiencies in providing free legal assistance to challenge first instance asylum decisions.¹⁶ An assessment by ECRE and ICJ of Greece's capacity reveals a resumption of returns to be illusory and quite probably unlawful.¹⁷ An appraisal of the legality of reinstating Dublin transfers to Greece will be made by the Commission in June 2016.¹⁸ The Commission expressly identified managing the EU external borders (namely, Greece) as essential to 'saving' the Schengen system.¹⁹

The closure of the Balkans route

To add to the situation, almost directly after the EU-Turkey deal was announced on 7 March, Slovenia and Croatia announced that both Member States would refuse to allow asylum seekers to transit their territories.²⁰ The almost immediate response was for Macedonia to close its border with Greece²¹, essentially leaving asylum seekers stranded, or at least containing them in Greece. This action preceded a call by the European Council for stronger cooperation of Balkan countries.²² The closure of the Balkans route may also be seen as the culmination of measures already headed in that direction since Macedonia first closed its southern border on 20 August 2015 and later manifesting in the cooperation of the Austrian, Serbian, Croatian and Macedonian police chiefs.²³

4. The Deal

4.1 Documents

Although the core parts of the EU-Turkey agreement were announced on 7 March 2016²⁴ and later concluded after the European Council meeting on 18 March 2016,²⁵ it must be read in conjunction with:

1. The European Council Conclusions of 17-18 March 2016;²⁶
2. The European Commission Communication "*Next Operational Steps in EU-Turkey Cooperation in the Field of Migration*".²⁷

¹⁵ European Commission (2015), [Managing the refugee crisis](#): State of Play of the Implementation of the Priority Actions under the European Agenda on Migration, COM(2015) 510, Brussels, 14 October, P.12.

¹⁶ European Commission (2016), [Recommendation](#) addressed to the Hellenic Republic on the urgent measures to be taken by Greece in view of the resumption of transfers under Regulation (EU) No. 604/2013, C(2016) 871, Brussels, 10 February, see particularly P.4, point 15; P.5 points 17 and 19.

¹⁷ International Commission of Jurists and European Council on Refugees and Exiles (2016), [Fifth Joint Submission of the International Commission of Jurists \(ICJ\) and of the European Council on Refugees and Exiles to the Committee of Ministers of the Council of Europe in the case of MSS v Belgium & Greece](#) (Application no. 30696/09) and related cases, March.

¹⁸ European Commission (2016), *Back to Schengen – A Roadmap*, op. cit.

¹⁹ Ibid.

²⁰ The Guardian (2016), "[Slovenia and Croatia ban transit of refugees to other European countries](#)", 9 March.

²¹ Reuters (2016), "[Macedonia closes border to illegal migrants: police official](#)", March 9.

²² European Council (2016), [European Council Conclusions, 17-18 March 2016](#), Brussels, 18 March.

²³ Amnesty International (2016), "[Trapped in Greece](#)", Pp. 8-11.

²⁴ European Council (2016), [Statement of the EU Heads of State or Government 07/03/2016](#), 8 March.

²⁵ European Council (2016), [EU-Turkey Statement, 18 March 2016](#), 18 March.

²⁶ European Council (2016), [European Council Conclusions, 17-18 March 2016](#), Brussels, 18 March.

²⁷ European Commission (2016), Communication from the Commission to the European Parliament, the European Council and the Council, [Next Operational Steps](#) in EU-Turkey Cooperation in the Field of Migration, COM(2016) 166 Final, Brussels, 16 March.

4.2 Key Elements

The deal consists of the following key elements:²⁸

1. Return of all irregular migrants crossing from Turkey to the Greek Islands

- a. "All new irregular migrants crossing from Turkey into Greek islands as from 20 March 2016 will be returned to Turkey."
- b. Returns "will take place in full accordance with EU and international law, thus excluding any kind of collective expulsion. All migrants will be protected in accordance with the relevant international standards and in respect of the principle of non-refoulement."
- c. "It will be a temporary and extraordinary measure which is necessary to end the human suffering and restore public order."
- d. "Migrants arriving in the Greek islands will be duly registered and any application for asylum will be processed individually by the Greek authorities in accordance with the Asylum Procedures Directive, in cooperation with UNHCR."
- e. "Migrants not applying for asylum or whose application has been found unfounded or inadmissible in accordance with the [Procedures] directive will be returned to Turkey."²⁹
- f. "Turkey and Greece, assisted by EU institutions and agencies, will take the necessary steps and agree any necessary bilateral arrangements, including the presence of Turkish officials on Greek islands and Greek officials in Turkey as from 20 March 2016, to ensure liaison and thereby facilitate the smooth functioning of these arrangements. The costs of the return operations of irregular migrants will be covered by the EU."

2. Resettlement of Syrians from Turkey to the EU

- a. "For every Syrian being returned to Turkey from Greek islands, another Syrian will be resettled from Turkey to the EU taking into account the UN Vulnerability Criteria".
- b. "Priority will be given to migrants who have not previously entered or tried to enter the EU irregularly."
- c. A total of 72,000 Syrians would be earmarked for resettlement from Turkey. This comprises a figure of 18,000 places remaining for third country resettlement agreed in 2015 and 54,000 unallocated places (of Hungary) previously agreed as part of the internal relocation scheme. "Should these arrangements not meet the objective of ending the irregular migration and the number of returns come close to the numbers provided for above, this mechanism will be reviewed. Should the number of returns exceed the numbers provided for above, this mechanism will be discontinued."
- d. "Once irregular crossings between Turkey and the EU are ending or at least have been substantially and sustainably reduced, a Voluntary Humanitarian Admission Scheme will be activated. EU Member States will contribute on a voluntary basis to this scheme."

3. Prevention of departure from Turkey

- a. "Turkey will take any necessary measures to prevent new sea or land routes for illegal migration opening from Turkey to the EU, and will cooperate with neighbouring states as well as the EU to this effect."

4.3 Scope of the EU-Turkey Deal

The form and legal basis of the deal is questionable. There are two schools of thought on the form of the deal and its legal basis. *Firstly*, Peers has noted that the deal takes the form of a statement.³⁰ Peers argues that, as such, the deal is not a legal instrument that is capable of being judicially tested. The deal consists of a number of individual elements that are to be implemented by various actors. For example, both the existing EU Readmission Agreement with Turkey and the bilateral readmission between Greece and Turkey provide the legal basis for the return elements of the deal. Accordingly, any challenge to the deal would require a challenge to its individual elements. A *second* school of thought stems from an analysis by Den Heijer and Spijkerboer, who demonstrate how the deal could constitute a treaty and, as such, how the deal is contrary to Article 218 TFEU in that the European Parliament was not consulted.³¹ These concerns were also expressed by Gatti in his analysis, including the consequences for democracy.³² Accordingly, the form and legal basis of the deal and the lack of consultation with the European Parliament raise serious questions about democratic accountability and the rule of law at the EU level.

²⁸ Quoted from European Council (2016), [EU-Turkey Statement, 18 March 2016](#), 18 March.

²⁹ European Commission (2016), Communication from the Commission to the European Parliament, the European Council and the Council, [Next Operational Steps](#) in EU-Turkey Cooperation in the Field of Migration, COM(2016) 166 Final, Brussels, 16 March, P.3 on its construction of the "unfounded" or "inadmissible" provisions of the Procedures Directive.

³⁰ S. Peers (2016), ["The final EU-Turkey refugee deal: a legal assessment"](#), 18 March.

³¹ M. den Heijer and T. Spijkerboer (2016), ["Is the EU-Turkey refugee and migration deal a treaty?"](#), 7 April.

³² M. Gatti (2016), ["La dichiarazione UE-Turchia sulla migrazione: un trattato concluso in violazione delle prerogative del Parlamento?"](#), 11 April.

*It is not known for how long these arrangements will remain in place.*³³ The return of “all irregular migrants” is said to be “temporary” but the precise duration of such a return policy is unknown. The concern is that extraordinary “emergency” measures such as these are invoked to derogate individuals’ rights³⁴ but which may have a more durable application and possibly providing future precedential value, such as has been verbalised by Italy.³⁵

*The deal is unusually geographically specific.*³⁶ The deal is said to apply only to those irregular migrants “crossing from Turkey into the Greek islands [emphasis added]”. It does not mention Greek territorial waters nor international waters. In this regard it is inconsistent with the geographic scope of the Procedures Directive II³⁷ and the obligations under ECtHR caselaw in relation to the obligations owed to asylum seekers on board Member State vessels and in international waters.³⁸

The deal equates asylum seekers with irregular migrants. The return aspect of the deal purports to apply to “all [new] irregular migrants” (that is arriving after midnight 20 March 2016). As will be discussed later, there are some contentious legal aspects to that statement, notwithstanding the purported guarantees of compliance with international and European Law. Under the Procedures Directive II, a right to remain is granted to asylum seekers who have lodged their claim for international protection.³⁹ Accordingly, as Peers has observed, much depends on whether a person has effective access to protection.⁴⁰ In this regard, the initial screening-in procedure is of critical importance, but which may be undermined by the emphasis on finding claims “unfounded” or “inadmissible” or a determined emphasis on return. In the event that a person is not owed protection obligations or makes no claim for international protection in Greece, then compliance with the guarantees of the Returns Directive is still necessary.⁴¹ In terms of the persons who are to be resettled from Turkey, this is an entirely voluntary commitment (that is, resettlement is different from the obligations towards a person who seeks asylum on the territory of a Member State or in a situation where a

³³ S. Peers (2016), “*The final EU-Turkey refugee deal: a legal assessment*”, op. cit.

³⁴ Sadly, recent developments in Austria, where a law has reportedly been passed enabling a state of emergency to be declared by the federal government and to refuse entry to migrants if numbers suddenly peak, bear witness to such an approach: see, Nielsen, N. (2016), “[Austria curtails asylum rights](#)”, EU Observer, 28 April; see also Human Rights Watch (2016), “[Austria; Drastic Unjustified Measures against Asylum Seekers](#)” 27 April.

³⁵ J. Politi (2016), “[Italy pleads for Greek-style push to return its migrants](#)”, Financial Times, 4 April; see also EU Observer (2016), “[Italy wants Turkey-style deal to return African migrants](#)”, 5 April.

³⁶ S. Peers (2016), “*The final EU-Turkey refugee deal: a legal assessment*”, op. cit.

³⁷ Article 3, 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 (recast) (“Procedures Directive II”).

³⁸ *Hirsi Jamaa and Others v Italy*, No. 27765/09, Judgment, Grand Chamber, 23 February 2012.

³⁹ Article 9, Procedures Directive II.

⁴⁰ S. Peers (2016), “*The final EU-Turkey refugee deal: a legal assessment*”, op. cit.

⁴¹ See Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348/98 (“The Returns Directive”). Under Article 4(1) of the Returns Directive, the Returns Directive acts as a minimum standard as against readmission agreements (either bilateral or EU). Member States have the possibility to exclude persons from the scope of the Returns Directive if apprehended in connection with an irregular crossing (*inter alia*) at the border (Article 2(2)(a)). If the Member State does not exclude the person within the scope of the Directive, the full range of guarantees apply which include (non-exhaustive list), taking due account of best interests of the child, family-life, the person’s state of health and respect for the principle of *non-refoulement* in implementing the Directive (Article 5); Procedural safeguards (Article 12); effective remedies for the appeal or review of return-related decisions (Article 13); safeguards pending return such as family unity, access to emergency health care, special needs of asylum seekers taken into account, access of minors to the education system (Article 14); procedural safeguards in relation to detention and the conditions of detention (Articles 15 and 16); special provisions in relation to detention of minors, unaccompanied minors and families (Article 17). If the Member State does exclude the person from the scope of the Returns Directive, then as a minimum guarantees on the limitation on the use of coercive measures (Article 8(4) and (5)); postponement of removal (Article 9(2)(a)); emergency health care and taking into account the needs of vulnerable persons (Article 14(1)(b) and (d)); and detention conditions (Articles 16 and 17). In relation to whether an asylum seeker whose claim has been declared inadmissible under border procedures of the Procedures Directive II falls within the scope of the Returns Directive, consider Recital 9 of the Returns Directive which states that “a third country national who has applied for asylum in a Member State should not be regarded as staying illegally on the territory of that Member State until a negative decision on the application, or a decision ending his or her right of stay as asylum seeker [sic] has entered into force.” See also C-357/09 PPU *Kadzoev*, 20 November 2009, Grand Chamber, para 41.

Member State or EU agency exercises jurisdiction over the person, irrespective of whether they are on the territory of the Member State).

5. Considerations

5.1 Legal Considerations

The legal considerations raised below do not represent a definitive statement but rather highlight key areas of concern that could warrant further consideration or perhaps give rise to judicial examination.

5.1.1 Return to Turkey

By itself, the statement that all irregular migrants will be returned to Turkey raises the prospect of collective expulsion, which is prohibited by the EU Charter,⁴² Protocol 4 of the ECHR and the related jurisprudence.⁴³

Collective expulsion can arise in *at least* two circumstances:

- i. when a state has exercised responsibility over migrants or asylum seekers (even outside its territory) and has not given them a proper opportunity to apply for international protection before disembarking them in a country that is not safe for them;⁴⁴ and
- ii. when a state has *prima facie* undertaken an individual assessment but certain cumulative factors⁴⁵ point to the expulsion being collective (such as the identical origin of the group being expelled; the public announcement and implementation of the measures by authorities; a compelled mass attendance at a police station; expulsion orders in identical terms; difficulties in communicating with lawyers; or the asylum process not being concluded).⁴⁶

Despite the purported assurances in the EU-Turkey statement of compliance with international and EU law (including respect for the principle of *non-refoulement*), much, then, will turn on:

- i. the effective access of asylum seekers to the asylum procedure; and
- ii. whether Turkey can be considered a 'safe country'.

These elements will be considered at various points in the sections below.

5.1.1.1 How is return to Turkey said to be legally possible?

Under the Procedures Directive II, the removal of persons seeking international protection to a third country is provided for on the basis of the 'safe third country'⁴⁷ or 'first country of asylum'⁴⁸ concepts.⁴⁹ Under the Dublin III Regulation, Member States retain the right to transfer an applicant to a "safe third country" (but there is no express provision for transfers on the basis of 'first country of asylum').⁵⁰

⁴² Article 19(1) EU Charter.

⁴³ *Hirsi Jamaa and Others v Italy*, No. 27765/09, Judgment, Grand Chamber, 23 February 2012; *Conka v Belgium*, No. 51564/99, Judgment, 5 February 2002.

⁴⁴ *Hirsi Jamaa and Others v Italy*, No. 27765/09, Judgment, Grand Chamber, 23 February 2012, particularly at paras 76-82 (in relation to jurisdiction).

⁴⁵ *Sultani v France*, No. 45223/05, Judgment, 20 September 2007, para 81.

⁴⁶ *Conka v Belgium*, No. 51564/99, Judgment, 5 February 2002, paras 61-62.

⁴⁷ Article 38, Procedures Directive II.

⁴⁸ Article 35(b), Procedures Directive II.

⁴⁹ There are additional bases such as safe country of origin which will not be examined here – see Articles 36 & 37 Procedures Directive II.

⁵⁰ Article 3(3) of Regulation (EU) No 604/2013 of the European Parliament and of the Council

The effect of the safe third country and first country of asylum concepts is for the asylum seeker's application to be deemed inadmissible and, therefore, authorities are not required to conduct a substantive examination of his/her claims.⁵¹ Having had their claims declared inadmissible, and once all effective remedies have been exhausted (if sought), the person will lose their right to remain on the territory of the Member State and become an "illegally staying third country national" falling under the scope of the Returns Directive.⁵²

According to the Commission,⁵³ it is implied that the applications of non-Syrians would be deemed inadmissible because Turkey is a 'safe third country' and that Syrians would be deemed inadmissible because Turkey is a 'first country of asylum'.

The Commission sees the chief legal basis for readmission of failed asylum seekers to Turkey from Greece as the Greece/Turkey (bilateral) readmission agreement.⁵⁴ However, bilateral agreements, of themselves, cannot override human rights obligations⁵⁵ and the guarantees applicable under the Returns Directive should apply.⁵⁶

Although Greece will be primarily responsible for implementing any returns and assessing the admissibility of applicants' claims to its asylum procedure, it should be noted that, firstly, it is entirely *voluntary* under the Procedures Directive II for Greece to declare an application inadmissible based on these concepts.⁵⁷ The voluntary nature of the admissibility assessments means that Greece is under no obligation to apply the safe third country or first country of asylum concepts at the cost of legal and human rights obligations. Secondly, the stated policy aim "all irregular migrants will be returned to Turkey" by the European Commission and European Council may be a sufficiently public announcement of the overarching aim to return or expel thereby constituting one of the factors that the ECtHR considered in *Conka* (see above – mindful that the factors identified in *Conka* are *cumulative*).

5.1.1.2 Background – Protection in Turkey

An International Protection procedure for non-Syrian nationalities which entered into force in April 2014 and is administered by the Directorate General of Migration Management ("DGMM").⁵⁸ The key issue here is that, in Turkey, only persons coming from a European country are entitled to refugee status (that is, there is a geographic limitation).⁵⁹ There is a hierarchy of rights based on status: refugee status (for persons coming from a European country of origin); conditional refugee status (non-European country of origin); and subsidiary protection status.⁶⁰

Parallel to the International Protection procedure, a Temporary Protection Regime was introduced for Syrians *en masse* in October 2014 (that is, a formal status assessment is not made), but which expressly

of 26 June 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 by a third-country national or a stateless person (recast) ("Dublin III Regulation").

⁵¹ See Procedures Directive II, Article 33(1) inadmissibility; 33(2)(c) safe third country; 33(2)(b) first country of asylum.

⁵² Articles 2 and 3, Returns Directive; see n.41 above.

⁵³ European Commission (2016), Communication from the Commission to the European Parliament, the European Council and the Council, [Next Operational Steps](#) in EU-Turkey Cooperation in the Field of Migration, COM(2016) 166 Final, Brussels, 16 March, P.3; see also UN High Commissioner for Refugees (UNHCR) (2016), "[Legal considerations](#) on the return of asylum-seekers and refugees from Greece to Turkey as part of the EU-Turkey Cooperation in Tackling the Migration Crisis under the safe third country and first country of asylum concept", 23 March, P.1.

⁵⁴ European Commission (2016), "Next Operational Steps", op. cit., Pp.2-3.

⁵⁵ *Hirsi Jamaa and Others v Italy*, No. 27765/09, Judgment, Grand Chamber, 23 February 2012, para 129.

⁵⁶ See n.41 above.

⁵⁷ Both Articles 35 and 38 of the Procedures Directive II are cast as "may" and noting that the EU-Turkey deal is in the form of a statement, not a legal instrument capable of justiciability.

⁵⁸ European Council on Refugees and Exiles (ECRE) (2015), "[AIDA Country Report: Turkey](#)", P.16.

⁵⁹ Article 61(1), Turkey, [Law no. 6458 on 2013 of Foreigners and International Protection](#), 4 April 2013.

⁶⁰ ECRE (2015), "[AIDA Country Report: Turkey](#)", op.cit., Pp. 16-24.

excludes long-term legal integration of beneficiaries of temporary protection.⁶¹ There is no validity period for the temporary protection regime, meaning that it can cease at any time by the will of the government.⁶² The Temporary Protection Regulation explicitly states that, “Persons benefiting from temporary protection shall not be deemed as having been directly acquired one of the international protection statuses as defined in the Law”.⁶³

Turkey has incorporated the *non-refoulement* principle under Article 6 of its Law on Foreigners and International Protection,⁶⁴ and Article 4 of its Temporary Protection Regulation.⁶⁵

It has been reported that Turkey proposes to equalise the protection guarantees of Syrians and non-Syrians⁶⁶ - it is presently unclear whether this will make any substantive difference to the present inability of Turkey to confer refugee status to non-Europeans in accordance with the Geneva Convention (as discussed in more detail below). These developments warrant close monitoring due to diplomatic assurances being an insufficient basis for human rights protection. JRS Germany will be examining the protection regime in Turkey in a forthcoming discussion paper.

5.1.1.3 Turkey as a “Safe Third Country”

The notion behind the safe third country concept is that an asylum seeker could have availed himself or herself of protection in a third country but has not done so or where an application was made for protection but not finally determined. This has derived from states generally taking a very strict interpretation of the “coming directly” basis for allowing a refugee “illegal” entry to its territory (and non-penalisation) under Article 31(1) of the Geneva Convention, such that it has been used as the normative basis for the removal of asylum seekers to countries where they may have transited but not sought asylum.

The safe third country provisions contain **substantive** and **procedural** elements that must be followed in order for them to be applicable.

The **substantive elements** of the safe third country requirements, the Procedures Directive II⁶⁷ requires that:

- (a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political group;
- (b) There is no risk of serious harm as defined in the EU Qualification Directive II;
- (c) The principle of *non-refoulement* in accordance with the Geneva Convention is respected;
- (d) The prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected; and
- (e) The possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention.

The **procedural elements** of the safe third country requirements, the Procedures Directive II⁶⁸ requires that Greece legislate for:

- (a) rules requiring a connection between the applicant and the third country concerned on the basis of which it would be reasonable for that person to go to that country;
- (b) rules on the methodology by which the competent authorities satisfy themselves that the safe third country concept may be applied to a particular country or to a particular applicant. Such

⁶¹ ECRE (2015), “AIDA Country Report: Turkey”, op.cit., Pp.15-16.

⁶² Ibid., Pp.126-127

⁶³ Article 7(3), Turkey, [Temporary Protection Regulation](#), 22 October 2014.

⁶⁴ Law no. 6458 on 2013 of Foreigners and International Protection, 4 April 2013 (supra).

⁶⁵ [Temporary Protection Regulation](#), 22 October 2014 (supra).

⁶⁶ A. Barker (2016), “[Turkey to boost legal protection for migrants, easing EU returns](#)”, Financial Times, 25 April; N. Nielsen (2016), “[Turkey vows better protection of non-Syrian migrants](#)”, EU Observer, 26 April.

⁶⁷ Article 38(1), Procedures Directive II.

⁶⁸ Article 38(2), Procedures Directive II.

methodology shall include case-by-case consideration of the safety of the country for a particular applicant and/or national designation of countries considered to be generally safe;

- (c) rules in accordance with international law, allowing an individual examination of whether the third country concerned is safe for a particular applicant which, as a minimum, shall permit the applicant to challenge the application of the safe third country concept on the grounds that the third country is not safe in his or her particular circumstances. The applicant shall also be allowed to challenge the existence of a connection between him or her and the third country in accordance with point (a).

Importantly, other **procedural** safeguards under the Procedures Directive II include:

- (a) that the asylum seeker is entitled to a personal interview on the admissibility of their application for international protection;⁶⁹
- (b) that the asylum seeker has access to an effective remedy before a court of tribunal if their application is considered inadmissible;⁷⁰
- (c) the automatic right to suspensive effect of their removal from the Member State territory provided that they have sought an effective remedy before the time limit for doing so has expired;⁷¹
- (d) the right to consult a legal advisor or other counsellor “in an effective manner” and at their own cost.⁷² Member States are required to provide free legal assistance on appeals.⁷³

The key issues in considering Turkey a safe third country can be summarised as follows:

1. *Whether Turkey respects the principle of non-refoulement in accordance with the Geneva Convention (Article 38(1)(c) Procedures Directive II):* this concern has stemmed from the geographic limitation that Turkey has placed as a signatory to the Geneva Convention restricting its application to Europeans as well as whether *non-refoulement* is respected in practice (see below). This issue is also related to the EU legislative criteria of whether an asylum seeker can be granted refugee status in accordance with the Geneva Convention in Turkey (see Article 38(1)(e) Procedures Directive II). A great deal of scholarly debate has surrounded whether the geographic limitation on Turkey’s accession to the Convention effectively means that Turkey cannot be considered a safe third country under Article 38 of the Procedures Directive II.⁷⁴ The debate has focussed on the meaning of the words “in accordance with” the Geneva Convention and the relevance of the words “refugee” and “refugee status” which, on one view, can only be conferred by an unimpeded application of the Geneva Convention.

The Commission considers it unnecessary for a country to have ratified the Geneva Convention without geographical reservation and that the possibility “to receive protection in accordance with the Geneva Convention” is sufficient.⁷⁵ However, as pointed out by scholars, the Commission’s interpretation does not quote Article 38(1)(e) in full, resulting in the logical and legal impossibility of a Syrian, Iraqi or Afghani requesting refugee status, being found to be a refugee and receiving protection in accordance with the Geneva Convention when they do not fall within the personal scope of Turkey’s obligations under the Convention.⁷⁶ In other words, as a matter of legal construction based on a complete reading of Article 38(1)(e), to be granted refugee status and to be found a refugee can only occur if the person actually falls within the personal scope of the Geneva Convention as subscribed by Turkey. Turkey initially indicated it had no intention to change its domestic laws in relation to Syrian or non-Syrian refugees,⁷⁷ although Turkey

⁶⁹ Article 34(1), Procedures Directive II.

⁷⁰ Article 46(1)(a)(ii), Procedures Directive II.

⁷¹ Article 46(5), Procedures Directive II.

⁷² Article 22(1), Procedures Directive II. Under Article 23(2) Procedures Directive II legal advisors or counsellors have the right to access closed areas such as detention facilities.

⁷³ Article 20(1), Procedures Directive II.

⁷⁴ See, S. Peers, and E. Roman (2016), “[The EU, Turkey and the Refugee Crisis: What could possibly go wrong?](#)” 5 February; and D. Thym (2016), “[Why the EU-Turkey Deal Can Be Legal and a Step in the Right Direction](#)”, 11 March.

⁷⁵ European Commission (2016), 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 February, p. 18.

⁷⁶ E. Roman, T. Baird and T. Radcliffe (2016) “[Statewatch Analysis – Why Turkey Is Not A “Safe Country”](#)”, February, P.12.

⁷⁷ N. Nielsen (2016), “[Turkey will not give in to EU on refugee laws](#)”, EU Observer, 23 March.

seems to have changed its tone more recently in relation to non-Syrian asylum seekers⁷⁸ – a development which warrants close monitoring as diplomatic assurances are an insufficient safeguard for human rights protection.

2. *Whether Turkey has engaged or engages in actual refoulement:* There have been recent reports of push-backs of Syrians at the Turkish-Syrian border,⁷⁹ “large scale returns of Syrian refugees”,⁸⁰ as well as increased incidents of deportations and detention,⁸¹ and recent reports that Turkey has shot dead Syrians escaping Syria.⁸² It is important to note, however, that a general consideration of *non-refoulement* would not appear to be the relevant test under the EU legislation but, rather, based on an individualised assessment of the applicant, whether it would be safe for that particular applicant to be removed to a particular country.⁸³

3. *The risk of chain refoulement from Turkey* on account of rejected asylum seekers being sent back to their country of origin,⁸⁴ also facilitated by state-by-state transfers based on readmission agreements.⁸⁵ As noted by Roman *et al*, the Commission’s Action Plan has pledged to prevent irregular migration through cooperation with the “Silk Routes’ Partnership for migration”⁸⁶ – namely, Afghanistan, Pakistan, Iran, Iraq and Bangladesh.⁸⁷

4. *A risk of serious harm if returned to Turkey:*⁸⁸ Concerns have been raised of the harsh treatment of asylum seekers and refugees in detention,⁸⁹ with non-Syrians who have not been able to access an asylum procedure being particularly prone to detention,⁹⁰ as well as reports of ill-treatment in detention.⁹¹ Further, migrants and asylum seekers may be at risk of serious harm due to indiscriminate violence in situations of internal armed conflict with Kurdish rebels in southeast Turkey.⁹² Again, the general situation in Turkey appears not to be the relevant legal test here but rather how those circumstances would place the individual person at hand at risk of serious harm if returned to Turkey.

5. *Lack of implementation of procedural safeguards:* UNHCR expressed concerns that, as at 23 March 2016, Greek law did not implement the procedural safeguards under Article 38(2) of the Procedures Directive II, namely the connection between the applicant and the third country concerned, the

⁷⁸ N. Nielsen (2016), [“Turkey vows better protection of non-Syrian migrants”](#), EU Observer, 26 April.

⁷⁹ Human Rights Watch (2015), [“Turkey, Syrians Pushed Back at the Border”](#), 23 November.

⁸⁰ Amnesty International (2016), [“Turkey: Illegal mass returns of Syrian refugees expose fatal flaws in EU-Turkey deal”](#), 1 April.

⁸¹ Amnesty International (2015), [“Europe’s Gatekeeper: Unlawful Detention and Deportation of Refugees from Turkey”](#), 16 December.

⁸² W. Worley (2016), [“Turkey ‘shooting dead’ Syrian refugees as they flee civil war”](#), The Independent, 31 March; A. Rettman (2016), [“Turkey accused of crimes against refugees, as EU returns begin”](#), EU Observer, 1 April.

⁸³ S. Peers (2016), [“The final EU-Turkey refugee deal: a legal assessment”](#), 18 March.

⁸⁴ This was an issue of concern for the ECtHR in *MSS v Belgium & Greece*, No. 30696/09, Judgment, Grand Chamber, 21 January 2011, paras 298 and 342; and in *Hirsi Jamaa and Others v Italy*, No. 27765/09, Judgment, Grand Chamber, 23 February 2012, paras 148 -158.

⁸⁵ Roman, Baird and Radcliffe (2016), “Statewatch Analysis”, op. cit., P.10.

⁸⁶ European Commission (2015), [Fact Sheet](#) – EU-Turkey joint action plan, Brussels, 15 October.

⁸⁷ See Roman, Baird and Radcliffe (2016), “Statewatch Analysis”, op. cit., P.10.

⁸⁸ See Article 38(1)(b) Procedures Directive II which refers to Article 15 of the Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 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 II”) which is defined as “(a) death penalty or execution; (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; (c) serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of internal armed conflict.”

⁸⁹ *S.A. v. Turkey*, Application no. 74535/10, Judgement, 15 December 2015.

⁹⁰ Global Detention Project (2016), [“Turkey Immigration Detention”](#); Amnesty International (2015), [“Europe’s Gatekeeper: Unlawful Detention and Deportation of Refugees from Turkey”](#), 16 December, P.6.

⁹¹ Amnesty International (2015), [“Europe’s Gatekeeper: Unlawful Detention and Deportation of Refugees from Turkey”](#), 16 December, P.7-9.

⁹² Roman, Baird and Radcliffe (2016), “Statewatch Analysis”, op. cit., citing Federal Republic of Germany (2015): Federal Office for Migration and Asylum, [Information Centre Asylum and Migration Briefing Notes \(16 November 2015\)](#), 16 November, P.3.

methodology in applying the safe third country concept; and an individual examination procedure.⁹³ In light of recent changes to Greek law,⁹⁴ a careful examination of the legislation will be necessary to assess its compliance with EU law and its application in practice.

6. *Concerns about the speed of the procedure in Greece and whether a full individual assessment of a person's claims can be completed in a short timeframe and respecting appeal rights.* The Procedures Directive requires that the applicant's *particular* circumstances be considered. There is a risk that these particular circumstances may be unable to be evidenced sufficiently by the asylum seeker or insufficiently taken into account by authorities. It is to be noted that applying the safe third country concept is **not** a justification under the Procedures Directive II for an accelerated procedure,⁹⁵ contrary to the assertions of the Commission.⁹⁶ Concerns include, *firstly*, that the timelines under the procedure appear to be extremely tight – it is reported that applicants are given one day to prepare for interviews, and there is a three-day time limit for deciding appeals.⁹⁷ *Secondly*, the Council of Europe's PACE Committee has questioned the capacity of the Greek asylum system to process applications.⁹⁸ *Thirdly*, although the new Greek Law 4375/2016 introduced free legal assistance for appeals,⁹⁹ concerns have been expressed about the very limited access to legal assistance on the islands.¹⁰⁰ *Fourthly*, concerns have been raised about the ambiguity of Article 60(3) of the new Greek law 4375/2016 which would appear to provide for dispensing with the right to automatic suspensive effect, contrary to Article 46(5) of the Procedures Directive II.¹⁰¹ These matters render the exercise asylum seekers' procedural rights of serious concern. Reports have emerged that Greek authorities "forgot" to process the asylum claims of persons they returned to Turkey.¹⁰²

7. *Whether there is a "sufficient connection" between the asylum seeker and Turkey.* The Procedures Directive II requires that there is a "sufficient connection" between an applicant and a third country before the application can be deemed inadmissible.¹⁰³ In UNHCR's view, the mere fact that an asylum seeker has transited through a country is more a product of circumstance than a "sufficient" connection or meaningful link such as to justify return to that country. UNHCR has also indicated that just because an asylum seeker has a right of entry to Turkey, but is not actually present there, cannot constitute a meaningful link.¹⁰⁴

⁹³ UN High Commissioner for Refugees (UNHCR) (2016), "[Legal considerations](#) on the return of asylum-seekers and refugees from Greece to Turkey as part of the EU-Turkey Cooperation in Tackling the Migration Crisis under the safe third country and first country of asylum concept", 23 March, P.6., n.33, commenting on Law 113/2013 which has since been repealed by Law 4375/2016 – see Asylum Information Database (AIDA) (2016), "[Greece: Asylum reform in the wake of the EU-Turkey deal](#)", 4 April.

⁹⁴ Asylum Information Database (AIDA) (2016), "[Greece: Asylum reform in the wake of the EU-Turkey deal](#)", 4 April; G. Baczynska and K. Tagaris (2016), "[Greece, Turkey take legal short-cuts in race to return migrants](#)", Reuters, 31 March.

⁹⁵ See Article 31(8)(g), Procedures Directive II. However, note that border procedures are possible – see Article 43 Procedures Directive II. Vulnerable asylum seekers and unaccompanied minors may have their application prioritised but any such prioritisation is with full procedural guarantees and is distinct from "accelerated procedures" – see Recital 19 and Article 31(7) Procedures Directive II. See also S. Peers (2016), "[The final EU-Turkey refugee deal: a legal assessment](#)", op. cit.

⁹⁶ European Commission (2016), "Next Operational Steps", op. cit., P.3

⁹⁷ Asylum Information Database (AIDA) (2016), "[Greece: Asylum reform in the wake of the EU-Turkey deal](#)", 4 April.

⁹⁸ Council of Europe (2016), "[The situation of refugees and migrants under the EU-Turkey Agreement of 18 March 2016](#)", Parliamentary Assembly, Committee on Migration, Refugees and Displaced Persons, Doc. 14028, 19 April, P.8.

⁹⁹ Asylum Information Database (AIDA) (2016), "[Greece: Asylum reform in the wake of the EU-Turkey deal](#)", 4 April, noting Article 44(3) of Law 4375/2016.

¹⁰⁰ ECRE (2016), "[EU must face up to risk of dirty deal with Turkey](#)", 1 April.

¹⁰¹ Asylum Information Database (AIDA) (2016), "[Greece: Asylum reform in the wake of the EU-Turkey deal](#)", 4 April.

¹⁰² P. Kingsley (2016), "[Greece may have deported asylum seekers by mistake, says UN](#)", The Guardian, 5 April.

¹⁰³ Recital 44 and Article 38(2)(a) Procedures Directive II.

¹⁰⁴ UN High Commissioner for Refugees (UNHCR) (2010), "[UNHCR comments](#) on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (COM(2009)554, 21 October 2009)", August; reaffirmed in UN High Commissioner for Refugees (UNHCR) (2016), "[Legal considerations](#) on the return of asylum-seekers and refugees from Greece to Turkey as part of the EU-Turkey Cooperation in Tackling the Migration Crisis under the safe third country and first country of asylum concept", 23 March.

Accordingly, there are serious substantive and procedural law issues as well as factual circumstances that raise questions about the ability of Greece to declare asylum seekers' applications inadmissible on account of Turkey being a Safe Third Country in accordance with EU law.

5.1.1.4 Turkey as a "First Country of Asylum"

The notion behind the first country of asylum is to justify removal to a third country where a person has obtained international protection in that third country.

The concept of first country of asylum has both **substantive** and **procedural** elements under the Procedures Directive II.

A country can be considered a first country of asylum if the following **substantive** requirements are met for a particular applicant (that is, in the individual case):

- (a) He or she has been recognised in that country as a refugee and he or she can still avail him/herself of that protection; or
- (b) He or she otherwise enjoys sufficient protection in that country, including benefitting from the principle of *non-refoulement*.¹⁰⁵

In determining whether there is "sufficient protection" for the applicant in a third country (which is otherwise undefined in the Directive), Member States *may* have reference to the criteria for safe third countries outlined in Article 38(1) of the Procedures Directive II.¹⁰⁶

The applicant is also entitled to the following **procedural** guarantees under the first country of asylum concept:

- (a) that the asylum seeker is entitled to a personal interview on the admissibility of their application for international protection;¹⁰⁷
- (b) that the asylum seeker is allowed to challenge the application of the first country of asylum concept to his or her particular circumstances;¹⁰⁸
- (c) that the asylum seeker has access to an effective remedy before a court of tribunal if their application is considered inadmissible;¹⁰⁹
- (d) the power of a court or tribunal to rule whether or not the applicant may remain on the territory of the Member State if a decision on admissibility results in ending the applicant's right to remain in the Member State and where in such cases the right to remain in the Member State pending the outcome of the remedy is not provided for in national law.¹¹⁰
- (e) the right to consult a legal advisor or other counsellor "in an effective manner" and at their own cost.¹¹¹ Member States are required to provide free legal assistance on appeals.¹¹²

The current key issues in applying the first country of asylum concept can be summarised as:

1. *Syrians (indeed, any non-European) cannot benefit from the recognition of refugee status due to the geographical limitation of Turkey's accession to the Geneva Convention* (that is, it applies to Europeans

¹⁰⁵ Article 35, Procedures Directive II.

¹⁰⁶ Article 35, Procedures Directive II.

¹⁰⁷ Article 34(1), Procedures Directive II.

¹⁰⁸ Article 35, Procedures Directive II, last sentence.

¹⁰⁹ Article 46(1)(a)(ii) or (iii) and Article 46(6)(b), Procedures Directive II.

¹¹⁰ Article 46(6), Procedures Directive II. It would appear that automatic suspensive effect would apply when read in conjunction with Article 46(5), Procedures Directive II.

¹¹¹ Article 22(1) Procedures Directive II. Under Article 23(2) Procedures Directive II legal advisors or counsellors have the right to access closed areas such as detention facilities.

¹¹² Article 20(1) Procedures Directive II.

only).¹¹³ The Temporary Protection Regulation (applying to Syrians) explicitly states that “Persons benefiting from temporary protection shall not be deemed as having been directly acquired one of the international protection statuses as defined in the Law”.¹¹⁴ Accordingly, Syrians (or any non-European) cannot fall within the scope of Article 35(a) Procedures Directive II because they cannot be recognised as a refugee.

2. *The question then turns on whether Syrians enjoy “sufficient protection” under the Turkish Temporary Protection Regime.* If Greece exercised its discretion and referred to the criteria under Article 38(1) for the safe third country concept (as it may do under the Procedures Directive to determine “sufficient protection”), it is arguable that the criteria would not be satisfied for the reasons outlined in the safe third country analysis above. UNHCR indicates that, beyond protection from *non-refoulement*, serious harm (as defined in the Qualification Directive II) or onward *refoulement*, “sufficient protection” requires asylum to be “effective and available in law and practice”, including compliance with international refugee and human rights standards, including adequate standards of living, work rights, health care and education; access to a right of legal stay; assistance of persons with specific needs and timely access to a durable solution.¹¹⁵ The forthcoming paper prepared by JRS Germany will further explore these aspects.

3. *Whether Turkey respects the principle of non-refoulement in practice* (see earlier section on safe third country above) *in the circumstances of the individual at hand.* This element stems from the *non-refoulement* condition under Article 35(b) of the Procedures Directive II in order to determine whether an applicant would enjoy sufficient protection. As indicated in the background section, Turkey has incorporated the *non-refoulement* principle under Article 6 of its Law on Foreigners and International Protection,¹¹⁶ and Article 4 of its Temporary Protection Regulation (the latter applying to Syrians).¹¹⁷ As Peers points out, Greece may choose to do a case-by-case examination of whether there is sufficient protection for the applicant in the *individual case* which would require an amount of time and resources which would seem at odds with the policy’s initial rapid return objective.¹¹⁸ This may also contribute to extended periods in detention. However, if an individual case examination is undertaken, the quality of that examination may *prima facie* be questionable if time frames of the examination appear as exceedingly short (see previous section).

5. *It is not enough to say that a Syrian had the possibility to apply for temporary protection status in Turkey or that it is possibly available to him or her.* Article 35(b) of the Procedures Directive II also requires that the person actually enjoyed protection in the third country. Accordingly, the mere existence of the temporary protection status in Turkey is insufficient to invoke the safe first country concept without the person actually having *enjoyed* that status prior to making an application for international protection in an EU Member State.

6. *Turkey initially indicated that it would not change its legislation in relation to asylum for Syrians and non-Syrians,¹¹⁹ although, as noted earlier, there have been in relation to non-Syrians and warrants further monitoring as it would appear to be only based on diplomatic assurances at present.¹²⁰* The Commission foreshadowed that legislative change to Turkish law would be necessary for Syrians to renew their temporary protection status after leaving Turkey and returning from Greece.¹²¹ However, as UNHCR has

¹¹³ Article 61(1), Turkey, [Law no. 6458 on 2013 of Foreigners and International Protection](#), 4 April 2013.

¹¹⁴ Article 7(3), Turkey, [Temporary Protection Regulation](#), 22 October 2014.

¹¹⁵ UN High Commissioner for Refugees (UNHCR) (2016), “Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey..” op. cit., Pp.3-4.

¹¹⁶ [Law no. 6458 on 2013 of Foreigners and International Protection](#), 4 April 2013 (supra).

¹¹⁷ [Temporary Protection Regulation](#), 22 October 2014 (supra).

¹¹⁸ S. Peers, and E. Roman (2016), “*The EU, Turkey and the Refugee Crisis: What could possibly go wrong?*”, Op. cit.

¹¹⁹ N. Nielsen (2016), “[Turkey will not give in to EU on refugee laws](#)”, EU Observer, 23 March.

¹²⁰ A. Barker (2016), “[Turkey to boost legal protection for migrants, easing EU returns](#)”, Financial Times, 25 April; N. Nielsen (2016), “[Turkey vows better protection of non-Syrian migrants](#)”, EU Observer, 26 April.

¹²¹ European Commission (2016), “Next Operational Steps”, op. cit., P.3.

indicated, clarification is needed concerning how Syrians returned from Greece to Turkey “can apply or reavail themselves of temporary protection under the Temporary Protection Regulation in Turkey”.¹²²

7. *There are concerns about whether asylum seekers have effective access to protection generally in Turkey, particularly in light of capacity constraints both of the DGMM and in a juridical sense.*¹²³

8. *Recently introduced Greek law provides insufficient protection for those whose applications have been declared inadmissible on account of the ‘first country of asylum’ criteria – firstly, authorities no longer need to have reference to the ‘safe third country’ guarantees when applying the “safe first country” criteria introduced by Article 55 of the new Greek Law 4375/2016.*¹²⁴ Secondly, the time limit within which to lodge an appeal against a decision under the new law is five days, but which is contrary to the one week time limit required by Article 46(7) of the Procedures Directive II in circumstances where there is no automatic suspensive effect.¹²⁵

Accordingly, there are serious substantive and procedural law issues as well as factual circumstances that raise questions about the ability of Greece to declare asylum seekers’ applications inadmissible on account of Turkey being a First Country of Asylum in accordance with EU law.

In order to bring clarity, a judicial determination on the application of the Safe Third Country and First Country of Asylum provisions under the Procedures Directive II is needed. Due to the uncertainty surrounding the application of the first country of asylum concept, it is advisable that a reference from a Greek court or tribunal be made to the CJEU. The elements of the scheme may also warrant judicial consideration by the ECtHR with an appropriate case, bearing in mind the principles enunciated in the cases of *Hirsi* and *Conka*.¹²⁶

5.1.2 Dublin and Family Considerations

One aspect that has been given little consideration under the EU-Turkey deal is the impact on families and family unity.¹²⁷

The profile of asylum seekers entering Greece from Turkey has been largely with families with a recent study showing that 41% of persons travelling through this route have children with their children accompanying half of those persons (50.5%). Since September 2015, the profile the proportion of women and children has risen from 27% to 60% in March 2016.¹²⁸ This may also be a product of some countries limiting access to family reunification,¹²⁹ prompting other family members make voyages in order to join family members already in EU Member States.

With the hotspots being transformed into detention facilities (see further below) and the prospect of expedited return, there are significant potential impacts for families and for children.

¹²² UN High Commissioner for Refugees (UNHCR) (2016), “Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey.” op. cit., P. 5.

¹²³ O. Ulusoy (2016), “[Turkey as a Safe Third Country?](#)”, University of Oxford, Faculty of Law, Border Criminologies Blog, 29 March.

¹²⁴ Asylum Information Database (AIDA) (2016), “[Greece: Asylum reform in the wake of the EU-Turkey deal](#)”, 4 April.

¹²⁵ Ibid.

¹²⁶ *Hirsi Jamaa and Others v Italy*, No. 27765/09, Judgment, Grand Chamber, 23 February 2012; *Conka v Belgium*, No. 51564/99, Judgment, 5 February 2002.

¹²⁷ See, UN High Commissioner for Refugees (UNHCR) (2016), “Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey.” op. cit. Pp. 7-8. Note also the report of ASGI (2016), “[Idomeni, un’analisi giuridica sui diritti negati ai migranti](#)”, 13 April, particularly at section 4.3.

¹²⁸ H. Crawley, F. Duvell, N. Sigona, S. McMahon and K. Jones (2016), “[Unpacking a rapidly changing scenario: migration flows, routes and trajectories across the Mediterranean](#)”, MEDMIG Project, Research Brief No. 1, March, Pp. 4 & 6.

¹²⁹ See, for example, Denmark, L. Dearden (2016), “[Denmark refugee law: concern over ‘inhumane’ family reunification delays that could cause more deaths](#)”, The Independent, 27 January; and in Germany, JRS Europe (2016), “[JRS Germany raises questions over proposed asylum package](#)”, 15 February; S. Wagstyl (2016), “[Germany moves to toughen refugee rules](#)”, Financial Times, 28 January.

Firstly, a concern would be to ensure that the guarantees in relation to family unity should be upheld, especially in the context of admissibility procedures. Although the Procedures Directive is silent on family unity, the Reception Conditions Directive II applies once an application for international protection has been lodged.¹³⁰ The Reception Conditions Directive II calls for the full compliance with the best interests of the child and family unity, and with the EU Charter, CROC and ECHR.¹³¹ Member States are under an obligation to take measures to maintain family unity as far as possible “if applicants are provided with housing”.¹³² It is arguable that, given the overarching aims expressed in the recital, housing should be interpreted to include all forms of shelter and should not be seen as a *lex specialis* as regards detention.

Secondly, little express attention has been given to how the current Dublin Regulation is to interact with the implementation of the EU-Turkey deal. Admissibility and return procedures run the risk of applicants being unable to adequately evidence the existence of family members present in other Member States as well as insufficient or too late consideration by authorities of the presence of family members in other Member States. It is arguable that the mandatory requirement for Member States to examine any application for asylum and for the Member State responsible for doing so in accordance with the hierarchy of criteria (which includes presence of family members) overrides the discretionary ability of Member States to send an applicant to a safe third country in accordance with the Procedures Directive.¹³³

In this regard, it is essential that Greece firstly ensure that asylum seekers are informed of the Dublin Regulation¹³⁴ and giving them the opportunity to submit information or give an interview¹³⁵ about the existence of family members in other Member States; and then secondly conduct an assessment of which Member State is responsible for determining the asylum claim¹³⁶ before proceeding to the questions of admissibility based on the safe third country or first country of asylum concepts in order to ensure that the principle of family unity and the best interests of the child are upheld, in accordance with the Dublin Regulation.¹³⁷ This is particularly important in the case of unaccompanied minors,¹³⁸ whose rights to representation and/or assistance should be protected¹³⁹ and recalling that Greece remains under an obligation to take “appropriate action to identify the family members, siblings or relatives of the unaccompanied minor” in other Member States.¹⁴⁰

5.1.3 Detention

The transformation of hotspots from “registration and screening” to “accelerating readmission procedures for irregular migrants” was discreetly foreshadowed in the Commission Communication.¹⁴¹ The recently introduced Greek Law 4375/2016 effectively provides for asylum seekers to be detained in the hotspots for the entirety of their asylum procedure.¹⁴²

Shortly after the announcement and implementation of the EU-Turkey deal, UNHCR withdrew its cooperation from the hotspots in Greece in an uncharacteristically blunt statement of 22 March 2016, indicating that the hotspots had been transformed into detention centres and that UNHCR’s actions were

¹³⁰ Article 3, Directive 2013/33 of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) OJ L 180/96 (“Reception Conditions Directive II”).

¹³¹ Recital 9, Reception Conditions Directive II.

¹³² Article 12, Reception Conditions Directive II.

¹³³ Compare Article 3(1) with Article 3(3), Dublin III Regulation.

¹³⁴ Article 4(1)(c), Dublin III Regulation.

¹³⁵ Article 5, Dublin III Regulation.

¹³⁶ Article 3 and Articles 7-11, Dublin III Regulation.

¹³⁷ Recital 13 and Article 6(1) (Best interests of child as primary consideration); Recital 16 and 17 (family unity); Recital 14 (respect for family life), Dublin III Regulation.

¹³⁸ Article 8, Dublin III Regulation. See also Case C-648/11 *The Queen on the application of MA, BT, DA v Secretary of State for the Home Department*, Judgment, 6 June 2013.

¹³⁹ Article 6(2), Dublin III Regulation; Article 25 Procedures Directive II.

¹⁴⁰ Article 6(4), Dublin III Regulation.

¹⁴¹ European Commission (2016), “Next Operational Steps”, op. cit., P.4.

¹⁴² Asylum Information Database (AIDA) (2016), “[Greece: Asylum reform in the wake of the EU-Turkey deal](#)”, 4 April.

consistent with its opposition to mandatory detention.¹⁴³ UNHCR also clearly indicated that it was not a party to the EU-Turkey deal (lest there be any impression to the contrary).

Following the UNHCR's withdrawal, further high-profile civil society withdrawals accompanied similarly blunt statements from Norwegian Refugee Council,¹⁴⁴ Medecins Sans Frontières¹⁴⁵ and Oxfam.¹⁴⁶ Clashes ensued between Syrian and Afghan asylum seekers,¹⁴⁷ and more recently a riot broke out at the Moria detention centre.¹⁴⁸

The transformation of the hotspots into a detention estate has been a concern for JRS Europe since their announcement in conjunction with the relocation scheme. In a recent meeting of the JRS Europe Protection at the External Borders Project (PEB), the Italian partners of the project (IPA¹⁴⁹) indicated how hotspots had morphed into detention in the Italian context, and without a basis in Italian law. The Greek context raises concerns not only for the scale of numbers held pending admissibility procedures but that the profiles of individuals are more likely to be families, with a recent spike in women and children arriving.¹⁵⁰ In addition to the largely mandatory detention regime that has followed since the EU-Turkey deal, the profile of arrivals raises concerns about the necessity, suitability, length and legality of hotspot detention for families.¹⁵¹ Reports of the conditions of detention have been described as "dire" and "appalling",¹⁵² also brought to light by Dan Tyler of Norwegian Refugee Council at a recent policy dialogue on alternatives to detention.¹⁵³ Reports also emerged of the lack of basic care for children and that babies detained on Chios were "not getting adequate milk".¹⁵⁴

The apparent ease and seamlessness of the transformation of hotspots into detention facilities also confirms a view held since the introduction of the detention provisions into the second generation CEAS legislation – that the grounds for detention contained in the EU secondary legislation are so broad as to question whether they are a sufficient safeguard against arbitrary detention in practice.¹⁵⁵

Tied with the issue of alternatives to detention is the issue of reception capacity generally in Greece (indeed, in Europe generally¹⁵⁶). Recent submissions to the Council of Europe Committee of Ministers by ECRE and ICJ have noted reception capacity is far from sufficient (despite the optimistic claims of the Commission) as well as noting the loose interchangeability of descriptors between "detention" and "reception facilities".¹⁵⁷ The issue of providing alternatives to detention is inextricably linked to reception capacity.

¹⁴³ United Nations High Commissioner for Refugees (UNHCR) (2016), "[UNHCR redefines role in Greece as EU-Turkey deal comes into effect](#)", 22 March.

¹⁴⁴ Norwegian Refugee Council (2016), "[NRC is suspending activities at Chios 'Hotspot', though will maintain a protection presence to ensure rights of refugees are upheld](#)" 23 March.

¹⁴⁵ Medcins Sans Frontiers (2016), "[Greece: MSF ends activities inside the Lesbos 'hotspot'](#)", 22 March, see also Aljazeera (2016), "[UNHCR, MSF withdraw from Greece's refugee 'hotspots'](#)", 22 March.

¹⁴⁶ Euractiv (2016), "[MSF, Oxfam pull out of Lesbos hotspot in yet another blow to the EU](#)", 24 March.

¹⁴⁷ S. Michalopoulos (2016), "[Clashes reported at Greek hotspot](#)", Euractiv, 1 April.

¹⁴⁸ A. Connelly (2016), "[Refugee riot breaks out on Greek island](#)", 27 April; Oxfam International (2016), "[Detention riots expose how EU is failing people fleeing to Greece](#)", 29 April.

¹⁴⁹ Istituto Pedro Arrupe – see www.istitutoarrupe.it/

¹⁵⁰ Crawley et al, "Unpacking a rapidly changing scenario", op. cit., P. 4 & 6.

¹⁵¹ See *Kanagaratnam & Ors v Belgium*, No. 15297/09, Judgment, 13 December 2011, paras 94-95; *Popov v France*, Nos. 39472 and 39474/07, Judgment, 19 January 2012, paras 119 and 121; *Mubilanzila Mayeka and Kaniki Mitunga v Belgium*, No. 13178/03, Judgment 12 October 2006. On the relevant secondary legislation, see M. Provera (2013), *The Detention of Asylum Seekers in the European Union and Australia – A Comparative Analysis*, Oisterwijk, Wolf Legal Publishers, chapters 5 & 7.

¹⁵² Amnesty International (2016), "[Greece: Refugees detained in dire conditions amid rush to implement EU-Turkey deal](#)", 7 April.

¹⁵³ Jesuit Refugee Service Europe (2016), [Alternatives to Detention report and policy seminar](#), 21 April.

¹⁵⁴ P. Kingsley (2016), "[Refugee babies detained on Greek island 'not getting adequate milk'](#)", The Guardian, 19 April.

¹⁵⁵ See further, C. Costello (2015), "Immigration Detention: The Grounds beneath our Feet", *Current Legal Problems*, 1-35.

¹⁵⁶ See, European Council on Refugees and Exiles (2016), "[AIDA – Wrong counts and closing doors – The reception of asylum seekers in Europe](#)", March, Brussels.

¹⁵⁷ International Commission of Jurists and European Council on Refugees and Exiles (2016), "Fifth Joint Submission", op. cit.

5.2 Resettlement from Turkey to EU Member States

Resettlement from Turkey to EU Member States is contemplated for Syrians only as part of the ‘one-for-one’ deal. For each Syrian returned from Greece to Turkey, another Syrian will be resettled in an EU Member State. A mechanism for determining numbers is to be updated on a week-by-week basis.

The idea is for a total of 72,000 Syrians to be relocated from Turkey to EU Member States.¹⁵⁸ This number is calculated “within the framework of existing commitments” consisting of 18,000 from the European Resettlement Scheme (agreed upon last year) and 54,000 unallocated places under the temporary relocation scheme (places originally allocated for relocation from Hungary but remained unallocated due to Hungary’s refusal to participate).

Once the irregular crossings “have come to an end or have been substantially reduced” the Voluntary Humanitarian Admission Scheme (“VHAS”) is to be activated,¹⁵⁹ possibly later extended to Jordan and Lebanon. The focus is for Syrians to benefit from the scheme, provided that they have been registered by Turkish authorities before 29 November 2015. The standard operating procedures for selecting candidates developed for the VHAS may be used for the one-for-one scheme. The Commission has indicated that, in addition to those procedures, “a mechanism that creates a disincentive for persons to cross the Aegean Sea”.¹⁶⁰

A number of concerns include: *firstly*, the one-for-one scheme is perverse in that it still relies on one Syrian risking their life and making the journey from Turkey to Greece in order to enable a completely different Syrian to be resettled in the EU. Indeed, the scheme is based on the very act that it purports to eliminate.

Secondly, the Commission incorrectly analogises resettlement (that is, from outside EU territory) and relocation (that is, from within EU territory) and considers that the two are equivalent on the basis of “a concrete expression of solidarity”.¹⁶¹ The question that has to be asked is – solidarity *with whom*? The legal obligations of resettlement and relocation are different – the obligations for resettlement are entirely voluntary as those persons are outside EU territory. There is a legal obligation of Member States to those asylum seekers actually on EU territory to examine their claims for international protection¹⁶² and it was this that was the subject of the Member States’ commitment of 54,000 places for relocation (see below). It remains to be seen if the legal basis for relocation (that is, within the EU) is transformed into a legal basis for resettlement (that is, from outside the EU) and which would require further examination and consideration.

Thirdly, the 54,000 places have as yet not been the subject of commitments by EU Member States. The concern is that, although the 54,000 places were the subject of once compulsory commitments by Member States to relocate (that is, for those within EU territory), they have, in effect, been downgraded to a *voluntary* commitment by Member States to resettle from Turkey (that is, because they are not on EU territory). Curiously, any persons resettled under bilateral admission agreements with Turkey will also be counted in the one-for-one scheme,¹⁶³ which warrants careful scrutiny of those figures.

Fourthly, the numbers contemplated, even at a foreshadowed 72,000, are small compared to the more than 2 million Syrian and other refugees currently in Turkey. The scale of resettlement is embarrassingly low given the EU population of 500 million and compared to the populations hosted by Jordan and Lebanon as well as Turkey. As has been suggested by Eugene Quinn, Country Director of JRS Ireland, the key to the success of any such resettlement scheme is the scale at which it is applied. Even if one were to put to one side the perversity of the one-for-one scheme, the numbers contemplated fall well below what is necessary to make a meaningful difference.

¹⁵⁸ European Commission (2016), “Next Operational Steps”, op. cit., P.5.

¹⁵⁹ European Commission (2015), [Commission Recommendation](#) of 15.12.2015 for a voluntary humanitarian admission scheme with Turkey, C(2015) 9490, Strasbourg, 15 December.

¹⁶⁰ European Commission (2016), “Next Operational Steps”, op. cit., P.6.

¹⁶¹ European Commission (2016), “Next Operational Steps”, op. cit., P.5.

¹⁶² Article 3(1), Dublin III Regulation.

¹⁶³ European Commission (2016), “Next Operational Steps”, op. cit., P.5, fn 8.

Fifthly, the scheme is to benefit Syrians. The concern here is that, although the circumstances of Syrians are largely well-known and whose needs are great, persons holding other nationalities are also in need of international protection and reference to the global international protection context is missing in the EU-Turkey deal. A concern with the deal focussing solely on Syrians is that it may have the consequence of further contributing to a nationality-based sense of legitimacy for protection needs, rather than a reference to the definition of refugee under the Geneva Convention. This can have a direct impact at the crucial screening-in stage.

Sixthly, the precise standard operating procedures for selection of candidates under the VHAP (that are also to be used for the one-for-one scheme) are not presently known beyond a general heading of an assessment of vulnerability and existing family links in EU Member States¹⁶⁴ and a leaked Council document outlining possible elements of the Standard Operating Procedure.¹⁶⁵ Accordingly, as indicated earlier, it is not known *to what extent* these will be priorities in any selection procedure and how they will be operationalised. The standard operating procedures are to be jointly developed by EASO, Turkey, the Commission and UNHCR.¹⁶⁶ Accordingly, further clarity is needed on precisely how and on what basis persons will be selected for resettlement and which warrants further close monitoring of developments.

Seventhly, the mention of the ‘disincentive mechanism’ is somewhat revealing as it is troubling. The means and actors implementing such a mechanism are not identified. Further, the mention of the disincentive mechanism perhaps reveals the perceived role of deterrence. Indeed, Collett has suggested that the EU-Turkey deal as a whole is directed more towards the message of deterrence than the viability and legality of its implementation.¹⁶⁷ The flaw in adopting such a deterrence strategy, in addition to circumventing human rights obligations, is that people are merely displaced to another country, region or entry point of the EU.¹⁶⁸

5.3 The rising importance of nationality in accessing EU international protection

The emergence of the temporary relocation scheme in 2015 also saw the introduction of nationality as the basis for a *prima facie* determination of whether a person was “in clear need of international protection”. Under the scheme, those in “clear need of international protection” were to have a nationality for which the EU-wide recognition rate according to Eurostat was 75% or above in order to be eligible for relocation. At the time it commenced, mainly Syrians and Eritreans fell within the personal scope of the temporary relocation scheme but eligible nationalities have since been updated to reflect the more recent recognition rates of other nationalities. The problem with such a basis for eligibility to the relocation scheme is that the statistics only take into account *first instance* recognition rates, not those on appeal (meaning that the *overall* recognition rates are not used – a particularly important factor if an asylum determination system is procedurally failing or if a Member State predominantly resorts to declaring asylum claims inadmissible or unfounded at first instance). Further, using quarterly updated recognition rates do not reflect the quickly changing reality in countries of origin but rather are an historical snapshot of a process that may have commenced 18 months or more ago before the outcome is reached (as JRS Ireland notes, the assessment procedure can take up to 7-8 years in Ireland). Further, recent discussions with JRS Italy and IPA in Italy indicate that those arriving at hotspots in Italy are automatically screened for pre-removal detention if they do not have the appropriate nationality but may make their claim for asylum once in detention.

The concern with the predominance of nationality as a basis for screening-in is that it undermines the *individual* assessment of a person’s claim for protection, irrespective of their nationality, and consistent with

¹⁶⁴ European Commission (2015), [Commission Recommendation](#) of 15.12.2015 for a voluntary humanitarian admission scheme with Turkey, C(2015) 9490, Strasbourg, 15 December, para 7.

¹⁶⁵ Council of the European Union (2016), [“Note from Presidency](#) to Representatives of the Governments of the Member States - Standard Operating Procedures implementing the Mechanism for resettlement from Turkey to the EU as set out in the EU-Turkey Statement of 18 March”, 7462/16, 5 April.

¹⁶⁶ *Ibid.*, para 8.

¹⁶⁷ E. Collett (2016), [“The Paradox of the EU Turkey Deal”](#), Migration Policy Institute, March.

¹⁶⁸ T. Spijkerboer (2007), “The Human Costs of Border Control”, *European Journal of Migration and Law*, Vol. 9, pp. 127-139.

the definition of refugee under the Geneva Convention.¹⁶⁹ This means that, for example, a person belonging to a particular social group who has a well-founded fear of persecution may not be screened-in and, consequently, not have their claim assessed or assessed properly, due to his or her holding of a nationality of a country which is considered “safer” than a person who holds a nationality fulfilling the “in clear need of international protection” criteria. Indeed, the issue of nationality became visible in the crossing of the gradually closing borders along the Balkans route.¹⁷⁰

The discursive consequences of the EU-Turkey deal warrant further consideration in this regard.

Syrians are the focus of the resettlement efforts for the one-for-one scheme as well as for the disbursement of the Facility [funds] for Refugees in Turkey.¹⁷¹ The situation of Syrians is perhaps most widely known and it is entirely laudable to direct efforts towards advancing their circumstances. However, without referring to the global international protection needs of all refugees and the refugee definition, firstly, a binary “deserving/undeserving” discourse based on nationality can emerge; and secondly, it may be contributing to a misguided view that nationality is a justifiable basis for discriminating amongst those asylum seekers seeking international protection on EU territory but which is also contrary to the non-discrimination provisions of the Geneva Convention (Article 3). The concern here is that this may indirectly contribute to people being denied the opportunity to access (or access effectively) the asylum procedures based on their nationality alone.

Accordingly, care should be taken to ensure that the overall context of all refugees and the definition of refugee is communicated in order to avoid further compounding nationality as the basis for assessing the legitimacy of protection needs and accessing the asylum procedure.

5.4 Making a ‘safe zone’ in Syria

The EU-Turkey deal also foreshadows joint cooperation to improve the humanitarian conditions in Syria “which would allow refugees [sic] to live in areas which will be more safe”.¹⁷²

Leaving to one side that, under international refugee law, a person must be outside the country of his or her nationality or, if not having a nationality, be outside his or her country of habitual residence in order to fall within the definition of “refugee”,¹⁷³ it would seem that the EU strategy would be (perhaps more medium term) to create a “safe zone” within Syria. All efforts to establish safety in Syria is a welcome and laudable objective.

However, as Peers has pointed out, it is theoretically possible that a ‘safe zone’ could be created but naturally there are concerns as to whether Syrians returned from Turkey would be safe - this would need to be assessed “when and if it happens”.¹⁷⁴ Accordingly, efforts in this regard should be closely monitored in conjunction with monitoring of any returns of Syrians by Turkey, other states or Member States to “safe zones” or other areas within Syria to ensure that more than mere lip service is paid to the principle of *non-refoulement*. This is particularly so in light of the internal protection criteria under the Qualification Directive II, that not only requires the safety of the person and their ability to legally and safely gain admittance to the ‘safe’ part of the country, but that also requires that the person “can reasonably be expected to settle there”.¹⁷⁵

¹⁶⁹ A view also expressed by the Danish Refugee Council (2016), “[DRC concerned about returns from Greece to Turkey](#)”, 4 April.

¹⁷⁰ Amnesty International (2016), “[Trapped in Greece](#)”, Pp. 9-10.

¹⁷¹ European Commission (2016), “Next Operational Steps”, op. cit., Pp.7-8.

¹⁷² European Commission (2016), “Next Operational Steps”, op. cit., P.9.

¹⁷³ Article 1A, Geneva Convention.

¹⁷⁴ S. Peers (2016), “*The final EU-Turkey refugee deal: a legal assessment*”, op. cit.

¹⁷⁵ Article 8 of the Qualifications Directive II.

6. Conclusion

The EU-Turkey deal represents a seismic shift in the European Union's policy towards forced migrants and its international protection obligations. The deal is historic but, regrettably, for all the wrong reasons – it represents a serious challenge to the basic principles of international refugee law, the rule of law and democratic accountability. The perverse nature of the 'one-for-one' scheme has been justified on the basis of 'saving lives' but is cruelly only made operational by risking lives. There are other safe and effective means of enabling people to seek protection within the EU that maintain, rather than vanquish, peoples' dignity.¹⁷⁶

The cumulative legal, procedural and operational challenges that face the deal place it at a high risk not only of policy failure but also of failing to advance the circumstances of those who desperately seek sanctuary. The form and legal basis of the deal raise questions about the Union's commitment to the rule of law and democratic accountability. There are serious questions to be judicially examined about the compliance of any returns with EU law and ECtHR jurisprudence. The transformation of hotspots into detention centres is a deeply troubling development, particularly in light of the potentially serious consequences for families, women and children who constitute a considerable number of arrivals and the reports of conditions to date. Great care needs to be taken to ensure that family unity is maintained, particularly those with family members already present in other Member States. The discursive effects of focusing on nationality as a basis of *prima facie* legitimacy of claims may have negative consequences for those holding certain nationalities, divorced from the underlying basis of their claims for protection. The many serious concerns posed by the deal, not least for those seeking international protection, warrant close monitoring, vigilance and further investigation.

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¹⁷⁶ Caritas Europa, CCME, COMECE, Eurodiaconia, ICMC, JRS Europe, QCEA (2014), "[Recommendations for the development of safe and legal paths to protection in the European Union](#)", 19 November, Brussels.