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# The Readmission Agreement between the EU and Turkey

Compatible with the right to seek asylum?

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# Abbreviations

CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEPS	Centre for European Policy Studies
CEU PSJ	Central European University Political Science Journal
CoE	Council of Europe
Commission	European Commission
Council	Council of the European Union
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECRE	European Council on Refugees and Exiles
ECtHR	European Court of Human Rights
EEC	European Economic Community
EP	European Parliament
EU	European Union
EU Charter	Charter of Fundamental Rights of the European Union
HRW	Human Rights Watch
ICCPR	International Covenant on Civil and Political Rights
NATO	North Atlantic Treaty Organization
NGO	Non-governmental organisation
Protocol	Protocol Relating to the Status of Refugees
Refugee Convention	Geneva Convention Relating to the Status of Refugees
RSQ	Refugee Survey Quarterly
TFEU	Treaty on the Functioning on the European Union
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees

# Chapter 1

## Introduction

### 1.1 Background

The international protection of refugees is one of the most critical questions that concern the international community today. The need for international protection is the direct consequence of conflicts, violence and human rights violations. Many individuals are forced to escape their homes in order to seek protection, some finding refuge in countries far from their homeland. Consequently, asylum law has gone from just being a question of international law to also become a matter of domestic politics for many countries including the member states of the European Union (EU).

Even though the EU is an important part of the international protection of refugees, the non-access to the EU makes it hard for many refugees to seek asylum in Europe. In order to seek asylum in one of the member states, most refugees must reach the borders of EU. Although asylum law is a matter of human rights, the European Union's approach to regulate asylum is far from only dealing with the protection of fundamental rights for individuals. Scholars agree that the "securitisation" of the EU has made asylum law a matter of border security and migration control.<sup>1</sup> The migration policies and laws of the EU lack the character of human rights that asylum law was intended to be, in some cases even violating basic human rights. Immigrants getting severely damaged by razor-wired border fences or losing their lives during overfilled boat rides trying

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<sup>1</sup> E.g. Şemsit, *Transformation of Migration Policies in Poland and Turkey in the EU Accession Process: Europeanized and/or Securitized?*, CEU PSJ, vol. 3, issue 4, 2008, p. 369-374, İçduygu & Yükserek, *Rethinking Transit Migration in Turkey: Reality and Re-presentation in the Creation of a Migratory Phenomenon*, Population, Space and Place, vol. 18, issue 4, 2012, p. 450 f.

to reach EU are cruel but real consequences of this approach. Even when immigrants reach the borders, the denial of entrance by border securities is reported to occur constantly with so called *pushbacks*. Due to this securitisation, the right to seek asylum is threatened by the non-access to EU's borders.

Among the strict EU measures of border security and migration control are readmission agreements concluded between the EU and other countries. These agreements concern the removal of persons not fulfilling the conditions to stay in the member states and make an important part of the EU migration policies. Although the EU practice of readmission agreements has come a long way since the first agreements 10 years ago, reports show that these agreements are used to justify violation of refugee rights. By concluding readmission agreements with other countries without ensuring the rights of refugees, the EU tightens its already unreachable borders for protection seekers and keeps enabling the desperation that makes people risk their lives.

A readmission agreement between states and international organisations is the ultimate proof of the states' power over individuals and touches concepts of state sovereignty with border control as well as human rights safeguards. The very thought that agreements between states and the EU can be used in a way to commit human rights violations seems wrong. The right to seek asylum and thereby being able to enjoy protection from persecution should not be a matter dismissed within the political and economic strategies of the EU with other cooperating countries. Readmission agreements are problematic in this sense, as the EU is a human rights proponent within the international community. Consequently, the EU should not pave the way for human rights violations in its international relations, especially not with countries having questionable human rights records.



## 1.2 Purpose

The purpose of this paper is to highlight the right to seek asylum and assess if the EU readmission agreements violates this right. The main subject of research will be the readmission agreement signed between the EU and Turkey, which will serve as an example of how the EU manages the right to seek asylum within its international relations.<sup>2</sup>

Concluding readmission agreements with third countries is a way to cope with unauthorised immigration. This study is not questioning the need to control borders and regulate migration, but reports show that readmission agreements tend to make it much easier to violate basic and fundamental rights of those who shouldn't be subjected to restrictions, namely refugees seeking protection. With focus on readmission agreements as measures of migration control, the study will lead to an analysis of the compatibility of these agreements with the right to seek asylum.

In order to fulfil the purpose of the study, the following questions will serve as guidelines:

- What does the right to seek asylum mean for refugees reaching the EU borders?
- Is there a correlation between violation of the right to seek asylum and EU's readmission agreements?
- Is the EU-Turkey readmission agreement compatible with the right to seek asylum and if not, how will it be compatible?

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<sup>2</sup> European Commission, *Proposal for a Council decision concerning the conclusion of the Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation*, COM (2012) 239 final.

### 1.3 Methodology

Due to the interdisciplinary nature of this study, the methodology and materials used are of diverse character. To begin with, the primary sources of international law will be considered. Accordingly with the Statute of the International Court of Justice, these legal sources are international conventions, international customs, general principles of law as well as judicial decisions and doctrine.<sup>3</sup> As the main subject of this study are international agreements, these agreements must obey the essential condition of not conflicting with *jus cogens*, the peremptory norms of international law.<sup>4</sup>

The study is mostly based on the readmission agreement signed between the EU and Turkey, an agreement that is not yet final. The agreement will come into effect within a few years and then be an essential part of the border control of the immigration to the EU. The international conventions relating to refugee rights and the EU law regulating migration and asylum will be considered as rule of law, as well as the national law of Turkey. As the subject of this essay is not only limited to juridical aspects, the methodology is thereby also defined by the political nature of the subject as well. In order to fulfil the purpose of the study, it is essential to consider non-juridical sources and materials. Consequently, the materials are not limited to international organisations such as the UNHCR but various documents from NGO's will also be used in this study.

### 1.4 Disposition

The disposition of the paper intends to give a brief background of rule of law with a following detailed analysis in order to meet the purpose of the study.

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<sup>3</sup> Statute of the International Court of Justice, art. 38.

<sup>4</sup> Vienna Convention on the Law of Treaties, art. 53.

In **chapter 2**, the rule of law concerning the right to seek asylum will be analysed not only within international public law but also EU law and national law of Turkey. This will give a steady ground in order to understand the dynamics between seeking asylum and border control.

The readmission agreement between the EU and Turkey will be described and scrutinised in **chapter 3** in order to identify the positive and negative aspects of the agreement. Attention will be given to those provisions of the agreement that will have more impact on the right to seek asylum.

A wider description of the policy of readmission agreements in **chapter 4** will give an overview of earlier concluded readmission agreements. This includes agreements signed between specific EU member states and other transit countries. By highlighting these agreements, the human rights violations following the implementation of the agreements will be demonstrated to serve as an example of what the EU-Turkey agreement could eventually lead to in the future.

The analysis of the compatibility of concluding readmission agreement with the insufficient right to asylum will be made in **chapter 5** by discussing different aspects of the right to seek asylum and readmission agreements. It will highlight particular problems that need solutions and when possible, suggest such solution.

The study will be concluded with **chapter 6** containing other additional remarks as a commentary on the matter of right to asylum.

## 1.5 Delimitations

The limited scope of this study means that only certain issues of migration control policies can be examined. Due to current refugee crises, there is an on

going debate on migration control and refugee reception especially within the EU member states. With this general debate in mind, I have chosen to focus on EU's readmission agreements within its migration control. The thought of dealing with removals of individuals seems very sensitive and creates extra caution to guarantee human rights, which explains the need to focus on the readmission agreements concluded between the EU and other countries.

This study focuses on the readmission agreements' impact of the right to seek asylum. The right to seek asylum can refer to many different situations, including the right to gain access to seek asylum. This study is mainly focusing on refugees seeking asylum in the EU by trespassing the borders unauthorised. Therefore, "access to asylum" will be defined as "to be able to seek asylum within the EU" in this study, even if the trespassing of borders has been unauthorised.

The definition *readmission agreement* will be limited to the definition used by the EU as follows:

"An agreement between the EU and/or Member State with a third country, on the basis of reciprocity, establishing rapid and effective procedures for the identification and safe and orderly return of persons who do not, or no longer, fulfil the conditions for entry to, presence in, or residence on the territories of the third country or one of the Member States of the European Union, and to facilitate the transit of such persons in a spirit of cooperation."<sup>5</sup>

According to EU's definition, readmission agreements concern member state nationals and third country nationals who also have stayed in the respective state but have no longer right to be there. This study will not concern them; instead the focus will be on how the agreement affects immigrants trying to come into EU or newly arrived in EU.

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<sup>5</sup> European Commission, European Migration Network Glossary  
[http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european\\_migration\\_network/glossary/index\\_en.htm](http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/glossary/index_en.htm)

Regarding the choice of agreement, the main focus will only be on the EU-Turkey agreement with a more detailed analysis. The EU-Turkey agreement differs from other readmission agreements concluded between the EU and other third countries, as Turkey is a major transit country for far more refugees. The EU is negotiating partnerships with other big transit countries as well (such as Morocco) but these negotiations have not come as far as the agreement with Turkey. Even if specific member states do have agreements with other countries as well, an agreement with EU as a revising institution and human rights proponent have a higher status and is intended to be guiding for the member states. These circumstances make the EU-Turkey agreement highly relevant and suitable to serve the purpose of this study

# Chapter 2

## The Right to Seek Asylum

### 2.1 Introduction

This chapter will describe the right to seek asylum within different legal sources in order to understand its relation with readmission agreements. Focus will be on the right to seek asylum for refugees reaching the border of a destination country and the access to an asylum application. Further on, the definition of the right to seek asylum will be explained to give an understanding to how readmission agreements can become obstacles in the access to protection. In order to fully understand the right to seek asylum within the EU-Turkey readmission agreement, an overview of relevant parts of EU law and Turkish law regulating asylum will also be given.

### 2.2 A question of access

The reason why the right to *seek* asylum is described as a separate right from the right to *enjoy* asylum is important to understand and needs to be explained when dealing with this issue. Although it may seem obvious, one must be able to seek asylum in order to enjoy asylum. Enjoying asylum is thereby dependent on the right to seek and the right to access asylum. Even in cases when there is no right to enjoy asylum, the right to seek asylum can be a life saver. This situation exists in the case of asylum in Turkey, which will be explained more in detail further on.

In this paper, the right to seek asylum focuses on the first stage in a refugee determination process. In an EU member state, the protection process starts with an application for asylum at the responsible authority within the state borders.<sup>6</sup> Consequently, refugees must pass the borders into the EU in order to be able to seek asylum, whether this is done by entering a member state with authorisation or not. In this sense, the right to seek asylum in the EU means the right to be able to hand in an asylum application. Logically, a violation of the right to seek asylum in the EU comes by not being able to hand in an asylum application.

Not to be able to seek asylum can be manifested in different ways, from language barriers with non-translation to non-existing examinations of protection claims with standardised rejections on general grounds. These kinds of maltreatments in the refugee reception is regulated by EU law and can be reduced due to the revising effect of control organs within the EU such as the European Court of Justice.<sup>7</sup> Thanks to accessing the protection procedures, refugees are also protected against maltreatments disabling the proper application for asylum. However, the prevention of properly seeking asylum in EU also occurs when refugees are denied to enter the member states, which is the type of situation focused on in this study.

The problem with the denial of entrance to the EU and pushbacks of immigrants is that it is a measure taken outside the refugee reception and deals with unauthorised immigrants. Consequently, border pushbacks are not revised by any control organs with the competence to protect refugee rights regulated by law. EU's securitisation of migration threatens the right to enjoy asylum by the non-access to the borders, including pushbacks of migrants trying to reach the borders. This illustrates the need to separately grant a right to seek asylum. As mentioned before, the right to seek asylum is essential in order to guarantee asylum for refugees.

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<sup>6</sup> Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, art. 6.

<sup>7</sup> As regulated in Directive 2005/85/EC.

## 2.3 International conventions

### 2.3.1 *The Universal Declaration of Human Rights*

In the dawn of the international cooperation for human rights, the right to seek and enjoy asylum was among the fundamental rights considered by the UN as demonstrated by the Universal Declaration of Human Rights (UDHR):

The Universal Declaration of Human Rights, article 14.1

“Everyone has the right to seek and to enjoy in other countries asylum from persecution”

Although the UDHR does not bring a responsibility for states to fulfil the rights declared, it still has the character of defining what human rights are or should be.<sup>8</sup> The declaration displays a common understanding of human rights and the right to seek asylum should be considered as part of international customs of human rights. Nevertheless, the non-binding nature of the UDHR cannot be ignored. In order to prove the existence of an independent right to seek asylum, one must look at international agreements confirming a common understanding of this right.

### 2.3.2 *The Refugee Convention and the Protocol*

The Refugee Convention, how oddly it may seem, does not explicitly grant a right to seek asylum.<sup>9</sup> However, by providing a refugee definition and ensuring basic refugee rights, the Refugee Convention demonstrates a consensus among the signatory states that they all provide asylum for protection seekers. Although not expressly regulated, the Refugee Convention must thus be considered to give a right to seek asylum in the signatory states.

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<sup>8</sup> Smith, *Textbook on International Human Rights*, 5<sup>th</sup> edit., 2012 p. 38 f.

<sup>9</sup> Convention Relating to the Status of Refugees.



Turkey was among the drafters of the Refugee Convention and was one of the original signatories of the Convention. In its original form, the Refugee Convention had a historical limit and was only applicable to events occurring before 1951.<sup>10</sup> The Convention also enabled the signatory states to choose a geographical limitation, meaning that the term refugee could apply on people fearing persecution due to events occurring in Europe or events occurring outside Europe as well.<sup>11</sup> Turkey chose the option limiting the Convention to events occurring only in Europe.

With time, the need for a refugee convention applicable to acute refugee crises created the need for an amendment of the Refugee Convention. With the Protocol, the historical limitation was removed.<sup>12</sup> However, even if the geographical limitation was removed as an option for new signatories, the already existing declarations made by earlier State Parties continue to apply.<sup>13</sup>

The Refugee Convention also provides a general principle that has become *jus cogens*, the principle of *non-refoulement*. *Non-refoulement* refers to the absolute ban for states to expel or return a refugee to a country risking his or her life or freedom in a discriminatory manner.<sup>14</sup> This principle is regarded as the ultimate safeguard against wrongfully expulsions. Due to its status as a peremptory norm, *non-refoulement* can also be applied in cases when no explicit regulation prohibits the expulsion in question.

### 2.3.3 *International Covenant on Civil and Political Rights and Convention against Torture*

The right to asylum was not included in the International Covenant on Civil and Political Rights (ICCPR) despite being one of the most important instruments in international human rights. However, various rights connected to *non-*

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<sup>10</sup> Refugee Convention, art. 1 A(2).

<sup>11</sup> Ibid, art. 1 B(1).

<sup>12</sup> Protocol Relating to the Status of Refugees, art. 1.2.

<sup>13</sup> Ibid, art. 1.3.

<sup>14</sup> Refugee Convention, art. 33(1).

*refoulement* are provided by ICCPR and prevents an expulsion or removal in a case giving reason to *non-refoulement*. These rights include the right to life and prohibition of torture and cruel, inhuman or degrading punishment.<sup>15</sup> The ICCPR also forbids the arbitrary expulsion of immigrants.<sup>16</sup>

The principle of *non-refoulement* also makes the Convention against Torture an important convention for refugees. As a result of the prohibition on torture, the Convention against Torture also obligates convention parties to not expel or return persons in a situation where they risk torture.<sup>17</sup>

#### 2.3.4 *European Convention on Human Rights*

Another international convention concerning the EU readmission agreements is the European Convention on Human Rights (ECHR) and its case law, as all EU member states and Turkey being state parties of the convention and judged by the controlling organ of the convention, the European Court of Human Rights (ECtHR). The court has created a rich and detailed case law, including within the field of refugee rights.

The ECHR does not grant a right to enjoy political asylum. Instead, the rights in the ECHR are applicable according to *non-refoulement* and prevent the removal of protection seekers or other immigrants risking death, prosecution or inhuman and degrading treatment.<sup>18</sup> The most important provision in the ECHR concerning refugees is the prohibition of torture and inhuman or degrading treatment or punishment.<sup>19</sup> The right to be free from torture or likewise treatment has been dealt with in case law with the conclusion that it also constitutes an indirect right for immigrants not to be returned or removed to a territory where they are risking this treatment. The ECHR requires the states to make sure that a person to be removed is not a refugee, making the right to seek asylum a part of

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<sup>15</sup> ICCPR, art. 6-7.

<sup>16</sup> Ibid, art. 13.

<sup>17</sup> CAT, art. 3.

<sup>18</sup> Coleman, *European Readmission Policy: Third Country Interests and Refugee Rights*, 2009, p. 265.

<sup>19</sup> ECHR, art. 3.

this indirect right. The ECHR also prohibits the collective expulsion of immigrants.<sup>20</sup> In this matter, Turkey has signed but not ratified the specific protocol.

Among the case law on refugees, the ECtHR has specifically dealt with bilateral agreements similar to readmission agreements. In the *Hirsi* case, the court criticized a bilateral agreement between Italy and Libya arguing the pushback measures regulated in the agreement violated the rights of the rejected immigrants trying to reach Italy with boats. By sending the refugees back to Libya, Italy violated the refugees right to be free from torture or inhuman and degrading treatment among other rights.<sup>21</sup> Although the agreement between Italy and Libya in this case was different from the EU-Turkey readmission agreement, the case must be considered as a guideline in agreements dealing with readmission or expulsion of individuals.

## 2.4 EU law

### 2.4.1 *Securitisation of EU migration policies*

The right to seek asylum has become one of the most important rights in Europe. Although its use has increased, recent tragedies including refugees losing their lives show that the EU is not fully implementing this right in a correct way. Today's asylum system makes refugees risk their lives in order to reach the EU borders and is therefore an unsustainable system. The main goal of the EU to unite the European states took a great leap with the abolishing of borders within the union. The borders were opened up for merchandise, services and citizen between the member states. EU citizens were able to resettle in other parts of Europe in order to seek work or create a better living. The abolition of the inner borders brought a bigger need to watch and control the outer borders which the

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<sup>20</sup> Protocol no. 4 to the ECHR, art. 4.

<sup>21</sup> *Hirsi Jamaa and Others v. Italy*, no. 27765/09.

EU shares with third countries. This meant tougher rules for third country citizens traveling to the EU.

Migration and asylum policy of the EU is defined as “securitisation” of these issues. This means that the way migration laws are handled within the EU is mostly focused on security and border control, instead of a more humanitarian approach which takes into account the migrating individuals. The humanitarian side of this matter seems to be up to the member states to implement. For example, humanitarian clauses in many directives and regulations do not constitute a responsibility for the member state, but gives them the possibility of a humanitarian approach in the implementation of the EU law.<sup>22</sup> Within the aim to create a harmonised asylum system, the EU has created several legislations regulating refugee rights.

#### 2.4.2 *EU Charter of Fundamental Rights*

As one of the few international conventions regulating a right to asylum, the Charter of Fundamental Rights of the European Union (EU Charter) has been described as a progressive legal act within the international community with other ground breaking provisions as well. This makes it not so hard to understand why the right to asylum is granted by the EU Charter.<sup>23</sup> However, the reference to the EU treaties does create conditionality for this right to be applicable in the EU. In this sense, the right to seek asylum accordingly with the EU Charter is dependent on what “seeking asylum” means within the EU legislation.

The EU Charter also prohibits collective expulsion and codifies the principle of *non-refoulement*, which serves as safeguards for the respect of the immigrants’ human rights’.<sup>24</sup> Despite the conditions on not conflicting with the EU treaties,

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<sup>22</sup> E.g. *Regulation (EU) No 604/2013* of the European Parliament and of the Council 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, art. 17.

<sup>23</sup> The EU Charter, art. 18.

<sup>24</sup> The EU Charter, art. 19.

the human rights concerning refugees in the EU Charter creates a steady ground for precautions in the implementation of migration control measures.

### 2.4.3 *Procedures Directive*

The Procedures Directive is the instrument used by EU member states to determine the measures for granting or withdrawing refugee status and to ascertain whether asylum-seekers can be removed to a “safe third country” responsible for the examination of their asylum claims.<sup>25</sup> The Directive grants the right to make an application for asylum on its own, with the possibility of requesting the application to be made at designated places.<sup>26</sup> The legal status of asylum-seekers is evaluated in an initial phase following their arrival in the territory of one of the EU member states.<sup>27</sup> Although the Procedures Directive aims to create a safe return of refugees already granted asylum in safe countries, it has been criticised because of its adoption of safe third country policy on states with questionable safety for refugees.<sup>28</sup>

The legal notions in the Procedures Directive generally imply that access to an effective asylum procedure can be denied if individuals have transited through another safe third country before reaching the State in which they are ultimately soliciting protection, and if they have already enjoyed asylum in another State.<sup>29</sup> Pursuant to the “safe third country” formula, refugees should request asylum in the first safe country they are able to reach. Since transfer of responsibility for asylum-seekers to another “safe” country does not find a legal basis in general international law, the EU rely upon readmission agreements to obtain the necessary cooperation for readmitting third-country nationals commonly. They do not only regulate the return of unauthorised migrants but also that of rejected

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<sup>25</sup> Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status.

<sup>26</sup> Directive 2005/85/EC, art. 6.

<sup>27</sup> Giuffrè, *Readmission Agreements and Refugee Rights: From a Critique to a Proposal*, RSQ, vol. 32, no. 3, 2013, p. 85 f.

<sup>28</sup> Hurwitz, *The Collective Responsibility of States to Protect Refugees*, 2009, p. 52 f.

<sup>29</sup> Directive 2005/85/EC, art. 25-27.

refugees and asylum-seekers whose application was not examined on the basis of a safe third country exception.<sup>30</sup>

The Procedures Directive has been revamped with the new Directive to be applicable from 20 July 2015.<sup>31</sup> The most important change for the right to seek asylum is the more detailed regulation regarding the access to procedure, including the training of border personnel for the proper reception of asylum applications.<sup>32</sup>

#### 2.4.4 *The Return Directive*

As far as unauthorised immigrants are concerned, the main EU instrument regulating the removal of unauthorised immigrants is the Return Directive.<sup>33</sup> This Directive sets out common rules concerning removal, return, detention standards, safeguards for returnees and re-entry bans for people subjected to a return decision.<sup>34</sup> The Return Directive underlines the need for readmission agreements with third countries to facilitate the return process.<sup>35</sup>

Although not regulating directly on asylum, the Return Directive does include a safeguard against violation of refugee rights.<sup>36</sup> By making it possible for the member states not to apply the directive to third country nationals apprehended by the borders, the right to seek asylum can be provided.<sup>37</sup> However, as the exception for border apprehending only is a choice up to the member states to make, the risk of not guaranteeing an access to protection still exists.

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<sup>30</sup> Giuffré, p. 85.

<sup>31</sup> 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, art. 51.

<sup>32</sup> Ibid, art. 6.

<sup>33</sup> 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.

<sup>34</sup> Giuffré, p. 85 f.

<sup>35</sup> Directive 2008/115/EC, para. 7 of the preamble.

<sup>36</sup> Ibid, art. 1

<sup>37</sup> Ibid, art. 2.

## 2.5 Turkish law

Although being a big country of origin for many immigrants and refugees settling to Europe in the past, Turkey has since the creation of the Republic been a major migration destination especially for Muslim ethnic groups from the Balkans, Caucasus and Central Asia. Since the end of the Cold War, Turkey has also received many immigrants from the former Soviet republic.<sup>38</sup>

### 2.5.1 *The geographical limitation*

As mentioned before, the Refugee Convention enables early signatory parties to apply the geographical limitation. In this sense, Turkey still has a geographical limitation concerning the status of refugees, meaning that only persons fearing persecution in Europe can be considered as refugees in Turkey. The Protocol is essential in making the Refugee Convention globally applicable. The fact that Turkey does not share a common understanding with the world community even in a basic thing as defining refugees raises serious questions if agreements potentially affecting refugees should be concluded with Turkey. Due to the geographical limitation, Turkey must be considered as not fully providing a right to seek asylum.

Even though Turkey does not grant refugee status for non-European refugees, many refugees still reach Turkey in order to seek protection, especially from neighbouring countries as Iran, Iraq and Syria. This fact has made Turkey create a solution with the UNHCR, granting the non-European refugees a temporary right to stay in Turkey until they are sent to another asylum destination country by the UNHCR.<sup>39</sup> Although not granting a right to seek asylum with the result of protection in Turkey, this solution still grants a protection. This is an important

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<sup>38</sup> Kirişci 2003, *The Question of Asylum and Illegal Migration in European Union-Turkish Relations*, In: Turkey and the European Union: Domestic Politics, Economic Integration and International Dynamics, Çarkoğlu, A. & Rubin, B. (editors), p. 82.

<sup>39</sup> Kirişci 2003, p. 87.

example why the right to seek asylum must be considered even in cases where there is no actual right to enjoy asylum.

To understand Turkey's role as a major transit country, one must take into account the official procedures of temporary asylum until resettlement in another safe country. This makes Turkey in fact a voluntary transit country for protection seekers and explains Turkey's position as a transit country. It is undisputable that the EU membership process introducing a new perception and new legal arrangements on the management of the immigration and asylum flow in Turkey plays a role in the changing perception of migration and asylum in the country.<sup>40</sup> In an eventual membership, the geographical limitation must cease in order to comply with EU law.

### 2.5.2 *Law on Foreigners and International Protection*

In 2013, Turkey adopted a new law addressing the issue of asylum and migration control for the first time.<sup>41</sup> The Law on Foreigners and International Protection created a new system of migration control introducing the Directorate General of Migration Management, a new administrative body for the purpose of the law dealing with visas, residence and work permits as well as asylum applications.<sup>42</sup>

The law refers to the principle of *non-refoulement*, meaning that a correct refugee reception according to the law cannot violate against *non-refoulement*.<sup>43</sup> As for the right to seek asylum, the law explicitly entitles every foreigner or stateless person the right to apply for asylum.<sup>44</sup> For non-European refugees, this application concerns a temporary residence in Turkey until resettlement to a final asylum country.<sup>45</sup> Regarding the readmission agreements Turkey concludes with

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<sup>40</sup> İçduygu & Yükserek, p. 453.

<sup>41</sup> Kirişci 2014, *Will the readmission agreement bring the EU and Turkey together or pull them apart?*, CEPS Commentaries, publ. 4 February 2014, p. 3.

<sup>42</sup> Law on Foreigners and International Protection, art. 1(1).

<sup>43</sup> Ibid, art. 4(1).

<sup>44</sup> Ibid, art. 65(3).

<sup>45</sup> Ibid, art. 62(1).



the EU as well as other countries, the law establishes the responsible department for these agreements.<sup>46</sup>

Although the law makes sure that Turkey complies with international standards on refugee rights, the law is new and the migration control system created with it untested. Before the introduction of the new law, there were concerns over Turkey's capacity to receive refugees in a correct manner. The shortage of trained personnel dealing with asylum seekers and unauthorised migrants as well as the inadequacy of facilities for apprehended irregular migrants was among these concerns.<sup>47</sup> With the new law, these problems will assumable not exist once the law has been implemented and applied over a period of time.

## 2.6 Conclusion

Although there are no provisions in international public law confirming the right to seek asylum, the existence of such right must be assumed to exist due to the extend of regulations on refugee determination.<sup>48</sup> Additionally, the powerful and undeniable principle of *non-refoulement* makes an extra safeguard preventing wrongful expulsions. *Non-refoulement* can also be described as making the right to seek asylum indirectly mandatory, as the determination if an immigrant can be returned or not partially overlaps with the examination of protection claims. Logically, in order to not violate *non-refoulement*, immigrants must be granted a right to seek asylum and have protection claims examined.

The right to seek asylum exists and must be granted when implementing various migration control measures. In the case of the EU, the right to seek asylum means the right to access asylum procedures and is regulated and ensured in EU

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<sup>46</sup> Law on Foreigners and International Protection, art. 108(1)(a)(6).

<sup>47</sup> İçduygu & Yükserek, p. 453.

<sup>48</sup> The EU Charter must be excluded in this assumption, as it only is applicable among the EU member states.

legislation. However, it is important to have in mind that this right also needs to be ensured in reality. Precautionary measures such as the return of immigrants by the borders fails to ensure the right to seek asylum. In this sense, the readmission agreements must be clear enough to make sure the implementations are made with respect to the right to seek asylum.

# Chapter 3

## The EU-Turkey Readmission Agreement

### 3.1 Introduction

On December 16<sup>th</sup> 2013, the EU Commissioner for Home Affairs Cecilia Malmström signed the EU-Turkey readmission agreement with the Turkish authorities. The agreement is part of the EU's wide politics of migration and border control and the conclusion of the agreement is considered as a historical moment bringing the cooperation between the EU and Turkey forward.<sup>49</sup> In the following, the agreement will be described to give a steady ground to understand if readmission agreements violate the right to seek for asylum. In order to fully understand the importance of the particular EU-Turkey agreement, a background of the agreement will be given before the examination of it.

### 3.2 Turkey's accession to the EU

The initiative to a deeper European partnership between the European states after the World War II also included the participation of Turkey. Turkey was one of the founding states of Council of Europe and among the first member states of the NATO among other European organisations. A Turkish membership of a wider European community has never been a matter within the last decades. The first steps towards a membership of the European Economic Community took place in 1963 with the Ankara Agreement between the EEC and Turkey.<sup>50</sup>

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<sup>49</sup> European Commission press release, *Cecilia Malmström signs the Readmission Agreement and launches the Visa Liberalisation Dialogue with Turkey*, publ. 16 December 2013.

<sup>50</sup> Agreement Establishing an Association Between the European Economic Community and Turkey.

Although the Association Council created within the Ankara Agreement did bring various rights for Turkish nationals to work and reside in the EEC, the Association Council did not regulate anything about immigration control as such.<sup>51</sup>

In 1999 Turkey gained the status of candidate country, but the actual membership negotiations started in 2005 with the accession process to the European Union. The shift from association agreement to a negotiation of membership meant a breakaway from the comfort-zone of a relation of only economic matters between the Turkey and the EU. Within the accession process, Turkey needs to fulfil the criteria in different fields and match the political, economic, juridical and administrative standards of the EU. This includes the field of Justice and Home Affairs, which deals with cooperation and common policies on various cross-border issues such as migration and border control. The EU institutions has shared mandate with the member states within the area of Justice and Home Affairs, meaning that Turkey must be prepared and ready to share the control of these matters after an eventual membership.

The difficulty of meeting the accession criteria has been one of the main obstacles in Turkey's path towards becoming an EU member state. The readmission agreement is seen as crucial in reassuring Turkey's competence to meet the criteria for the EU, especially as the Turkish borders eventually will form a big part of the EU's outer borders with third countries in the case of membership to the EU.<sup>52</sup> The promise of an EU membership must be considered as the main reason for Turkey to conclude the agreement, which makes it important to understand the dynamics of the possibility of a membership with the will to implement the readmission agreement correctly. The more possible an EU membership is for Turkey, the better the agreement is assumed to be implemented. A successful implementation of the agreement will make sure that

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<sup>51</sup> Turkish Ministry for EU Affairs, *Turkey-European Community Association Council Decisions (1972-2000)*.

<sup>52</sup> Coleman, p. 179.

the EU trusts Turkey as the new gate and border to the union. Another factor that assumable must have encouraged the Turkish part to sign the agreement is the visa liberation roadmap jointly signed with the readmission agreement.

For the EU, the readmission agreement has not only been a matter of Turkey's fulfilment of the accession criteria. The preparations for a readmission agreement with Turkey started before the accession process when the negotiating directives for an EC-Turkey readmission agreement were adopted by the Council of Ministers in 2002.<sup>53</sup> The need of a readmission agreement with Turkey was more important before the accession process, as a big part of the immigrants in the EU has had more or less connections with Turkey. Earlier, many Turkish nationals were present in the EU unauthorised including Kurdish protection seekers having their protection claims rejected. Additionally, Turkey is known as a major transit country for refugees and other migrants trying to reach the EU.<sup>54</sup> The readmission agreement can be seen as a testing of what a membership will mean for Turkey in the area of migration control but as well as a merging destination country for protection seekers.

### 3.3 Analysis of the agreement

After years of negotiations the EU-Turkey readmission agreement is coming to a conclusion, but is still in the final stages. Although the European Parliament has approved the agreement signed between the European Commission and the Turkish government, it needs to be formally ratified by the EU and Turkey to enter into force.<sup>55</sup> Within the ratification process the agreement is closely scrutinised, especially by the Turkish part. Members of the Turkish Parliament play a big part in this scrutiny, as several of them are sceptical and critical by the

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<sup>53</sup> Council of the EU, *Criteria for the identification of third countries with which new readmission agreements need to be negotiated*, Council doc. 7990/02, para. 3.

<sup>54</sup> Coleman, p. 146.

<sup>55</sup> EP press release, *Parliament backs EU-Turkey deal to return clandestine migrants*, publ. 26 February 2014.

fact that the joined agreement of a visa liberation road map is not directly incorporated into the readmission agreement.<sup>56</sup>

### *3.3.1 General provisions*

The readmission agreement and the visa liberation roadmap include provisions that allows for transparency with respect to the responsibilities of both sides. A joint readmission committee composed by representatives of both parties is established in order to monitor the application of the agreement as well as taking various decisions and recommending adjustments.<sup>57</sup> Although the agreement takes effect already two months after ratification, Turkey will not have to accept third country migrants who reach EU via Turkey until three years after the agreement has come into force.<sup>58</sup> This exception is good considering the lack of experience of cooperation on readmission that exists between EU and Turkey. In order for the readmissions to work correctly, the reception system of Turkey needs to improve and have a steady ground in time for readmissions. With a steady reception system and experience, the risk of violating human rights must be assumed to be minimised.

Addressing Turkey's concerns of not gaining anything from the agreement, Turkey has the right to suspend the agreement if the EU does not meet the terms of the visa liberation roadmap. Equally, for the visa liberalisation to occur the readmission agreement has to come into force and actually work.<sup>59</sup> However, the right to terminate the agreement is not bound to any particular circumstance and is more of a general character.<sup>60</sup> Concerning the right to suspend the agreement in relation with the three-years exception on non-nationals, it seems odd to have a practical meaning three years after the agreement has come into effect. The question is if it is possible to suspend the agreement after a couple of years in force without losing political prestige. Further questions arise on the visa

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<sup>56</sup> Kirişci 2014, p. 2.

<sup>57</sup> The EU-Turkey Readmission Agreement, art. 19.

<sup>58</sup> Ibid, art. 24.

<sup>59</sup> Kirişci 2014, p. 3.

<sup>60</sup> The EU-Turkey Readmission Agreement, art. 24.5.

facilitation program and if it can start sooner than the three-years exception expires. These questions demonstrate how uncertainties are already surfacing in the general provisions of the agreement.

### 3.3.2 *The readmission procedures*

The readmission agreement is concluded in order to strengthen the handling of unauthorised immigration in EU and Turkey setting out effective procedures to return persons who do no longer fulfil the conditions for entry, presence or residence within the party states respectively.<sup>61</sup> This is regulated as a responsibility to readmit nationals of Turkey or the Member States between the parties, as well as third country nationals or stateless persons who do not have a valid permit to stay in the territories of the respective parties.<sup>62</sup> Unauthorised third country nationals and stateless persons can only be readmitted to respective party if they have stayed in or transited through that state and entered without permission directly from that state.<sup>63</sup>

The agreement relies on certain principles in order to function as smoothly as possible. The most important principle is to make every effort to return third country nationals and stateless persons directly to the country of origin, although this principle does not apply to accelerated procedures regarding third-country nationals and stateless persons that Turkey shall readmit.<sup>64</sup> An accelerated procedure is possible when unauthorised immigrants are apprehended in the border regions.<sup>65</sup> As the agreement extends the definition border region to include all external borders for both parties, the agreement also applies to migrants entering EU by sea coming directly from Turkey.<sup>66</sup> Consequently, the readmission agreement will enable an EU member state to send back immigrants who do not have an authorisation to enter the country back to Turkey, without

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<sup>61</sup> The EU-Turkey Readmission Agreement, para. 1-2 of the preamble.

<sup>62</sup> Ibid, art. 3-6.

<sup>63</sup> Ibid, art. 3.1 and 6.1.

<sup>64</sup> Ibid, art. 7.1.

<sup>65</sup> Ibid, art. 7.4.

<sup>66</sup> Ibid, art. 1(p).

investigating further about the country of origin. Provisions on accelerated procedures seem to be the legal ground for border forces wrongly justifying pushbacks.

The readmission requires a readmission application containing personal information of the person to be readmitted. If possible, the application should include information regarding the person's need of help or care.<sup>67</sup> The application must be submitted to the requested state within six months after the requesting state has gained knowledge that a person does not fulfil the conditions for entry, presence or residence. This time limit can be extended in cases of hindrance to submit the application in time until the hindrance is overcome.<sup>68</sup>

A readmission application must be replied within 25 calendar days or according to the national legislation of the requesting state if the time limit is regulated as less. In case of hindrance to reply and if the legislation of the requesting state is not regulating lesser maximum time limit, the time limit can be extended to 60 days. When a reply is not given within the time limits, it should be considered as an acceptance of the application and an agreement is reached.<sup>69</sup> After the application has been replied and an agreement has been reached, the readmission shall be executed within three months.<sup>70</sup>

The requested state can refuse a readmission request with an explanation of the reason.<sup>71</sup> The fear of a breach of non-refoulement is mentioned as a valid ground to refuse a readmission request. By being refused a request to readmit, the requesting state shall take back the third-country national or stateless person without exception.<sup>72</sup>

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<sup>67</sup> The EU-Turkey Readmission Agreement, art. 8.2.

<sup>68</sup> Ibid, art. 11.1

<sup>69</sup> Ibid, art. 11.2.

<sup>70</sup> Ibid, art. 11.3.

<sup>71</sup> Ibid, art. 11.4.

<sup>72</sup> Ibid, art. 14.4



### 3.3.3 *Protection seekers*

Starting by referring to asylum seekers in the preamble, the provisions in the agreement does not remove or limit the protection seekers access to seek asylum.<sup>73</sup> The non-affected clause refers to the responsibilities arising from international law and lists conventions that are not to be affected by the agreement. Among these conventions are the Refugee Convention, the Protocol as well as the ECHR. The article also refers to EU directives regulating refugee rights.<sup>74</sup> As the agreement deals with expulsion of non-nationals, the need to address public international law is important. The non-affected clause serves as a safeguard for refugees and makes sure that the agreement itself does not violate any human rights.

As mentioned before, the agreement enables the refusal of a readmission application. The readmission can also be aborted in cases when the readmitted person risks persecution in the country of origin. In these cases, the party states can stop a transit to third country making the requesting state take back the readmitted person.<sup>75</sup> The provision clarifies the principle of non-refoulement, but the need for it raises questions as non-refoulement is mentioned in general provisions. The circumstances described are factors determining the status of a refugee. According to the non-affected clause, a refugee cannot be readmitted. A scenario where a person fulfilling the criteria of a refugee but not being a refugee can only occur if he or she has not applied for asylum. A farfetched guess is that the agreement tries to include persons that willingly have not applied for asylum. A more realistic reason can be wrongfully rejected protection claims. If so, the article is a proof that refugees might be subjected to readmission in violation with the safeguards of the agreement.

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<sup>73</sup> The EU-Turkey Readmission Agreement, para. 3-4 of the preamble.

<sup>74</sup> Ibid, art. 18.

<sup>75</sup> Ibid, art. 14.

### 3.4 Turkey's responsibilities

The readmission agreement between the EU and Turkey is based on mutual respect of both parties' responsibilities without bringing more burdens to one of the parties, but the reality is that Turkey needs improvements in the area of migration control in order to fulfil the agreement. With 11 000-km-long borders and an extensive visa-free regime Turkey is an easy country to enter, which proofs the extra need of improvements.<sup>76</sup>

#### 3.4.1 Border control

Within the visa liberation dialog, the European Commission has made it clear that Turkey must ensure an effective border control in order to enjoy visa liberation and free inner market for individuals. This addresses one of the main requirements from Turkey's accession process, which is the replacement of the current border-control system by a professional civilian border control unit. The proposal is largely welcomed, although Turkey prefers to implement this gradually due to the huge efforts and financial costs it would bring. Concerns on the Turkish side over instituting a civilian border control unit still exist on the grounds that Turkey's eastern borders are vulnerable to terrorism, regional unrest and violence in neighbouring countries. The large costs, both political and financial, coupled with the lack of a secure promise of full membership of the EU have resulted in delay on the part of Turkey.<sup>77</sup>

The delay of a readmission agreement with the EU has also to do with Turkey's own preparations before a final implementation. In order to make sure that readmitted persons will be sent back to their countries of origin, Turkey has concluded its own readmission agreements with several third countries.<sup>78</sup> The readmission agreement between Turkey and third countries also guaranties a safe

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<sup>76</sup> CoE, Committee on Migration, Refugees and Displaced Persons, *Migration and asylum: mounting tensions in the Eastern Mediterranean*, p. 9.

<sup>77</sup> Macmillan, *Europeanisation and Migration and Asylum Policies in Turkey*, In: Turkey and the European Union: Processes of Europeanisation, Nas, Ç. & Özer, Y. (editors), 2012, p. 251 f.

<sup>78</sup> E.g. with Belarus and Pakistan.

return for unauthorized immigrants not seeking protection. This is essential for Turkey as an increasing country of destination in order to be prepared to handle the administrative changes.<sup>79</sup>

### 3.4.2 *Refugee rights*

Although it can be questioned how well protection claims are tried in the EU member states today and if these trials will lack in quality after the EU-Turkey agreement, the readmission agreement in does not contain any provision directly violating any refugee rights, especially not the right to seek asylum. The problems are instead with the practical application of these kinds of agreements and the informal measures taken by the border securities. The agreement makes it possible to conclude bilateral protocols between Turkey and Member States.<sup>80</sup> This might be used to make sure that Turkey respects the right to seek for asylum, but at the same time misused to expel a protection seeker to Turkey.

Worse case scenarios with more refugee crisis and economic downfall in Turkey are described within doctrine, leading to more immigrants fleeing to Turkey and more Turkish citizen trying their luck in the EU. This comes with questions of what kind of impact the readmission agreement will hold in these cases.<sup>81</sup> However, these questions tend to seem irrelevant when taking account one of the main reasons behind the agreement being Turkey's accession to the EU. The full implementation of the agreement is a key to further development of the accession process, which means that the readmission agreement only will be a temporary measure until a full membership for Turkey. This also shows the importance of why the agreement must work. By implementing the agreement correctly, which logically means fulfilment of other accession criteria, the future of the agreement will be a non-question in case of a membership to the EU.

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<sup>79</sup> Coleman, p. 179.

<sup>80</sup> The EU-Turkey Readmission Agreement, art. 20-21.

<sup>81</sup> Kirişci 2014, p. 4.

Although the readmission agreement brings improvements in Turkey's refugee reception, it is still important to not lose focus on the potential misuse of the agreement. Even if the agreement would be temporary, the misuse occurring during its time would still affect numerous of protection seekers. In the case of a refugee crisis, this would lead to a lost generation taking years to heal. The misuse would also most certainly pave way for further violation of refugee rights in Turkey as an EU member state.

#### 3.4.3 *Violation of the right to seek asylum*

As it has been made clear, the EU-Turkey readmission agreement itself does not violate the right to seek asylum. However, there are questionable provisions constituting a risk of violating this right. Among these is a provision in the non-affectation clause, which gives the possibility to return persons without using the procedures laid down in the agreement.<sup>82</sup> The provision makes it possible to return a person under formal and informal arrangements. The possibility to return persons under informal arrangements is alarming, as it increases the risks of push back of refugees. Another problem to take into consideration is the possible violation of refugee rights is the potential to reject refugee claims on unclear grounds in order to make Turkey the responsible asylum country, but this problem seems less realistic taking account the EU revision of refugee reception in the member states.

### 3.5 Conclusion

The EU-Turkey agreement is important in two aspects, EU's migration policy on non-EU citizen and Turkey's accession to the EU. However, the agreement is not only a part of strategic partnership between Turkey and the EU. The agreement deals with the removal of individuals, which creates the need for precautions to ensure their rights. As the examination of the agreement has demonstrated, the

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<sup>82</sup> The EU-Turkey Readmission Agreement, art. 18.7.

agreement in itself seems to fulfil this and ensures the respect of refugee rights. However, it does not explicitly deal with the right to seek asylum. This means one safeguard less against eventual misuse of the readmission agreement.

The EU-Turkey readmission agreement is keen on not violating refugee rights on the one hand and specifically creates a loophole for misuse of the agreement on the other hand. The uncertainty whether the agreement will help respecting human rights or violate them must be considered the biggest concern regarding the right to seek asylum.

# Chapter 4

## The Practice of Readmission Agreements

### 4.1 Introduction

This study has demonstrated the importance of how readmission agreements are implemented and that it is the main problem in the failure of ensuring the right to seek asylum. However, the conclusion of agreements in order to remove individuals is in fact a way to prevent arbitrary removals without any regulation. At least, readmission agreements determine a responsible country for the person thus making it impossible to remove individuals from state territories with unclear circumstances. In this sense, the readmission agreements should comply with human rights.

This chapter will give an overview of the agreements concluded between Spain-Morocco, Italy-Libya and Greece-Turkey in order to find out in how the implementation of these readmission agreements have violated the right to seek asylum.

### 4.2 EU's readmission agreements

The EU has within its migration policy signed several readmission agreements with third countries. These third countries do not only include neighbouring countries as Turkey and Ukraine, but also countries geographically far from the European continent as China and Pakistan. The concept of readmission agreements has been a part of Europe for a long time. The first readmission

agreement between European states were concluded in late 19<sup>th</sup>-early 20<sup>th</sup> century. These early agreements were usually concluded in order to expel *persona non grata* or others constituting a threat for the nation.<sup>83</sup> But it was in the late 90's after the increase of refugees due to wars that the European Community started preparing agreements with states outside of the Community. Consequently, all readmission agreements between the EU and third countries do not only concern own nationals but also third country citizens and stateless persons as well.<sup>84</sup> Today, the legal ground for EU readmission agreements is found in the Treaty on the Functioning of the European Union (TFEU) article 79(3).<sup>85</sup>

Signing agreements between states dealing with the removal of individuals may seem as an abuse of state power, but readmission agreements concerning own nationals is regarded as relying on human rights. The individual's right to return and the state responsibility to take back *persona non grata* are meant to justify readmission agreements. However, this opinion is not confirmed within the legal context of international public law.<sup>86</sup> Even if so, the return of non-citizens cannot be justified by this opinion.

Although the incentive for the EU to conclude readmission agreements with third countries may seem to be a part of the abolition of its inner borders, there are other factors creating the need for readmission agreements.<sup>87</sup> Reasons for the EU to conclude readmission agreements include difficulties sending to countries of origin, the high costs of identifying and dealing with unauthorised immigrants and the will to create a "buffer zone".<sup>88</sup> The EU practice of concluding readmission agreements has made an impact on other countries as well, with

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<sup>83</sup> Coleman, p. 14

<sup>84</sup> Ibid, p. 28.

<sup>85</sup> TFEU art. 79 (3): "The Union may conclude agreements with third countries for the readmission to their countries of origin or provenance of third-country nationals who do not or who no longer fulfil the conditions for entry, presence or residence in the territory of one of the Member States."

<sup>86</sup> Ibid, p. 29 f.

<sup>87</sup> Ibid, p. 51.

<sup>88</sup> Ibid, p. 61.

increasing numbers of readmission agreements concluded between third countries.<sup>89</sup>

### 4.3 Readmission agreements in human rights violations

Readmission agreements may be effective in discouraging immigrants to try to get in that specific country. However, the immigrants do not disappear or stay where they are pushed back. Effectively enforced readmission agreements means a shifting of migration routes, as has been the result of Spain's and Italy's readmission agreement. Instead of the Spanish and Italian routes, the heavy immigration route has turned to the border between Greece and Turkey.<sup>90</sup> How does readmission agreements violate the right to seek asylum? In the following, the practice of several agreements between EU member states and transit countries will give an answer to this question.

#### 4.3.1 *The Spain-Morocco agreement*

Spain's two enclaves in Morocco, Ceuta and Melilla, have caused much attention as main points for immigrants trying to reach the EU. Although Spanish law grants several rights for immigrants intercepted at the border, including legal assistance and identification, these safeguard does not seem to be respected in Spanish enclaves in North Africa. Reports shows that immigrants are pushed back to Morocco while trying to reach the borders to Spain and the EU.<sup>91</sup>

The reason for these pushbacks and returns to Morocco is confirmed to be the readmission agreement between Spain and Morocco, which is in force since 2012. Although the agreement in itself provides safeguards against arbitrary pushbacks, officers involved in the pushbacks mean that the agreement is the

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<sup>89</sup> Coleman, p. 187.

<sup>90</sup> CoE, Committee on Migration, Refugees and Displaced Persons, *Migration and asylum: mounting tensions in the Eastern Mediterranean*, p. 9.

<sup>91</sup> ECRE Weekly Bulletin, *Spain illegally pushing back migrants to Morocco*, publ. 22 November 2013.



legal basis for the return of migrants back to Morocco. Nevertheless, even if the agreement did not prevent such pushbacks it would still violate Spanish law as well as EU law on the right to seek asylum.<sup>92</sup>

Due to the Spain-Morocco agreement, violating human rights does not seem to be as intimidating for the border security as it should be. Spain has installed fences designed to prevent climbing and has also announced it would extend the breakwaters separating Ceuta and Morocco. These security measures have contributed to incidents with fatal outcomes. Reports confirm immigrants losing their lives in water trying to reach Ceuta on February 2014. In this specific accident, officials have confirmed that border security fired rubber bullets and teargas into the water. The EU have expressed concerns that the firing of rubber bullets may have provoked panic among the swimmers and contributed to the deaths. Evidence appears to show Spanish security leading survivors from the beach straight back to Moroccan territory.<sup>93</sup>

In spite of the strict border control and security measures taken by the Spanish authorities, the desperation of the immigrants has not prevented them from successfully reaching Spanish territory. According to official statistics, over 4,300 people entered the two enclaves irregularly in 2013, compared with 2,804 in 2012. Migrants in large groups regularly attempt to scale the fences separating Ceuta and Melilla from Morocco and prove that pushbacks may not work as a sustainable measure. In March 2014, nearly 500 migrants managed to climb over the fences at Melilla at one single occasion, successfully entering EU soil in Melilla in the largest successful attempts in recent years.<sup>94</sup> However, even in cases where immigrants reach Spanish territory in Melilla, they are not guaranteed access to protection procedures. Instead, many have been returned to Morocco.<sup>95</sup>

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<sup>92</sup> ECRE Weekly Bulletin, *Spain illegally pushing back migrants to Morocco*.

<sup>93</sup> HRW *Spain/Morocco: Protect Migrants, Asylum Seekers*, publ. 24 March 2014.

<sup>94</sup> *Ibid.*

<sup>95</sup> ECRE Weekly Bulletin, *Spain illegally pushing back migrants to Morocco*.

#### 4.3.2 *The Italy-Libya agreement*

As demonstrated in the *Hirsi Jamaa* case, Italy has years of experience in cooperating with Libya on returning immigrant. It is not surprising that the UNCHR has criticised Italy for the resulting pushback measures being a part of the cooperation.<sup>96</sup> Although the EU has negotiated a number of readmission agreements, the absence of a clear regional framework for such agreements including a lack of minimum human rights standards, has led to the creation of a number of bilateral readmission agreements between Italy and its neighbours which often do not appear to have human rights at their core.

After the decision of the European Court of Human Rights pronounced in the *Hirsi* case that pushbacks by Italian authorities towards Libya were not acceptable, the Italy-Libya agreement suspended and pushbacks appeared to cease as the Italian government publicly committed to implement the judgement.<sup>97</sup> However Italy and Libya agreed to start their collaboration again just a few weeks after the judgment on the *Hirsi* case. The new agreement signed with Libya includes planning of sea operations, under the terms of the bilateral agreements on migration control which earlier had led to violations according to the ECtHR.<sup>98</sup> This new political framework however, contains very little concrete information on strengthening Libya's normative framework and institutional capacities regarding the human rights of migrants."<sup>99</sup>

The Italian measures to return immigrants before reaching the borders have affected other EU member states in unwelcomed ways. In 2009, Italian border security intercepted migrants in Maltese territory. Despite that Italy was not authorised to do so, the immigrants were apprehended on Italian boats and sent

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<sup>96</sup> UNCHR press release, *UNHCR deeply concerned over returns from Italy to Libya*, publ. 7 May 2009.

<sup>97</sup> UNHCR, *UN Special Rapporteur on the human rights of migrants concludes his third country visit in his regional study on the human rights of migrants at the borders of the European Union: Italy*, publ. 8 October 2012.

<sup>98</sup> Amnesty International public statement, *Italy must sink agreements with Libya on migration control*, publ. 20 June 2012.

<sup>99</sup> UNHCR, UN Special Rapporteur *supra*.

back to Libya without proper identification of any protection claims and thus yet again violating their right to seek asylum.<sup>100</sup>

#### 4.3.3 *The Greece-Turkey agreement*

Turkey's cooperation on return of immigrants has not only been with the EU. Greece and Turkey has dealt with this question over a decade, with a readmission protocol signed as early as 2001. However, due to the frosty dynamics of political relations being a tradition between Greece and Turkey, a proper implementation of readmissions between the countries was not agreed upon until 2010.<sup>101</sup> Within a couple of years after this, violations of human rights began to appear and were confirmed by reports. In 2012, there were reports of several pushbacks of boats with immigrants where Greek border security meets the boats in sea and leads them back to Turkish water.<sup>102</sup>

Although readmission agreements may be designed to cope with only unauthorised migration, the implementation of these agreements jeopardise refugees' lives.<sup>103</sup> An example of this is the implementation of a readmission agreement between Greece and Turkey. In this case, Greece has been tempted to push boats of immigrants back into Turkish waters or release them, allowing them to escape back into Turkey.<sup>104</sup> As late as in January 2014, a horrible accident was reported involving the pushback of boats between Greece and Turkey. The survivors told UNHCR they had been towed by Greek security in the direction of Turkey at the time of the accident.<sup>105</sup>

#### 4.3.3 *Other concerns over readmission agreements*

The examples mentioned above show how readmission agreements can be misused and thereby violate refugee rights, especially the right to seek asylum.

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<sup>100</sup> UNCHR press release, *UNHCR deeply concerned over returns from Italy to Libya*.

<sup>101</sup> CoE, Committee on Migration, Refugees and Displaced Persons, *Migration and asylum: mounting tensions in the Eastern Mediterranean*, p. 9.

<sup>102</sup> Amnesty International, *Greece: the end of the road for refugees, asylum-seekers and migrants*, p. 4.

<sup>103</sup> Giuffrè, p. 81.

<sup>104</sup> Macmillan, p. 252.

<sup>105</sup> UNCHR press release, *Statement on boat incident off Greece coast*, publ. 21 January 2014.

Another example of the misuse of readmission agreements is the informal co-operations that were used by the Netherlands within the former readmission agreements with Bulgaria and Romania, sending people back to country of origin without identification of the immigrants.<sup>106</sup>

Besides from risking a violation of the access to protection, readmission agreements have also created scenarios where readmitted third country nationals cannot be sent to country of origin and are trapped in the transit country. In cases where the reception capacity of the readmitting country is not well equipped, violations of basic human rights are not inevitable. In another point of view, the border control equipment provided to third countries through a readmission agreement could be used for purposes that could damage the EU, including military purposes.<sup>107</sup>

#### 4.4 Conclusion

The critique against readmission agreements goes on, with the following three statements summing up the most necessary points. The readmission agreements do not regulate an obligation to inform the readmitting country if the persons being readmitted are protection seekers or not, risking violation of non-refoulement. There is not an explicit reference to the principle of non-refoulement in some of the readmission agreements. The responsibility of asylum application must be clarified to ensure the right to seek asylum.<sup>108</sup> With big flaws concerning refugee rights, the readmission agreements are regarded as problematic within the international refugee law. However, the UNCHR encourages the conclusion of readmission agreements. At the same time, the

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<sup>106</sup> Coleman, p. 60.

<sup>107</sup> Ibid, p. 63.

<sup>108</sup> Ibid, p. 229.

UNCHR expresses the need of agreements that refer to the needs of protection seekers and establishing a responsibility to try application for asylum.<sup>109</sup>

Although the agreements have flaws that could be rendered, the implementation of the readmission agreements demonstrated in this chapter has one problem in common. Irrespectively of how many safeguards the agreements in themselves may contain, the safeguards in and outside the agreements do not seem to be able to prevent the violations. Because of the life risking situations involved, one violation is more than unacceptable. The earlier statement that the readmission agreements in themselves may not violate the right to seek asylum can be wrong. It seems like the existence of a readmission agreement justifies wrongful measures, no matter what the agreement regulates.

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<sup>109</sup> Coleman, p. 223 f.

# Chapter 5

## An Unsustainable Asylum Policy

### 5.1 Introduction

As readmission agreements forms a part of EU's migration control, it is an expression of the sovereign right for the member states to control and decide over who can enter their country or not. At the same time, a part of that sovereignty is given away by the fact that the states have shared competence with the EU over migration. Additionally, by signing various human rights conventions states have also given away a part of its sovereignty over migration control.

The implementation of readmission agreements has shown an overwhelmingly carelessness not to comply with the safeguards of the agreements as well as the right to seek asylum. The inadequacy of the EU-Turkey agreement that this study has shown requires actions in order to ensure that refugee rights are not violated. In the following, a couple of suggestions will be described and analysed with focus on the right to seek asylum.

### 5.2 Solutions within readmission agreements

#### 5.2.1 *Application clause*

The main problem of the EU-Turkey readmission agreement is the risk of refugees being readmitted to Turkey without any chance to seek asylum neither in the EU or Turkey. Although the agreement does contain a non-affectation clause

regarding the international obligations of both parties, the right to seek asylum should be mentioned on its own. By recognising the right to seek asylum within the readmission agreement, a pushback of immigrants would be impossible since respecting the immigrant's right to apply for asylum. The recognition of a right to seek asylum would also create a legal springboard in order to achieve the promising policy of burden sharing that the readmission agreement is said to be about.

Nevertheless, the suggestion of an application-clause is not unproblematic where a similar burden sharing system is already in use by the EU with the Dublin Regulation.<sup>110</sup> Started in order to guarantee a quick and easy asylum process for refugees, it has turned into a carousel of removals between the member states. The burden sharing has failed as the main countries receiving refugees through the Dublin Regulation has been the border countries such as Greece and Bulgaria. In the case of Greece, the capacity of refugee reception fell apart making a removal to Greece equal to an inhuman and degrading treatment.<sup>111</sup> Today removals to Greece have stopped, but other countries showing the same symptoms as Greece still accept protection seekers. The humanitarian clause in the Dublin Regulation is meant to be used very strictly, meaning the member states rarely use them even in cases where the drafter might have thought it to be used. Maybe in reality, these humanitarian cases are not as rare as the drafters imagined.

### 5.2.2 *Real burden sharing*

The Dublin Regulation shows that a burden sharing of protection seekers is not as easy in reality as it might seem on paper. My own conclusions on the Dublin Regulation and its problems are that cooperation for protection seekers should firstly focus on the protection seeker and not on the member states interests. Secondly, if the basic grounds for a harmonious cooperation are not in place in

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<sup>110</sup> Regulation (EU) No. 604/2013.

<sup>111</sup> M.S.S. v. Belgium and Greece, no. 30696/09.

the member states, the cooperation must create a common institute receiving the protection seekers. Before EU tries to regulate migration control and refugee conditions in third countries, it should fix the problems within the union itself. Otherwise, the bad chain of expulsion to inhuman conditions and de facto violations of fundamental rights as freedom from torture and inhuman treatment will go on.

An application-clause must regulate burden sharing in a sense that really gives the right meaning of the word sharing. Unlike the Dublin Regulation, the determinative action for taking the responsibility of an asylum application should not be the transit of a country or which border was trespassed. Besides from rules regulating family reunion and similar circumstances connecting the refugee with one of the parties, the burden sharing should be decided with taking the reception capacity into account. This suggestion points out a big lack of a burden sharing agreement between the EU and third countries. Maybe it would be better with a separate Dublin System with third countries including detailed regulation instead of a clause in individual readmission agreements.

In order for such a burden sharing to work, the parties must meet the minimum standards for refugee reception. This includes the crucial abolition of any limitation in refugee recognition, including the geographical limitation that Turkey has today. The standards for refugee reception must obviously apply on the member states of EU as well, which does not seem to be so obvious today.

### 5.2.3 *Removing the scepticism*

Turkey's sceptical perspective on the Europeanization of national immigration and asylum policies and practices is strongly linked to the question of burden sharing versus burden shifting.<sup>112</sup> The implementation of a readmission agreement with the EU, in the absence of adequate arrangements for burden sharing, may also contribute to Turkey's effectively becoming a buffer zone for

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<sup>112</sup> İçduygu & Yükserek, p. 453.



unwanted migrants and asylum seekers otherwise destined for the EU. This would not only put undue strain on Turkey's financial resources but would also prevent some genuine asylum seekers from making claims in the EU.<sup>113</sup>

### 5.3 Solutions outside readmission agreements

#### 5.3.1 *The root cause of pushbacks*

This study shows that the implementation of readmission agreements risks violation of the right to seek asylum. Whether the agreements provide any safeguards against violations of human rights or not, the problems are found within the implementation of the agreements. A reason for the wrongfully implementation must be the difficulty to identify the subjects of the agreements, which are persons not fulfilling the condition for entry to the EU. Refugees taking illegal ways into EU wanting to seek asylum do not fulfil this condition in a formal way, otherwise they would have come legally.

Although there are safeguards which prevent expulsion only on the ground of an illegal entrance to the EU, the rejection and pushbacks of all unauthorized immigrants without separating refugees show that such safeguards do not come into affect in the implementation. The presumption could also work in the opposite way, as to regard every immigrant as a potential refugee and consequently giving every immigrant the chance to apply for asylum. This is the real meaning of the right to seek asylum, leading to minimising the risk of refoulement. However, the refugee-presumption would also make border control into application receptions.

The problems with pushbacks even with legal safeguards have a rather simple solution. With an acknowledgment of every immigrants right seek asylum, every immigrant apprehended by the borders would be given the chance to apply for

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<sup>113</sup> Macmillan, p. 252.

asylum. This practice would make eventual pushbacks more severe than today, as they would directly violate every immigrants right to seek asylum instead of just indirectly affecting refugees wrongfully perceived as other immigrants. However, this wouldn't be something new. Instead this direct reception of all immigrants would mean a correct implementation of the safeguards already within the EU-Turkey readmission agreement as in most other agreements in this field. The question of wrongful implementations of the agreements with human rights violations would still be in doubt and not handled once and for all.

### *5.3.2 Legal ways to the EU*

In order to prevent the right to seek asylum to be a question of arbitrary border control, the underlying reasons of pushbacks must be solved. Although pushbacks may seem as the result of a complex political balance between border protection and asylum law, the only reason pushbacks can occur in violation with human rights is because of the illegal act of trespassing borders unauthorised. As mentioned before, refugees taking illegal ways into EU do so in lack of other options. There are no legal ways to pass the EU borders in order to give an application for asylum. This is the breaking point; there is no legal access to asylum in EU. Hence, immigrants do not have the right to seek asylum without committing a perceived criminal act and risking not only being perceived as a criminal and subjected to pushbacks, they also risk their lives and health due to dangerous and harmful border security.

It must be emphasised that the most obvious underlying reason for pushbacks of refugees is the lack of legal access to protection. If there were safe ways to seek asylum in the EU, refugees would not need to reach the EU borders assuming proper granting of the right to seek asylum. Without doubt, unauthorised immigrants not in need of international protection would still try to reach the EU and be subjected to readmission. However, eventual human rights violations due to readmissions would be easier to prevent, as these immigrants would not be a

sensitive issue with further responsibilities for the involved states as in the case of asylum seekers.

The discussion of how to enable a safe and legal access to asylum in the EU is not a question to be answered in this study. Nevertheless it is an interesting question, which acquires a brief comment with the right to seek asylum in mind. As the right to seek asylum is an important human right, every human should have access to this right no matter where they are. This means an access to protection as near the refugees as possible. Whether this is ensured by improvements of refugee camps near the country of origin or enabling asylum applications in embassies is hard to answer. Either way, the fact that refugees reach far from their homelands in their escapes is not going to change as long as we continue to live in a globalised world. The EU needs to change its perception on how to accept refugees and chose a realistic way to grant access without any life risking. Only then will the readmission of persons not fulfilling the conditions to stay in the EU be free from any risks of violating the right to asylum.

## 5.4 Conclusion

This study demonstrates that the readmission agreement between the EU and Turkey will be an important part of the EU's migration and border control policy. Although the agreement is drafted in accordance with international obligations concerning refugee rights, the study has shown that the implementation of readmission agreements bears the risk of violating the right to seek asylum. What makes the specific EU-Turkey agreement even more remarkable is the non-existing right to seek protection in Turkey for non-European refugees. This fact arises questions on the migration policies of the EU and if refugee rights aren't overshadowed in order to secure the EU borders.

A policy making by concluding agreements in the field of migration, without fully granting the right to seek asylum is worrying. With Turkey fearing it will become the main reception country for all refugees heading towards the EU, Turkey does not have enough encouragement to remove the geographical limitation. The most realistic measure to encourage it is to take a big step forward in Turkey's accession process by lifting restrictions and open up accession chapters that are locked. With this upwind in mind, a signing of the EU-Turkey agreement must be seen as a triumph for the EU. Nevertheless, the fact that Turkey's geographical limitation still stands is nothing to cheer for. The two parties may gain some, but the losers in this agreement are the refugees risking violation of their right to seek asylum.

# Chapter 6

## Concluding Remarks

Whether the readmission agreement between the EU and Turkey will be part of further human rights violations is a question for the future to answer. As this paper has shown, the existing readmission agreements between some EU member states and nearby transit countries have been used to justify wrongful actions by those who puts the readmissions into practice. Turkey has involuntarily been a part of this maltreatment by receiving boats being pushed backed from Greece over and over again. In this sense, it must be considered as a major success for the EU to conclude yet another agreement with Turkey. Consequently, questions over what incitements there are for Turkey and other countries with readmission agreements continue to make one wonder.

Within the wrongful practice of readmission agreement, the ones who have suffered the most are immigrants losing their lives due to pushback measures and refugees not receiving the international protection they need. By violating the right to seek asylum, these individuals are not only deprived a right stipulated in a legal act, they are also deprived their lives. Even if the right to seek asylum would make a greater impact in the readmission agreements, the question of immigrants losing their lives would not be solved. This paper has studied the right to seek asylum within the problem of non-access to EU, as non-access is the root cause of why refugees take unsafe and illegal ways to the EU.

In order to solve one of the biggest human rights issues of today, the existing ways to reach protection in the EU must be overviewed and changed. The existing conditions of today with immigrants risking their lives for the sake of protection makes the EU asylum system unsustainable. Instead of signing new

readmission agreements with other countries, the EU should focus on preventing the desperation leading to deaths. Hopefully, violations of the right to seek asylum will be a non-question once legal and safe ways to the EU opens up for refugees needing international protection.

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