UiO : Faculty of Law
University of Oslo

The Compliance of Greek Asylum Procedures with the Principle of non – refoulement

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Supervisor: Gentian Zyberi

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List of abbreviations

AI – Amnesty International

AIDA – Asylum Information Database

CAT – Convention Against Torture

CEAS – Common European Asylum System

ECCHR – European Centre for Constitutional and Human Rights

ECHR – European Convention on Human Rights

ECJ – European Court of Justice

ECRE – European Council on Refugees and Exiles

ECtHR – European Court of Human Rights

EU – European Union

HIAS – Hebrew Immigrant Aid Society

HRW – Human Rights Watch

ICCPR – International Covenant on Civil and Political Rights

ICJ – International Court of Justice

NOAS – Norwegian Organisation for Asylum Seekers

NRC – Norwegian Refugee Council

Refugee Convention – Geneva Convention Relating to the status of Refugees

STC – Safe third country

TFEU – Treaty on the Foundation of the European Union

TPR – Temporary Protection Regime

UDHR – Universal Declaration of Human Rights

UNHCR – United Nations High Commissionaire for Refugees

VCLT – Vienna Convention on Law of Treaties

1 INTRODUCTION

In 2015, 1.3 million migrants applied for asylum in the 28 member states of the EU, Norway and Switzerland[1]. Greece which was and still is one of the most affected countries by the migration influx, received more than 850,000 asylum seekers. Due to its geographical position, Greece functioned as a main entry point for the unprecedented inflows of migrants and asylum seekers.

The initial unwillingness of the European Union to respond the refugee crisis with concrete measures as well as the implementation of Dublin regulation, which established norms for making asylum claims in the first European country where a migrant was registered, had as a result to put the weight of the migration pressure upon recipient countries, with Greece being one of the most affected. The purpose for reconstruction of Europe's refugee policy was entailed in the Justice and Home Affairs Council proposal of a "temporary and exceptional relocation mechanism" for Syrian refugees who were in Greece and Italy to other member states.[2] However, this policy has been a subject of criticism by the *Visegrad* group,[3] who rejected the relocation of migrants and insisted in building walls and fences along their borders, in order to confront the flow of migrants. However, according to the reports from the Commission on the relocation and resettlement, the results of the relocation mechanism were unsatisfactory.[4]

Since the dichotomy of the policies in the EU created many obstacles in the management of the refugee crisis, it was demanded a new way to deal with the mass influx of refugees and this time the efforts revolved to the countries of origin or transit. By identifying the Balkan route, especially the Aegean as the area of uncontrolled flows and Turkey's crucial role as a transit country, the European Council started to hold negotiations with Turkey at three Summits, in order to conclude an agreement that would control the migratory flows.

In view of the last session, which took place on 18 March 2016, the European Commission adopted two days before a Communication COM (2016), noting the "temporary and extraordinary" measures to be taken in the context of EU cooperation.[5] These measures were subsequently adopted by the European Council in the Agreement with Turkey.

[1] Pew Research Center (2/08/2016), Number of refugees to Europe Surges to Record 1.3 million in 2015.
[2] European Council, Justice and Home Affairs Council (14/09/2015).
[3] Diana Ivanova (2016), Migrant crisis and the Visegrad group's policy, pg: 35-38.
[4] European Commission (12/04/2016), Second Report on the relocation and resettlement.
[5] European Commission (16/03/2016), COM (2016) final 166, "Next Operational steps in EU-Turkey cooperation in the field of migration".

The intensity of negotiations has led, among other things, to the Statement adopted jointly by EU and Turkey on 18 March 2016 for the processing of refugees and migrants - including asylum seekers - who arrived in Greece from Turkey, with the aim of ending the "irregular migration" from Turkey to the EU. Nevertheless, crucial issues were raised about the legitimacy of the procedures implemented.

Therefore, the exceptionally immense burden put onto Greek asylum system, subsequent dubious agreement with Turkey and exacerbated situation of precariousness for refugees and asylum seekers stranded in the desolate camps, foreground the necessity to examine the state of affairs, institutional structures and legislations in the context of Greece and the EU as a whole through the prism of the overarching principle of non-refoulement. Are we dealing here with lawful and legitimate means of addressing the unfolding refugee crisis? Do the EU and Greece in particular fulfil their obligations under the international law?

As Greece has been singled out to almost singlehandedly face the humanitarian crisis, we have to critically assess whether the existing legal framework in the country, especially in the light of the Agreement with Turkey, is sufficient to serve its underlying and fundamental purpose, namely providing assistance and alleviating the grievances of the refugees. And finally, if the relevant and adequate legal design is indeed in place, is it being effectively negated in practice? Does the legal regime suffer from conspicuous deficiencies? Do we encounter here the failure of due diligence to abide by the incurred commitments and provisions or, on the contrary, inherently weak institutional system of protection?

Thus, the present master thesis will examine the compliance of EU common procedures and Greek Asylum Procedures relating to the status of refugees with the principle of non – refoulement under refugee law and international human rights law, including Article 3 of the European Convention on Human Rights.

1.1 Research Question

As I have previously outlined in the introduction, the primary research question of the current study can be delineated as: *Are the Greek asylum system* and *the relevant legal framework, which undergirds it, including the likes of the EU-Turkey Statement, in accordance with the core international law norms?* In order to successfully delve into the analysis of this question, I intend to map out my research and divide it in respective sections of this paper, each corresponding a sub-question forming the complete body of the main issue under study.

The *first* chapter will touch upon the basis of the discussion and will introduce key concepts and definitions under the international refugee law and human rights law, with non-refoulement, especially relevant in the light of the European context, occupying the centre stage of the inquiry.

In the *second* chapter I will proceed to interrogate the comprehensive body of common procedures in the EU regarding the grounds for granting or withdrawing international protection, which will branch out into *(1)* general overview of the relevant internal legislation, with particular focus on the Directive 2013/32/EU and ambiguities surrounding the concept of safe third country and loopholes of inadmissibility criteria, embodied in, *inter alia*; fast track procedure; *(2)* scrutinization of the EU-Turkey Statement concluded on 18 March 2016, where I plan to explore whether and to what extent Turkey satisfies, if at all, the safe third country rule and whether the Readmission Agreement is in compliance with the non-refoulement obligation.

The *third* and final chapter, therefore, has as its objective the examination of the Greek case in particular due to the indispensable role the country plays as a bulwark for the whole European system of asylum. In this section I will attempt to see how the abovementioned two-tier structure of commitments and norms in the field of refugee and human rights protection are reflected in *(1)* Greek national legislation and other domestic provisions and, most importantly, in *(2) practice,* that is the implementation of the existing safeguards through the assessment of *(a)* asylum applications processing procedures, with a special attention given to the role of the European Asylum Support Office (EASO); *(b)* the analysis of the domestic courts' jurisprudence, mostly through the lens of the case law of the Supreme Administration Court of Greece.

1.2 Methodology

Firstly, the current inquiry will be conducted with the help of two major methods presented by McConville and Chui,[6] namely *doctrinal research,* which will incorporate both primary and secondary sources, as well as *international and comparative* research, which will integrate public international law with domestic Greek law and European regional law.

At the same time I will employ the logic of *legal realism*,[7] coined by Richard Posner, which draws on the tenets of politics and empiricism as opposed to an essentially detached textualism of legal formalism.

In the tradition of classical legal positivism this paper underlines the importance of custom and treaties as sources of International Law. Sources in International Law are considered as worded in the Statute of the ICJ, Art. 38, i.e. (a) international conventions, whether general or particular,

[6] Mike McConville and Wing Hong Chui (eds.) (2017), *Research Methods for Law*.
[7] Richard A. Posner (1986), "Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution".

establishing rules expressly recognized by the contesting states, (b) international custom, as evidence of a general practice accepted as law, (c) the general principles of law recognized by civilized nations, and (d) judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[8] Treaties shall be interpreted according the Vienna Convention on the Law of Treaties Article 31 (1), "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".[9]

Overall, however, I follow the line of thought presented by McInerney-Lankford, under which she suggests to critically assess the actual legal norms and regulations instead of taking them at face value and going 'beyond textual articulations'.[10] Furthermore, I am occupied with looking at the actual impact of the entrenched and established legal framework, thereby striving to highlight 'policy uptake'[11] through the bureaucratization that the initial international law provisions undergo in the setting of the European Union and how it is being realized in the final form, having Greece as a telling example.

The research methodology and material of the present study is made up of a review of the Greek asylum system and the relevant legal framework in the context of the implementation of the EU-Turkey statement in the light of *non- refoulement* principle. The research is based on an analysis of international refugee law, European primary and secondary law as well as the Greek and Turkish domestic law for granting and withdrawing protection. In addition to the relevant literature, NGO's and other reports, the research includes an examination of international and regional human rights instruments, especially a comprehensive analysis on Article 3 of the ECHR.

Furthermore, the main part of the present thesis is formed by an analysis of the related case law of the ECtHR in order to highlight its contribution to interpreting the extensive protection of *non-refoulement* principle. The relevant decisions of the decisions of the ECtHR compiled are obligatory for the concerned parties and illustrate a supplementary source of protection of refugee law. Additionally, EU secondary law, focusing on the Asylum Procedures Directive 2013/32/EU will be examined in the light of the *"safe third country"* as entailed in the EU-Turkey statement. Finally, in order to fulfil the aim of this study it was necessary to study the Greek national legislation and provide an analysis of the Supreme Administrative Court's jurisprudence and Turkey's legal system for refugees.

[8] Statute of the International Court of Justice, Article 38.
[9] United Nations, Vienna Convention on the Law of Treaties, Article 31(1).
[10] Siobhan McInerney-Lankford, "Legal methodologies and human rights research: challenges and opportunities", p. 40, chapter in *Research Methods in Human Rights* (2017), eds. Bard A. Andreassen, Hans-Otto Sano, Siobhan McInerney-Lankford.
[11] *Ibid*.

2 THE UNITED NATIONS CONVENTION RELATING TO THE STATUS OF REFUGEES

2.1 Refugee under the Geneva Convention

As stated in the Preamble to the 1951 Geneva Convention on the Status of Refugees, the purpose of the Convention is to ensure to the refugees "the widest possible exercise of the fundamental rights and freedoms"[12] as enshrined in the Charter of the United Nations and the Universal Declaration of the Rights.

The Geneva Convention, the cornerstone of the international legal order for the protection of refugees,[13] was adopted in 1951 and entered into force on 22 April 1954. This convention was amended by the 1967 Protocol Relating to the Status of Refugees. In accordance with Article 1 (A) (2) of the Geneva Convention the term "refugee" applies to any person who: "As a result of events occurring before 1 January 1951 and owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. Each Contracting State shall make a declaration at the time of signature, ratification or accession, specifying, if the meaning of the wording "events occurring before 1 January 1951" it applies for the purpose of its obligations under this Convention, shall be understood either as: (a) "events occurring in Europe before 1 January 1951"; or (b) "events occurring in Europe or elsewhere before 1 January 1951" (Article 1 B). Article I (2) of the 1967 Protocol Relating to the Status of Refugees amended the term "refugee" as worded by Article 1(A) (2) of the Convention, removing the chronological and geographical limitations.

This definition of refugee has been modified by the adoption of the 1967 Protocol Relating to the Refugees, which eliminates any geographical and temporal limitation of the original definition and falls within the scope of Article 1(A) (2) all refugees irrespective of the country of origin and date of abandonment.

Article 1A (2) distinguishes three criteria for the qualification of a person as a refugee, (a) that the person is located outside the country of his nationality or, whether he is not having a nationality, is located outside the country of his former habitual residence, (b) a well – founded fear

[12] The United Nations Convention Relating to the Status of Refugees (1951), Preamble.
[13] United Nations High Commissioner for Refugees (2010): 2.

of persecution, (c) due to reasons mentioned in the Convention (race, religion, nationality, membership of a particular social group or political opinion).

The meaning of the wording "well-founded fear of being persecuted" is a key element of the term "refugee". Because the purpose of the Convention is not to appease personal (subjective) fears but to provide protection to anyone who really needs it,[14] the assessment by the competent authority is based on the data from the applicant's narrative and sources, and whether the fear is well founded (objectively) or not. This is critical for the application of relative provisions of the Geneva Convention. Regarding the finding of persecution, it shall be taken into account any act of persecution, whether by public bodies or other bodies exercising public authority, or even by non – state actors, provided that the state authorities "consciously tolerate or deny or prove weak to provide effective protection".[15]

2.2 The principle of non – refoulement under the Geneva Convention

The principle of *non-refoulement* reflected in the provision of Article 33 (1) of the Geneva Convention constitutes "the cornerstone of international refugee law"[16] and provides that no refugees and asylum seekers should be returned to a country where there is a risk of persecution. More specifically, Article 33-(1) of the Geneva Convention prescribes: "No Contracting State shall expel or return *("refouler"*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion". The obligation of *non-refoulement* referred to in Article 33(1) is binding on the Contracting States to the Geneva Convention 1951 and the 1967 Protocol and shall apply to each person who is a refugee within the meaning of the Geneva Convention and as amended by the Protocol 1967. The obligation of states to ensure the "cardinal content" of the Convention, not to *refoule* refugees to territories where they would face persecution constitutes a principle of customary law, binding on all states of the international community, independently whether or not they have ratified the Geneva Convention.[17]

2.2.1 Exclusion clauses of Article 33(2) of the Geneva Convention

However, the principle of *non-refoulement*, as enshrined in Article 33 (1) of the Geneva Convention is not absolute due to the exclusions expressly provided for in the second paragraph of

[14] Vrachnas J. et. al. (2005), pg: 257.
[15] Konstantinidou V. (2014), pg: 4.
[16] San Remo Declaration on the Principle of Non-Refoulement, (2001).
[17] UN General Assembly, Note on the International Protection, A/AC.96/951, para.16.

that article, by restricting accordingly the protection accorded to refugees, as recognized in Article 1(A) (2).[18]

Under Article 33(2), the conditions for exemption from protection of *non-refoulement*, are based on one of the two provided justifications: "where there are reasonable grounds for a regarding as a danger to the security of the country or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country." In particular, the exceptions to the principle of *non-refoulement* are in terms of the individual,[19] while the evaluation of the case it is left to the discretion of the state, which must act in good faith in the interest of the refugee.[20]

The first part of the exclusion clause concerns the exemption security and explains that "there are reasonable grounds for a regarding as a danger to the security of the country". The concept of "risk to national security" as one of the most essential components of the exclusion clause is considered a complex one, due to the lack of regulation in international law. Therefore, it is a concept entailed in the "reserved domain of domestic jurisdiction".[21] According to Grahl-Madsen, the concept of "national security" requires States to demonstrate "serious reasons" in order to constitute an individual a risk to national security. In particular, the seriousness is prescribed as "a direct or indirect risk to constitutional order (governance), the territorial integrity, the independence or the external peace of the country concerned."[22]

The second exclusion clause of Article 33(1) concerns the "serious crime" and the assessment of the danger posed to the security of the country. Lauterpacht and Bethlehem have claimed that the existence of a criminal conviction of a refugee for a serious crime is not sufficient to justify the exclusion from the protection of Article 33(1), as it is necessary for the States to take into consideration and evaluate all the conditions under which the crime was committed and, in particular, the nature and the incentives of the crime as well as the behavior of the individual, and the terms of any sentence imposed.[23]

All things considered, it is evident that Article 33(2) illustrates the equation of State interest for the security of the country and on the other hand, the protection of refugee from *refoulement*. At this point it should be mentioned that Lauterpacht and Bethlehem have suggested that the exceptions included in Article 33(2) are to be applied under the principle of proportionality which are calibrating factors such as: the seriousness of the danger posed to national security, the nature and seriousness of the repercussions of *refoulement*, the feasibility of the *refoulement* as a measure

[18] Goodwin-Gill & McAdam (2007), pg: 234.
[19] *Ibid*, 235
[20] Grahl-Madsen, A., Commentary on the Refugee Convention 1951, pg:139
[21] Goodwin-Gill & McAdam (2007), pg: 235.
[22] Grahl-Madsen, A., Commentary on the Refugee Convention 1951, pg: 140.
[23] Goodwin-Gill & McAdam (2007), pg: 240.

for eliminating the risk, as well as exhausting all other available measures, such as transferring the refugee to a safe third country.[24]

2.2.2 Non-refoulement excluded from the scope of Article 33(1): Indirect refoulement

The principle of *non- refoulement* of Article 33(1) applies in cases of return refugee or asylum seeker "at the borders of the territories where their life and freedom are threatened" based on reasons of race, religion, nationality, membership of a particular social group or political opinion. Hence, the return of a refugee to a territory where he is not subjected to risk does not constitute *refoulement* and is therefore in accordance with Article 33(1) of the Geneva Convention. Specifically, the principle of *non – refoulement* may be subject to a significant exception according to which a state can return an asylum seeker to the territory of another if it is considered to be a "safe country". The *"safe third party"* mechanism is prescribed as the opportunity of host states to send asylum seekers to third States from which they have crossed the road to the host State and can be characterized as "safe".[25]

Under these circumstances, the contracting states "may adopt their own national methodology for determining how the concept applies, and this specifically permits the national designation of countries considered to be generally safe"[26]. In this context, the member states designation of a "safe third country' should be in accordance with international law. This mechanism of "safe third country" raises serious concerns regarding to the protection of asylum seekers from the risk of indirect *refoulement*. Although, the definition of "safe country" for the refugee' s return does not per se violate Article 33(1) of the Convention it, however, can lead to the phenomenon of *"chain refoulement"*[27] and the constant movement of a refuge from one state to another to" refugees in orbit."[28] Consequently, this mechanism raises serious concerns about the protection of the rights of refugees under the Geneva Convention. As presented by the UNHCR, Article 33(1): "An asylum-seeker should only be returned to a third State, if responsibility for assessing the particular asylum application in substance is assumed by the third country and if the asylum-seeker will be protected from *refoulement*."[29] This meaning derives from the interpretation of the phrase "in any manner whatsoever" and is confirmed by *the travaux préparatoires*.[30] Therefore, a state that directly returns a refugee to persecution or other serious

[24] Lauterpacht and Bethlehem, (2003), "The Scope and Content of the Principle of the Principle of Non-Refoulement: Opinion", DOI: 10.1017/CBO9780511493973.008, pg:138-139.
[25]Goodwin-Gill & McAdam, (2007), pg:392.
[26] Directive 2013/32/EU, Article 38 (2) (b).
[27] *M.S.S. v. Belgium and Greece*, Application No 30696/09.
[28] James C. Hathaway (2005), pg:293.
[29] UNCHR (2001), Global Consultations on International Protection, pg:12.
[30] Coleman (2009), pg:235.

harms remains responsible for that act, primarily the first state, through its act of expulsion may be equally liable for it.[31] Therefore, it is of great importance when the sending State applies the criteria of "safe country" for the rejection of the asylum application, in the form of its availability protection in the "country of origin", or through the transfer of the competence to examine the asylum seeker in a "safe third country" or "first country of asylum " to conduct a rigorous examination regarding their impact on the principle of *non-refoulement* and the general conditions of protection of refugee rights.[32]

2.3 The principle of non-refoulement in Human Rights Law

In parallel, and in addition to the refugee law which regulates as *lex specialis* the status of refugees, refugees are also human rights carriers, and as such, subjects of one complementary protection stemming from human rights instruments and the relevant prohibition of inhuman or degrading treatment or punishment. Hence, the principle of *non-refoulement* is also embodied in mechanisms of international and regional protection of human rights, which, through their case law, indirectly raise its very principle *non-refoulement* to a judicial remedy, forming a complementary protection against *refoulement*.

This complementary protection of the principle of *non-refoulement* derives from article 3 of CAT where is it underlined that State Parties are prohibited "to return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture", in Article 7 of ICCPR[33] is provided an "extensive broad-ranging protection" to all persons[34], and in Article 3 of ECHR is affirmed that: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment". Therefore, as it derives from the above provisions, the prohibition of *refoulement* is prescribed as the obligation of States to not return an individual for well-founded reasons due to it being a violation of the right to life: exposure to torture and other forms of inhuman and degrading treatment is contrary to the fundamental rights to the protection of life.[35]

However, when analyzing the state obligations under these international and regional human rights systems they are found to be contextually differentiated. More specifically, CAT - although it is wider than the ECHR and the ICCPR – is an explicit affirmation of the *refoulement* and it

[31] Goodwin-Gill & McAdam (2007), pg: 252.
[32] Lauterpacht and Bethlehem (2003), pg. 122, para.116.
[33] According to the General Comment No. 20 of the Human Rights Committee Article 7 was interpreted as follows: "States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement".
[34] James C. Hathaway (2005), pg:120.
[35] Goodwin-Gill & McAdam (2007), pg:285-286.

restricts the prohibition on the risk of torture, while ECHR and ICCPR extend their protection to the risk of cruel, inhuman, or degrading treatment.

Nevertheless, the different scope of protection gradually created a common interpretation of the prohibition of torture and degrading treatment, which was reflected in an extensive jurisprudence relating to the protection of refugees and asylum seekers.[36] In this context, additional obligations have been created for the states and have strengthened the existing ones by the relevant quasi-judicial bodies such as the Human Rights Committee of the ICCPR and the European Court of Human Rights of the ECHR.[37]

The principle of *non-refoulement* has been reinforced as general human rights requirement by the international and regional judicial mechanisms which constitute a supplementary source of protection of refugee law. Both refugees and asylum seekers - from the point of view of international law - constitute subjects of both general and special protection, and for this reason the law governing the status of refugees at international level is inextricably linked to the general international law on the protection of human rights and is applied complementarily.[38]

All things considered, it is evident that there is a close interaction between refugee law and human rights law, where the latter reflects a wider expression of Article 33 and it contains a wide range of refugees which are not included in the Geneva Convention.

2.3.1 The protection of the principle of non- refoulement under Article 3 of ECHR

With regards to Article 3 of the ECHR, it could be argued that it possesses a prominent place in human rights protection. It has integrated the refugees, asylum seekers, and individuals in a wider context of protection in the European legal order and is verified by the dynamic case-law of ECtHR.

Although the Geneva Convention is considered the cornerstone of the principle of *non-refoulement*, the principle of *non-refoulement* in Article 33 of the Geneva Convention does not constitute an absolute right. This contrasts with Article 3 of the ECHR in the way it is interpreted by the Court, which entails an extensive, unconditional character and imposes an absolute prohibition on the removal of people to places where they would face a "real risk".[39]

In regards to the ECtHR interpretation of Art.3 of ECHR, the prohibition of *refoulement* constitutes an inherent prohibition of torture and inhuman or degrading treatment. More specifically, in the landmark case of *Soering v. United Kingdom*[40], the Court interpreted Article 3 in absolute terms, in order to prohibit any torture, inhuman and degrading treatment, or punishment of asylum seekers in recipient States. Furthermore, to conclude from the above absolute prohibition,

[36] Goodwin-Gill & McAdam (2007), pg:296-325.
[37] *Ibid*, pg:296-298.
[38] Goodwin - Gill G. S., McAdam J. (2007), pg: 285-325.
[39] Linos-Alexandre Sicilianos (2015), The European Court of Human Rights at a time of crisis in Europe, pg:6.
[40] *Soering v. United Kingdom* No. 14038/88, par:88, (7 July 1989).

there remains a positive obligation on States to not expel applicants to other States where they are well founded fears, which are proven grounds for treating them contrary to Article 3 of the ECHR.[41]

Moreover, that absolute prohibition on refoulement regarding the risk of torture or ill-treatment applies not only to the country of origin, but also to any other country - even a contracting state of ECHR - usually a transit country where the person is reasonably afraid of being subjected to ill treatment or returned to his country of origin.[42] Consequently, the asylum seeker, the refugee and the individual are protected in the context of human rights law from any act of refoulement which may be entailed in indirect violation of Article 3 of ECHR.

2.3.2 Procedural implications under Article 3 of the ECHR

As mentioned above, the ECtHR has concluded an implicit absolute prohibition of the principle of *non-refoulement* by the member states. In order to preserve this absolute character and enhance the effectiveness of its prohibition on *refoulement*, the Court has interpreted Article 3 as including procedural obligations and by combining it with Article 13, it requires effective remedy for each person whose rights guaranteed by the Convention are violated. More specifically, Article 13 of the Convention provides: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."[43]

Under the Court's case law there have been identified many cases of arbitrary *refoulement* decisions due to the ineffective procedural safeguards, where the applicant was exposed to a risk of treatment contrary to Article 3, for this reason the Court requires that "a rigorous scrutiny must necessarily be conducted of an individual's claim."[44] In this regard, the ECtHR has concluded from the application of Articles 3 and 13, that the States positive procedural obligations require an "effective remedy', in conjunction with "independent and rigorous scrutiny of a claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 and the possibility of suspending the implementation of the measure impugned."[45]

Although the ECHR system does not contain specific provisions to protect the rights of asylum seekers as well as refugees, it seems to have extended to the protection of Articles 3 and 13 of the ECHR, in order to create an effective framework for their protection. A fact which is illustrated through the Court's jurisprudence in the case of *M.S.S. v. Belgium and Greece*, underlines that it remains the state's responsibility when the transfer of an asylum seeker to another

[41] *Cruz Varas v. Sweden*, No.15576/89, (20 March 1991).
[42] *M.S.S. v. Belgium and Greece*, No. 30696/09 (21 January 2011).
[43] ECHR, Article 13.
[44] *Jabari v. Turkey*, No. 40035/98, (11 July 2000) par: 50.
[45] *Ibid.*

leads to a violation of his/her fundamental rights. In particular, the case of M.S.S. concerned an Afghan citizen who entered the territory of the European Union through Greece and then arrived to Belgium, where he applied for asylum. The Belgian authorities considered that according to the EU Dublin II Regulation, Greece was responsible for examining the applicant's request, and for that reason the applicant was transferred there. In Greece, the asylum seeker: (a) has been subjected to detention conditions where his rights were offended; (b) has encountered dire conditions of treatment; and (c) has come into contact with an asylum system which was characterized by major structural deficiencies for access to the asylum procedure and remedies.[46]

In regards to Belgium, the ECtHR reaffirmed the primary responsibility of the Member States to conduct a rigorous scrutiny on individual's claims, and highlights Belgium's responsibility of violating Article 3 of the ECHR [47] because it exposes the applicant to risks of ill treatment and effective remedy.[48]

At this point it could be argued that the regional legal order seems to provide a wider and coherent protection framework for refugees and asylum seekers, while states provide a narrower interpretation of refugee law. The case of *M.S.S. v. Belgium and Greece* constitutes a verification of this opinion, where the ECtHR achieves in providing applicants with effective protection through ECHR rather than the refugee law. All things considered, it is evident that both international and regional human rights instruments can ultimately provide an important and substantial basis for the protection of refugees.

2.4 Examination of protection claims before return to a third country

Contracting States have "positive obligations" as defined in Art.3, ECHR in compliance with Art.1,[49] to ensure the guarantees within the Convention and protect applicants from expulsion to States where there is reasonable suspicion that they will be subjected to treatment contrary to Article 3 of ECHR.[50] In this context, the ECtHR in the case *Hirsi Jamaa and Others against Italy*, reaffirmed the responsibility of states compliance with their positive obligations. Specifically, it was emphasized the importance of the sending states' responsibility to conduct a thorough examination of the applications in order to ensure the respect of the principle of *non – refoulement* before removing the applicant to a third country.[51] In order to ensure the principle of *non-refoulement*, the

[46] *M.S.S. v. Belgium and Greece*, No.30696/09 (21 January 2011).
[47] *Ibid*, par: 293.
[48] *Ibid*, NOAS, Norwegian Helsinki Committee, AITIMA (2009), Out the Back Door: The Dublin II Regulation and Illegal Deportations from Greece, pg: 15-21.
[49] ECHR, Article 1.
[50] G. Clayton (2009) "Asylum Seekers in Europe: M.S.S. v Belgium and Greece".
[51] *M.M.S. v. Belgium and Greece*, (Application no. 30696/09) par:338.

sending state should assess the grounds for believing that the third country might not provide access to sufficient asylum procedures and conditions contrary to Article 3 of the Convention to the applicant, so this assessment should be a rigorous one.[52]

The case *of Hirsi Jamaa and Others against Italy*, where 11 Somali and 13 Eritrean citizens were intercepted in the high sea by the Italian authorities is of great importance because this case illustrates the safeguards concerning returns to third countries. The applicants alleged that their transfer to Libya by the Italian authorities had violated Article 3 and 13 of the Convention and Article 4 of Protocol No. 4.[53]

Regarding this case, the Court underlined the necessity and importance of access to asylum and the "importance of guaranteeing anyone subject to a removal measure, the consequences of which are potentially irreversible, the right to obtain sufficient information to enable them to gain effective access to the relevant procedures and to substantiate their complaints."[54] Moreover, the Court interpreted that the purpose of Article 4 of Protocol 4 is "to prevent States being able to remove certain aliens without examining their personal circumstances and, consequently, without enabling them to put forward their arguments against the measure taken by the relevant authority."[55]

Ultimately, the Court found that the Italian authorities did not comply with their positive obligation to carry out an appropriate examination of the individual protection claims and provide them access to an effective remedy (Article 3 and 13 of the ECHR), but instead they applied collective expulsion which is prohibited in Article 4 of Protocol 4.[56]

In conclusion, there was a violation of Article 3 of ECHR, because the Italian authorities did not focus on the foreseeable consequences of the removal of the applicants as irregular immigrants to Libya, where the treatment was contrary to the Convention and there was not provided any kind of protection in that country.[57] This is of high importance because the lack of protection of refugees in Libya exposes the risk of *refoulement* concerning the Eritrean and Somali applicants.

2.5 Examination of protection requests-Return to a "safe third country"

The European Court has also dealt with cases concerning the returns pursuant to the "safe third country" concept.[58] According to the Court's decisions, it is necessary to verify each time, *in concreto*, the risk of *indirect refoulement* and possible violation of fundamental rights of the asylum

[52] *Saadi v.Italy*, No. 37201/06, (28 February 2008).
[53] *Hirsi Jamaa and Others v. Italy*, No. 27765/09, (23 February 2012).
[54] *Ibid*, par: 204.
[55] *Ibid*, par:177.
[56] *Ibid*.
[57] *Ibid*, par: 131.
[58] *Ilias and Ahmed v. Hungary*, Application No. 47287/15, (14 March 2017).

seeker, through an examination of the general situation as well as the applicant's personal circumstances to the destination country. Therefore, the concept of the safe third country cannot release the contracting states from their obligations to ensure fair and efficient asylum procedures for the protection against arbitrary *refoulement.*

In this context - the ECtHR in the case of *Ilias and Ahmed against Hungary* - the Court found violations of Articles 3 and 5, and of Article 13 (right to an effective remedy) in combination with Article 3 of the ECHR[59]. In 2015, after being subjected to deprivation of their liberty and access to a legal remedy in the transit zone for three weeks, two applicants from Bangladesh were sent back to Serbia, which is considered a "safe third country" under the Governmental Decree 191/15.[60] The Court found that the Hungarian authorities did not consider an individualized assessment to verify that the two applicants concerned will not face a real risk of prohibited treatment in Serbia[61]. A fact which involved that the public authorities exercised an unfair assessment of the "burden of proof to the applicants" and secondly, it concluded that the competent authorities failed to consult material from reliable sources in order to verify that they will not be subjected to any potential risk[62]. At this point it should be mentioned that in 2012 the UNHCR presented a report: "Serbia as a Country of Asylum" which characterizes Serbia' asylum system insufficient to ensure protection against refoulement to asylum seekers as they are not provided procedural safeguards. For all the above mentioned reasons the UNCHR states that ", Serbia should not be considered a safe third country, and in this respect, UNHCR urges States not to return asylum-seekers to Serbia on this basis."[63]

Similarly, in Greece the implementation of the EU-Turkey Statement in border procedures under the assumption of a "safe third country" has raised many concerns regarding the protection of *non-refoulement* for refugees and asylum seekers returned to Turkey.[64]

On September 22, 2017, the Supreme Administrative Court of Greece, in its decisions rejected the appeals of two Syrians refugees on the premise that Turkey is a safe third country[65]. Initially the competent Authority rejected the applications as inadmissible without further individualized assessment, on the grounds that Turkey is a "safe third country" and the "temporary protection" regime provided to Syrians refugees in Turkey is sufficient to the entitlements of the Geneva Convention and principle of *non – refoulement*.

In practice, Turkey has not lifted yet the "geographical limitation" to Geneva Convention for non – Europeans, but are only granted with a temporary protection status which contradicts with the

[59] *Ibid*.
[60] *Ibid*, 118.
[61] *Ibid*.
[62] *Ibid*.
[63] UNCHR (August 2012), Serbia as a country of asylum, par: 81. Serbia as a country of asylum. Observations on the situation of asylum-seekers and beneficiaries of international protection in Serbia.
[64] European Council on Refugees and Exiles (ECRE) (2017), *Debunking the "safe third country" myth*, pg:5.
[65] Supreme Administrative Court of Greece, (Plenum), Decision 2348/2017, 2347/2017.

general entitlements foreseen in the Geneva Convention. The question that arises is whether the standards for protection provided by the Turkish authorities are in accordance with the Geneva Convention? The "subsidiary protection" established by the Law on Foreigners and International Protection for non – Syrians raises questions regarding its sufficiency and implementation, mainly with the "post - coup state of emergency". As regards the establishment of the "temporary protection" regulation offered by Turkey, this system is characterized by many deficiencies as it is accompanied by a prohibition on the Syrians to submit a regular asylum application and there is no time – limit for the status of the regime, but it depends on the Turkish Government's discretion to withdraw it. Consequently, the level of international protection enjoyed by the Syrians in Turkey is doubtful if it can be considered "sufficient" or "equivalent" to the Geneva Convention. Therefore the rejected applications as inadmissible because of the designation of Turkey as a safe third country[66] without a individualized assessment of the relevant circumstances can expose Syrian refugees to the risk of being deprived of their fundamental rights and finally can violate the principle of *non – refoulement* under Article 3, ECHR.[67]

All things considered, it is evident that the returns to a third country and even this country is included in a safe country list give rise to serious issues. Wherefore, the returns of asylum seekers without an individualized assessment to a third country, even if this country is considered a "safe" one,[68] is contrary with the principle of *non-refoulement* as enshrined in Article 3 of the ECHR.

[66] *Ilias and Ahmed v. Hungary*, Application no. 47287/15, (14 March 2017) par: 124.
[67] *Ibid*, par:125.
[68] *Ilias Ahmed v. Hungary*, par:118-124.

3 COMMON PROCEDURES FOR GRANTING AND WITHDRAWING INTERNATIONAL PROTECTION IN THE EUROPEAN UNION

EU primary legislation includes the founding treaties, as well as their amendments, additions and protocols in particular in the form of Maastricht, Amsterdam, Nice and Lisbon Treaties, as well as the various accession treaties, which contain the fundamental provisions regarding the objectives, organization and the functioning of the European Union. EU secondary legislation includes mainly regulations, directives, decisions, recommendations and opinions, which derive from the objectives and principles, set out in the treaties.[69] Regulations establish legal rules which apply directly, fully and uniformly throughout the European Union, binding Member States and citizens.[70] Directives bind Member States only with regard to their objectives and leave them the choice of the form and the means of achieving these objectives.[71] Decisions rule individual cases and they have directly legally binding effects on the addressee (Member State or citizen).[72] Recommendations recommend that the addressee acts in a certain way, while opinions are assessing the current situation or certain incidents in the Union or in the Member States. Both, recommendations and opinions are not binding for the Member States.[73]

3.1 The Charter of Fundamental Rights of the EU

The protection of fundamental rights in the Community legal order was based initially on the case law of the ECJ, since the Court developed the guarantees of fundamental rights based on certain provisions of the Treaties. The Charter of Fundamental Rights of the European Union was proclaimed on 12 December 2007 in Strasbourg. The Treaty of Lisbon, with Article 6 on fundamental rights, refers to the Charter of Fundamental Rights of the European Union, as binding for the EU institutions and Member States when they implement Union law. Furthermore, the Treaty of Lisbon included in Article 6 (2) an explicit provision for the EU's accession to the ECHR.[74]

The Charter of Fundamental Rights of the European Union, provides in Article 4 that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment", and in Article

[69] Borchardt (2011), pg: 89.
[70] Ibid, pg: 97.
[71] Ibid, pg: 98.
[72] Ibid, pg: 103 – 104.
[73] Ibid, pg: 104 – 105.
[74] Ibid, pg: 26 – 30.

19: “1. Collective expulsions are prohibited. 2. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.” Moreover the Charter confirms in Article 18 that the “right to asylum shall be guaranteed with due respect for the rules” of the Geneva Convention 1951 and the 1967 Protocol relating to the status of refugees and in accordance with the Treaty on European Union and the TFEU.

3.2 The Treaty on the Functioning of the European Union (TFEU)

The Treaty on the Functioning of the European Union concretises in Article 78(1), that the “Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement*. This policy must be in accordance with the Geneva Convention and the Protocol of 1967 relating to the status of refugees, and other relevant treaties”. The Treaty authorises in Article 78(2) the European Parliament and the Council, to adopt measures for a common European asylum system comprising a uniform status of asylum and of subsidiary protection for nationals of third countries, common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status, a common system of temporary protection for displaced persons in the cases of mass influx, criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection, standards concerning the conditions for the reception of applicants for asylum or subsidiary protection and partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection.[75] In particular, the Council in Article 78(3) “may adopt provisional measures for the benefit of the Member State(s) confronted by an emergency situation characterised by a rapid rate of arrivals of nationals of third countries.”

3.3 Recast Asylum Procedures 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.

During the period of 2011 – 2014, there have been several reforms in the European Union’s legislation on asylum in order to achieve its primary objective to establish a Common European

[75] TFEU, Article 78(3).

Asylum System (CEAS). In the context of the CEAS, there have been issued several Regulations and Directives which address specific asylum issues, with many of them being replaced by newer ones due to the deficiencies of the pre-cast CEAS architecture. Such changes are also due to the constant developments in the field of asylum and migration, with the influx of large and intense migratory flows into the EU Member States. Given its importance, I will examine the Directive 2013/32/EU (recast)[76] laying down the procedures with which Member States grant and withdraw refugee status.

3.3.1 Objective

Applying Article 78 (2) of the TFEU, which authorizes the European Parliament and Council to establish a Common European Asylum System, was issued the Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection. The Directive 2013/32/EU which is in full accordance with the Geneva Convention and ascertains the protection of the principle of *non-refoulement* is of great importance as "it has a major impact on access to asylum determination procedures in the European Union."[77]

According to Article 1 of the Directive 2013/32/EU, the main objective is to establish a higher degree of harmonization and better standards for common procedures for granting and withdrawing international protection in the EU pursuant to Directive 2011/95/EU.[78] The Directive 2013/32/EU intends to: "

(a) provide uniform procedural mechanisms for providing guarantees and safeguards in the process of asylum claimants and refugees,

(b) enhance access to the asylum procedure with the inclusion of applications made at the borders, in the territorial waters and transit zones,

(c) regulate the use of special procedures, in particular based on safe country concepts, both safe country of origin (SCO) and safe third country (STC) and

(d) determine rules for procedures at first instance and appeals procedures.[79]

Finally, it should also be underlined the objective of the Directive to ensure the right to the examination of the protection claims and access to an effective remedy "every applicant should have an effective access to procedures, the opportunity to cooperate and properly communicate with the competent authorities so as to present the relevant facts of his or her case and sufficient procedural guarantees to pursue his or her case throughout all stages of the procedure."[80]

[76] Directive 2013/32/EU supersede the 2005 Council Directive 2005/85/EC and was incorporated in Greek national law with the Presidential Decree 113/2013.
[77] Goodwin - Gill G. S., McAdam J. (2007) pg:397.
[78] rAPD 2013/32/EU, Article 1.
[79] Rapd 2013/32/EU.
[80] APD, Preamble Recital 25.

3.3.2 Structure

The Directive is structured as follows:

a) General Provisions (Articles 1-5 include: the purpose, definitions, scope, determination of responsible authorities and the establishment or maintenance of more favorable national provisions),

b) basic principles and guarantees (Articles 6-30 determine: the access and the acceleration to the procedure for examining applications for international protection, the applications made on behalf of dependants or minors, the grounds and conditions and the possibility of counselling in detention facilities and at border crossing zones, the right to remain in the Member State pending the examinations of the application, requirements for the examination of applicants, the guarantees and obligations of applicants, the opportunity and requirements for a personal interview, the role of European Asylum Support Office (EASO), the provisions of free legal assistance and representation in appeals procedures, guarantees for unaccompanied minors, the procedures in the event of explicit or implicit withdrawal of the application, and the crucial role of the UNCHR),

c) procedures at first instance (Articles 31-43 provide: the examination procedure for applications for international protection, the determination of unfounded and inadmissible applications, the necessity of special rules on an admissibility interview, the definition of the concept of first country of asylum, safe country of origin and safe third country, the national designation of third countries as safe third countries of origin, the exceptions from the right to remain in case of subsequent applications and the procedures at border or transit zones),

d) Procedures for the withdrawal of international protection (Articles 44-45 underline: the procedural rules of the competent authorities for withdrawing international protection),

e) appeals procedures (Article 46 provides: the right to an effective remedy),

f) general and final provisions (Articles 47-55),

g) annexes include: the designation of safe countries of origin for the purposes of Article 37(1), the Repealed Directive and the correlation table).

3.3.3 Article 33 of the Directive 2013/32/EU: Inadmissible applications and the concept of the safe third country exception

In accordance with Article 33, Directive 2013/32/EU, Member States may consider an application for international protection as inadmissible, without examination of the application for international protection in substance, “only if”: “

a) another Member State has granted international protection;

b) a country which is not a Member State is considered as a first country of asylum for the applicant, pursuant to Article 35;

c) a country which is not a Member State is considered as a safe third country for the applicant, pursuant to Article 38;

d) the application is a subsequent application, where no new elements or findings relating to the examination of whether the applicant qualifies as a beneficiary of international protection by virtue of Directive 2011/95/EU have arisen or have been presented by the applicant; or

e) a dependant of the applicant lodges an application, after he or she has in accordance with Article 7(2) consented to have his or her case be part of an application lodged on his or her behalf, and there are no facts relating to the dependant's situation which justify a separate application."

Although States are responsible under international law for examining protection claims in their territory, in practice States deny access to asylum procedures,[81] not because the asylum seeker does not meet the definition in Article 1(A) (2) of the Geneva Convention but due to the fact that he or she could have obtained protection elsewhere.[82] This opinion is confirmed by Article 33(c) of the Directive 2013/32/EU, which provides that States may consider an application for international protection as inadmissible without examining the substance of the claims for international protection in case that "a country which is not a Member State is considered as a safe third country for the applicant, pursuant to Article 38."

According to Guy S. Goodwill- Gill the concept of the "safe third country" prescribes "a procedural mechanism for shuttling asylum seekers to other States said to have primary responsibility for them, thereby avoiding the necessity to make a decision on the merits because another country is deemed or imagined to be secure.' Consequently, the arrival of the refugees through a "safe third country" functions as the basis for inadmissible applications and justifies the exclusion of the applicant from asylum procedure and therefore from the opportunity of granting the refugee status.

Since Article 33(1) of the Geneva Convention does not exclude *expressis verbis* practices such as the exclusion from the protection of arrivals from a safe third country, which intend to return the applicant to countries where there is no *prima facie* risk for *refoulement.* Member States have resorted to the application of this criterion for the rejection of asylum claims in cases where the asylum seeker did not arrive in the State of asylum "directly" from the State of origin but crossed other States of transit, where it could potentially be applied for asylum.[83] States adopted this practice through a contrary interpretation of Article 31 which prohibits the imposition of penalties

[81] *Hirsi Jamaa and others v. Italy*, No. 27765/09, (23 February) par:204-205.
[82] Goodwin - Gill G. S., McAdam J. (2007) pg:392.
[83] Costello, (2005), pg: 40.

"on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization.[84]" In this way states justify the returns of asylum-seekers who do not fulfil the condition of "coming directly" to the first transit country after their departure from the country of origin.[85]

3.3.4 Analysis of Article 38 of the Directive: The concept of the safe third country and safety requirements

The provisions regarding the safe third country concept and its application become increasingly important in the light of the EU - Turkey Statement 18 March 2016, on refugee crisis and its object and purpose. The safe third country concept may be applied "only" where the competent authorities of Member States are "satisfied" that a person seeking international protection will be treated in the third country concerned, in accordance with the following principles, as worded in Article 38(1), Directive 2013/32/EU: "(a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion; (b) there is no risk of serious harm as defined in Directive 2011/95/EU[86]; (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".

Thus, the assessment of the sending state regarding the safety of the third country should meet the following procedural requirements as enshrined in Article 38(2), Directive 2013/32/EU, including: "(a) rules requiring a connection between the applicant and the third country concerned (…); (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 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, (…) 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)".

[84] *Ibid*.
[85] *Ibid*.
[86] rAPD 2011/95/EU, Article 15.

The "grammatical" interpretation of the provisions regarding the safe third country concept and its application imply, that the competent authorities of Member States shall be "satisfied" that the third country concerned will grant protection in accordance with the Geneva Convention. The word "satisfy" prescribes the objective nature of the interpretation of safety by States as confirmed in 38(2) (b) where requires from Member States to include a "national designation of countries considered to be generally safe." Furthermore, it is of great importance that the ratification of the Geneva Convention without any geographical limitations, is not required, as it is the case by the concept of European safe third country of Article 39 (2) (a), Directive 2013/32/EU, since the EU – Legislator made a clear distinction between European and not European safe third countries.

3.4 EU – Turkey statement on refugee crisis

In 2015 the European Union faced the most severe refugee crisis since World War II. More specifically, there were recorded 1.015.078 irregular arrivals of refugees and migrants in Europe, with 856.723 of them travelling to Greece by sea from Turkey.[87] The uncontrolled refugee flows via the Aegean sea caused an humanitarian crisis that required a rapid confrontation. By identifying Greece as the most affected country and Turkey's crucial role due to its strategic location as a transit country, the European Council held intense negotiations with Turkey at three Summits in order to conclude an agreement that could manage the migration and refugee crisis. On 15 October 2015, the European Union and Turkey, with the aim of strengthening their cooperation in confronting the migration and refugee crisis, made an agreement with the Joint Action Plan (JAP).[88] The Joint Action Plan on refugees and migration management was activated at the EU-Turkey Summit on 29 November 2015. The main goal of the action plan was to prevent and confront the massive influx of migrants from Turkey via Greece to EU. Additionally, to readmit all irregular migrants who transited through Turkey to EU and they were found that they are not in need of international protection. Specifically, this plan was based on the following :

(a) Addressing the root causes leading to the massive influx of Syrians,

(b) Supporting Syrians under temporary protection and their host communities in Turkey

(c) Strengthening cooperation to prevent irregular migration flows to the EU (Part II).[89] However, according to EU-Turkey Joint Action Plan: implementation report, these actions were not sufficient or sustainable to reduce the flows of irregular migrants entering the EU from Turkey[90] and the EU and Turkey therefore agreed upon the Statement on 18 March 2016.

[87] UNCHR, Operational portal – refugee situation: http://data2.unhcr.org/en/situations/mediterranean?id=83.
[88] European Parliament, Resolution of 14 April 2016 on the 2015 Report on Turkey, 2015/2898.
[89] European Commission, EU-Turkey, Joint Action Plan, Fact sheet, MEMO/15/5860, November 2015.
[90] European Commission (2016), EU-Turkey Joint Action Plan: Implementation Report.

The initial German policy of welcoming Syrian and Iraqi refugees tested the country and EU – limits and crashed against strong political and social reactions within the country and the refugee policy expressed by Austria and the *Visegrád* Group, which became dominant in the European Union. The EU – Turkey Statement addresses the refugee and migration crisis with the main objective that "the already existing large number of Syrian refugees must remain in Turkey, Lebanon and Jordan, which are de facto characterized as "safe third countries". As far as Turkey is concerned, this characterization must also be legally provided. In the same spirit, refugees to Europe from other countries, such as Iraq, are barred from entering and this applies a fortiori to irregular migrants moving through Turkey. However, they can also, in accordance with international law, submit an asylum application which should be judged on the individual characteristics of the applicant."[91]

During the Summit on 18 March 2016, the European Union and Turkey agreed upon the EU – Turkey Statement, which was activated on 20 March 2016. The Statement aimed at ending the irregular immigration through the Aegean Sea and providing a legal and safe pathway to the EU through resettlement mechanism of refugees.[92] The key elements of the Agreement are that all those who have illegally entered Turkey from 20 March on the Greek islands and those who haven't applied for international protection, or their application is rejected as inadmissible or unfounded will be also returned to Turkey, this will take place in accordance with international and European law. In particular, the Agreement provides that for every Syrian repatriated by the Greek islands in Turkey, another Syrian will be resettled from Turkey directly to EU Member States on the basis of voluntary redistribution scheme. At this point it should be mentioned the high importance of the Factsheet of the EU-Turkey Statement of the European Commission which expresses, inter alia, the legal possibility of characterizing Turkey as a "safe third country."[93]

Emphasis will be given in the first element of the agreement which constitutes crucial and relevant for the purpose of this paper. Specifically, in the first paragraph is provided that:

All new irregular migrants crossing from Turkey into Greek islands as from 20 March 2016 will be returned to Turkey.

This 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*.

[91] Venizelos (2016), pg:1 – 3.
[92] European Council, Foreign Affairs & International Relations (18/3/2016).
[93] European Commission- Fact Sheet, EU-Turkey Statement: Questions and answers, (19/03/2016).

It will be a temporary and extraordinary measure which is necessary to end the human suffering and restore public order.

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.

Migrants not applying for asylum or whose application has been found unfounded or inadmissible in accordance with the said directive will be returned to Turkey.

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.

3.4.1 Challenges of the Statement regarding to the concept of "safe third country" and the procedural guarantees

Undoubtedly, the implementation of the statement adopted by the Member States of the EU and Turkey on 18th March 2016, have raised serious issues regarding the obligations of THE Contracting states for the protection of refugees and migrants, including the principle of *non-refoulement* under the presumption that Turkey constitutes a "safe third country".[94]

As identified in chapter 2, in order to ensure the safeguards of Art.3 of the ECHR and protect the asylum seekers from arbitrary *refoulement,* the contracting party shall provide sufficient procedural guarantees as well to conduct a rigorous examination regarding the repercussions of the removal of the applicant[95] and collect sufficient evidence from reliable sources regarding the general situation in order the returnee to be guaranteed that he/she will not be not subjected to torture, degrading treatment or arbitrary *refoulement*. The main question whether Turkey can be characterized as a safe third country is a complex one due to the reasons that will be mentioned below.

3.4.2 Turkey's asylum system

In view of the humanitarian crisis faced by the international community due to the refugee issue, Turkey plays a key role mainly due to its geostrategic position as it is the main gateway to refugees and immigrants to the European Union. According to UN refugee agency, Turkey is

[94] Margarite Helena Zoeteweij, Ozan Turhan (2016),"The European agenda on migration: let's talk Turkey" pg:142-158.
[95] *F.G v. Sweden*, Application no. 43611/11, (23 March 2016), par: 112-113.

considered the country which hosts the highest number of refugees in the world,[96] with more than 3.5 million refugees from Syria[97]. Turkey has also hosted refugees from other nationalities including: Iraqis, Afghans, Iranians, and Somalis. It is worth mentioning that although Turkey is one of the original signatories of the 1951 Geneva Convention has not lifted yet the "geographical limitation" to Convention for non – Europeans refugees, therefore recognizing only refugees from European states. Furthermore, it is worth mentioning that after the failure of *coup d'etat* in 2016, Turkey submitted a formal notice of derogation to the ECHR.[98] Moreover, under the state of emergency the Council of Ministers can restrict fundamental human rights by issuing decrees with the force of law.

The temporary protection regime, to which the Syrians are subject under Turkish law, provides "protection in accordance with the Geneva Convention" as provided for in Article 38 (1) (e) of Directive 2013/32 / EU and Article 56 (2) (e) of the Law 4375/2016.

Although Turkey has ratified the 1951 Geneva Convention Relating to the Status of Refugees, it retains a "geographical limitation" to the Convention, which means that in Turkey, only European citizens can apply actual refugee status in line with the Refugee Convention. On the other hand non-European asylum applicants are granted with the "conditional refugee status" Therefore, in line with the geographical reservation Turkey has created a dual asylum system which provide: (a) international protection statuses, which are available upon individual assessment of asylum seekers, and (b) temporary protection status, which can be provided on a group basis in mass-arrival situations.[99] The Syrians refugees are granted neither international status nor "conditional status" but a temporary protection under Turkish law.

3.4.3 Syrians under Temporary Protection Regime

The mass influx of Syrian refugees crossing the Turkish borders started in April 2011. In response to these large arrivals, the Turkish government conducted an "open door" policy [100]for the treatment of Syrian refugees by implementing a "temporary protection" regime, which entered into force of the Temporary Protection Regulation in October 2014.

According to Article 1, the objective of the TPR is "to determine the procedures and principles pertaining to temporary protection proceedings that may be provided to foreigners, who

[96] UN refugee agency (2018), "Grandi urges more aid for Turkey's refugee hosting effort".
[97] European Commission, European Civil Protection and Humanitarian Aid Operations. Turkey, https://ec.europa.eu/echo/files/aid/countries/factsheets/turkey_syrian_crisis_en.pdf.
[98] Ignatius Yordan Nugraha (2017), *Human rights derogations during coup situation*, pg:194.
[99] Norwegian Organization for Asylum Seekers, *A critical review of Turkey's asylum laws and practices: Seeking Asylum in Turkey*, pg:12.
[100] AIDA, Temporary Protection in 2011-2014: Political Discretion and Improvisation.

were forced to leave their countries and are unable to return to the countries they left and arrived at or crossed our borders in masses to seek urgent and temporary protection and whose international protection claims cannot be assessed individually."

Syrian refugees benefitting from "temporary protection" are barred from making a separate individual "international protection" request. [101]Furthermore, the TPR did not impose a set duration on the "temporary protection" regime currently in place for refugees from Syria. Continuation or termination of the policy going forward is entirely within the discretion of the Turkish Government. Neither does the TPR strictly guarantee access to the individual "international protection" procedure to former beneficiaries in the event of a future termination of the "temporary protection" regime. Consequently, the Turkish "temporary protection" regime falls short of promising a secure, long-term solution to refugees from Syria seeking safety in Turkey, while it does create a framework for addressing the immediate and short-term protection and humanitarian needs of beneficiaries.

When analyzing the asylum system for Syrians, it is questionable whether Turkey fulfils the criterion of Article 38 (1) (e) of Directive 2013/32 / EU to provide Syrians "protection in accordance with the Geneva Convention." Are the provisions of the Directive which establishing the Common European Asylum System interpreted in the light of the general scheme and their aims in compliance with Geneva Convention as referred to in Article 78 (1) TFEU? Since Turkish legislation doesn't grant to Syrians the possibility to apply for refugee status in view of the "geographical limitation" under which the Republic of Turkey signed the 1951 Geneva Convention. All things considered, it is evident that the "temporary protection" regime provided for by the Turkish legislation for Syrian applicants for international protection cannot be considered to be "protection in accordance with the Geneva Convention". As it was set out in the foregoing considerations, a regime including a massive, non- individualized and indefinite decision which can be changed by the Council of Ministers and which does not recognize the benefits and protection of Geneva Convention Relating to the Status of Refugees cannot be identified as "equivalent" to the Convention.

3.4.4 NGO's reports: incidents of refoulement

In the context of the designation of Turkey as a 'safe third country', they have been raised serious concerns regarding the principle of *non-refoulement*, as enshrined in Article 3 of the ECHR and Article 33 (1) of the Geneva Convention.

Reports of NGO's have repeatedly highlighted Turkey's systematic refusal to asylum seekers in the borders by using violence and conducting massive and systematic returns to Syrian territory

[101] AIDA, (2015), Country Report: Turkey, pg:15.

even in vulnerable groups as Gerry Simpson, a director at Human Rights Watch reported "Turkey's closure is forcing pregnant women, children, the elderly, the sick, and the injured to run the gantlet of Turkish border officials to escape the horrors of Syria's war.[102]" According to the Syrian Observatory for Human Rights, since August 2015 to November 2017, at least 330 people have lost their lives trying to cross the Turkish borders.[103]

Most recently, a report of Human Rights Watch (15 December 2017- 15 January 2018) mentioned some cases of refugees trying to cross the Turkish borders who were abused and shot by the Turkish guards. According to Lama Fakih, director of Human Rights Watch for Middle East "Syrians fleeing to the Turkish border seeking safety and asylum are being forced back with bullets and abuse." The abusive methods of Turkish border guards raise very serious concerns regarding to the principle of non-refoulement," which prohibits rejecting asylum seekers at borders when that would expose them to the threat of persecution, torture, and threats to life and freedom."[104] In parallel, it is evident that these practices create a serious problematization concerning the characterization of Turkey as a "safe third country."

Another recent report of Human Rights Watch has alleged that Turkish border guards have been carrying out mass deportations of Syrian asylum seekers to Idlib, the country's largest remaining rebel stronghold. The findings of Human Rights Watch research reported that Turkish border guards had shot at asylum seekers trying to cross the borders and used smuggling routes, killing and wounding them.[105]"As border guards try to seal the last remaining gaps in Turkey's border, hundreds of thousands of Syrians are trapped in fields to face the bombs on the Syrian side. The EU should press Turkey to open its border to those in need, and provide meaningful support, not silently stand by as Turkey ignores refugee and pushes thousands back to face carnage" stated Gerry Simpson, director at Human Rights Watch.

A research of Amnesty International, carried out in the southern border provinces of Turkey, documented that 100 Syrian men, women and children have been forcibly returned to Syria. The evidence collected by the AI researches, confirmed that mass forced returns of Syrian refugees to Syria constitute a widespread practice implemented by Turkish authorities. John Dalhuisen, the Director of Amnesty International for Europe and Central Asia, in an attempt to highlight the consequences of the implementation of the EU-Turkey Statement for Syrian refugees, stated that "It seems highly likely that Turkey has returned several thousand refugees to Syria in the last seven to nine weeks. If the agreement proceeds as planned, there is a very real risk that some of those the EU

[102] Human Rights Watch (2015) "Turkey: Syrians Pushed Back at the Border", Amnesty International (2016) "Turkey: Illegal mass returns of Syrian refugees expose fatal flaws in EU-Turkey deal".
[103] Human Rights Watch, (2018), "Turkey/Syria: Border Guards Shoot, Block Fleeing Syrians".
[104] *Ibid.*
[105] Human Rights Watch (2018), "Turkey: Mass deportations of Syrians".

sends back to Turkey will suffer the same fate.[106]" Undoubtedly, the mass illegal returns of Syrian refugees as well the torture and ill-treatment[107] by Turkish authorities exclude Turkey from being considered as safe third country "In their desperation to seal their borders, EU leaders have wilfully ignored the simplest of facts: Turkey is not a safe country for Syrian refugees and is getting less safe by the day,[108]" John Dalhuisen added.

Continuing, the Norwegian Refugee Council in a recent report has confirmed Turkey's policy of closing its borders to Syrian refugees and carrying out thousands forced returns of displaced Syrians at their borders. More specifically, in 2017 only for the period January to October, Turkish authorities returned approximately 250,000 Syrians at their border. In order to prevent refugees Turkey announced the construction of a 911- kilometer border wall with Syria which is expected to be completed by the end of spring.[109] According to the report, in Turkey are identified many uncertainties concerning the conditions which lead refugees to returns. "Syrians are requested to sign a voluntary return paper, at the same time surrendering Temporary Protection IDs/preregistration documents. Signature of the form, coupled with the forfeiture of documentation, precludes returnees from being allowed to return to Turkey."[110]

3.4.5 EU's Commission reports in the implementation of the EU-Turkey Statement

When analyzing the EU Commission's report on the progress made in the implementation of the EU – Turkey Statement, which constitute available resources to examine EU-Turkey Statement's compatibility with the EU law and the Convention Relating to the Status of Refugees and the *non-refoulement* principle, omits a large number of people returned. In the sixth report on the progress made in the implementation of the EU – Turkey Statement published in June 2017, the European Commission has noted that since 20 March 2016, there were 1,210 returns to Turkey under the EU-Turkey Statement and 588 returns following the adoption of the Greece – Turkey bilateral protocol. In the report it is clarified that among those returned, 56 have submitted international protection applications to the Turkish authorities and 707 non Syrians have been returned to their countries of origin. All returned Syrians were pre – registered for temporary protection, with the exception of 16 persons who decided to return voluntarily to Syria; eight Syrians decided to stay in the accommodation facilities provided by the Turkish authorities and 168

[106] Amnesty International (2016), "Turkey: Illegal mass returns of Syrian refugees expose fatal flaws in EU-Turkey deal.".
[107] Amnesty International (2014), Struggling to Survive, Refugees from Syria to Turkey, pg: 16.
[108] Amnesty International (2016) Turkey: Illegal mass returns of Syrian refugees expose fatal flows in EU-Turkey deal.
[109] Norwegian Refugee Council (2017), Dangerous Ground: Syria's refugees face an uncertain future, pg:9.
[110] *Ibid*, pg:10.

of them chose to live outside.[111] However, the Commission gave an explanation of what happened to 955 persons who have been returned from Greece to Turkey under the EU-Turkey Statement since 20 March 2016, but there is no explanation of what happened to 255 persons.

In the seventh report of the European Commission, published in September 2017, there are also inconsistencies regarding the number of persons returned from Greece to Turkey. The Commission clarifies the status of 1100 persons that have been returned to Turkey and fails to give an explanation of what happened to 207 returnees.[112] It is evident that a considerable number of persons are omitted in the above mentioned reports.

A fact that raises serious concerns about the EU – Turkey Statement conformity with EU law and the principle of *non–refoulement* as enshrined in the Geneva Convention.

111 European Commission, Report from the European Commission to the European Parliament, the European Council and the Council. Sixth Report on the Progress made in the Implementation of the EU-Turkey Statement, 13/6/2016.
[112] European Commission, Report from the European Commission to the European Parliament, the European Council and the Council. Sixth Report on the Progress made in the Implementation of the EU-Turkey Statement, 6/9/2017.

4 STATUS OF IMPLEMENTATION OF COMMON PROCEDURES FOR GRANTING AND WITHDRAWING INTERNATIONAL PROTECTION BY THE HELLENIC REPUBLIC

4.1 The incorporation of International Law in Greek domestic Law

According to the provisions of Article 28(1), Greek Constitution in force[113], the "generally accepted rules of international law, as well as international conventions, from their ratification by law and their entry into force in accordance with the terms of each one, are an integral part of Greek domestic law and prevail over any other contrary provision of law. The application of the rules of international law and international conventions to aliens is always subject to reciprocity"[114].

The "generally accepted rules of international law" are directly applicable in domestic law, their application does not require any particular implementing legislation or publication and they prevail over any other contrary provision of domestic law[115]. Their application derives also from Article 2(2) of the Greek Constitution.[116] These "rules" include "international custom as evidence of a general practice accepted as law" under Article 38, paragraph 1(b) of the ICJ Statute. The Supreme Civil and Criminal Court of Greece acknowledge that codification treaties which crystallize a customary rule that is already applicable or has been created after it is concluded, and decisions of the international and domestic courts that contribute to the determination of the existence and the content of customary international law, as well as the findings of science and in particular the teachings of the most highly qualified publicists of various nations (Article 38, paragraph 1(d) of the ICJ Statute), are subsidiary means for the determination of customary international law. "Thus, in order to have an international custom, two elements are necessary: (a) a real, external one, that is a constant and invariable practice and (b) a psychological one, the belief that this practice corresponds to a certain legal obligation or right (*opinio juris sive necessitatis*)".[117] A Specific Supreme Court decides upon whether a rule of international law shall apply as a

[113] The Greek Constitution entered into force in June 1975 (GG A΄/111) and was amended in 1986 (GG A΄/23), 2001 (GG A΄/85) and 2008 (GG A΄/120).
[114] Art. 28 § 1, Greek Constitution.
[115] Pantelis (2007), pg:414, Dagtoglou (2015), pg: 114.
[116] Art. 2 § 2, Greek Constitution: "Greece, following the generally recognized rules of international law, seeks to consolidate peace, justice, and the development of friendly relations between peoples and states".
[117] Supreme Civil and Criminal Court of Greece, (Plenum), Decision 11/2000.

generally accepted one or not in case that a controversy emerges (Article 100(1), Greek Constitution)[118].

The incorporation of an international convention into domestic law, generally includes "ratification" by law (Articles 28(1) and 36(2, 4,) of the Greek Constitution) and publication in the Governments Gazette and their entry into force in accordance with the terms of each one. The provisions of Article 28(1) of Greek Constitution, applies also on conventions ratified by law before their entry into force in June 1975.[119] The term "ratification" used in the context of Article 28(1), has the meaning of an internal legislatory Act incorporating by law an international convention into domestic law and differs from the use of term "ratification" under Article 2, paragraph 1 (b) Vienna Convention on Law of Treaties: "*(b)* 'Ratification', 'acceptance', 'approval' and 'accession' mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty."[120]

Both, "generally accepted rules of international law" and international conventions ratified by law and their entry into force in accordance with the terms of each one, prevail as *lex superior* over any other contrary provision of domestic law and bind legislator, courts, administrative authorities and individuals. The application of rules of international law and international conventions to aliens is always subject to reciprocity, thus the implementation of this principle has not been rigorous.[121]

4.2 Greece's ratification of the Geneva Convention 1951 and the Protocol of 1967 Relating to the Status of Refugees and relevant Conventions

The Convention Relating to the Status of Refugees has been ratified per Legislative Decree 3989/1959, (GG A΄/201)[122] under the Constitution of 1952, whereas the Protocol of 31 January 1967 has been ratified per Mandatory Law 389/1968, (GG A΄/125)[123], during the Dictatorship period (1967 – 1974). The Greek Government made reservations[124] by the deposit of the instruments of ratification to following articles of the Geneva Convention, in accordance with Article 42(1): "At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1, 3, 4, 16(1), 33, 36-46 inclusive."

[118] Art. 100 § 1, Greek Constitution: « A Supreme Special Court as hereby set up to: (f) The removal of the challenge to the designation of rules of international law as generally acknowledged under paragraph 1 of Article 28 ».
[119] Tachos (2007), pg: 128, Dagtoglou (2015), pg: 114 – 115.
[120] Vienna Convention on the Law of Treaties, Article 2(1).
[121] Dagtoglou (2015): 114.
[122] Legislative Decree 3989/1959, GG A΄/201, «Ratification of the Multilateral Convention on the Legal Status of Refugees.
[123] Mandatory Law 389/1968, GG A΄/125, Ratification of the New York Protocol of 31 January 1967 in relation to the Legal Status of Refugees.
[124] Legislative Decree 3989/1959.

1. “The Greek Government reserves to itself the right to waive the obligations imposed by the provisions of Articles 8, 26, 28, 31 and 32, in cases or under circumstances which, in its judgment, justify an extraordinary procedure for reasons of national security or public order. 2.) The Greek Government considers Articles 11, 24(3) and 34 as simple recommendations and not as legal obligations. 3.) Article 13 shall not be deemed to refer to any rights or claims on movable or immovable property that such persons have been subjected to before entering refugee status in Greece. 4.) As regards to the wage – earning employment referred to in Article 17, the Greek Government shall accord to refugees, legal rights not less favourable than to other aliens in general.

5.) As public relief and assistance provided under Article 23, is considered to be the public assistance provided based on general laws and regulations. Emergency measures already taken or received by the Greek Government as a result of extraordinary circumstances in favour of a certain group of nationals, will not automatically extend to refugees subject to the provisions of the Geneva Convention. 6.) The Greek Government does not accept and does not regard as having effect on her, the second paragraph of the reservation made by the Turkish Government at the time of signature.

The Turkish Government declared at the time of signature, that the wording ‘events occurring before 1 January 1951’ shall be deemed to refer to events took place before 1 January 1951 in Europe, specifying which meaning it applies for the purpose of its obligations under the Convention, in accordance with Article 1 B (b). Moreover, the Turkish Government considers that the wording ‘events occurring before 1 January 1951’ refers to the beginning of the events. Therefore, taking into account the fact that the exerted pressure on the Turkish minority in Bulgaria, a pressure which began before 1 January 1951, continues to be practiced, the Turkish origin of Bulgarian refugees who have been forced to leave this country because of that pressure, and those who cannot come to Turkey and will resort to the territory of another Contracting Party after January 1, 1951, they shall likewise gain from the benefits of this Convention”.[125]

In addition to the Geneva Convention and the Protocol Relating to the Status of Refugees, the Greek State has ratified relevant Conventions such as: (a) the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4th November 1950, as well as of the supplemented Protocol of Paris of 20th March 1952[126], (b) the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[127] (c) the International Covenant on Civil and Political Rights, the Optional Protocol to the International Covenant on Civil and Political

[125] Legislative Decree 3989/1959.
[126] Legislative Decree 53/1974, GG A/256, Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4th November 1950, as well as of the supplemented Protocol of Paris of 20th March 1952.
[127] Law 1782/1988, GG A΄/116, “Ratification of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment”.

Rights and the Second Optional Protocol to the International Covenant on Civil and Political Rights on the Death Penalty,[128] (d) the International Covenant on Economic, Social and Cultural Rights,[129] (e) the Convention on the Elimination of All Forms of Discrimination against Women and the optional Protocol of 1999,[130] (f) the Convention on the Rights of the Child. [131]

4.3 Adaptation of Greek Legislation to the provisions of Directive 2013/32/EU and Implementation of common procedures for granting and withdrawing international protection by the Hellenic Administration

4.3.1 "Safe third country" under Article 56 of L.4375/2016

The Provisions of Article 38(1, 3, 4, and 5) of Directive 2013/32/EU regarding the safe third country concept and its application are almost literally incorporated in Greek national law by Article 56, Law 4375/2016[132]:

"A country is considered as a "safe third country" for a particular applicant when the following criteria are met cumulatively: a.) his / her life and freedom are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion, b.) that country respects the principle of *non-refoulement*, in accordance with the Geneva Convention, c.) there is no risk of serious harm to the applicant under Article 15 of Presidential Decree 141/2013, d.) this country prohibits the removal of someone to a country where he or she is in danger of being subjected to torture or cruel, inhuman or degrading treatment or punishment, as defined in international law, i.e. there is the possibility of seeking refugee status and, if the applicant is recognized as a refugee, be granted protection under the Geneva Convention; and f. the applicant has a link with that third country, on the basis of which it would be reasonable for him / her to go to it.

The assistance of these criteria shall be examined on a case-by-case basis and for each applicant separately. In the case of a decision solely based on this Article, the Competent Authorities of shall inform the applicant accordingly and shall issue a document informing the authorities of that third country that the application has not been examined in substance.

[128] Law 2462/1997, GG A΄/25, Ratification of the International Covenant on Civil and Political Rights, the Optional Protocol to the International Covenant on Civil and Political Rights and the Second Optional Protocol to the International Covenant on Civil and Political Rights on the Death Penalty.
[129] Law1532/1985, GG A΄/45, Ratification of the International Covenant on Economic, Social and Cultural Rights.
[130] Law 1342/1983, GG A΄/39, On the Ratification of the Convention of the United Nations on the Elimination of All Forms of Discrimination against Women, GG A΄/248, Ratification of the optional Protocol of the Convention on the Elimination of All Forms of Discrimination against Women.
[131] Law 2101/1992, GG A΄/192, Ratification of the International Convention on the Rights of the Child.
[132] Article 56 of L.4375/2016 (Article 38 of the Directive 2013/32/EU).

Where the third country in question does not allow the applicant to enter its territory, its application shall be examined in substance by the Competent Authorities.

The European Commission shall be informed annually by the relevant departments of the Ministry of Foreign Affairs of the countries designated as safe in accordance with this Article."[133]

Thus, the provisions of Article 38(2), Directive 2013/32/EU, according to which the application of the safe third country concept shall be subject to rules laid down in national law, including rules requiring a connection between the applicant and the third country concerned, 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 and rules in accordance with international law, which 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, are not properly incorporated in Greek national law. These rules are not explicitly specified in the framework of Law 4375/2016 and can be derived solely on the basis of relevant general provisions.

4.3.2 Article 60 of L.4375/2016: "Fast track" procedure

According to Article 60(4) of Law 4375/2016, as amended by Article 86(13), Law 4399/2016, in case of arrivals of a large number of third – country nationals or stateless persons who apply for international protection at the border or in a transit area of ports or airports or while they remain at Reception and Identification Centres, by joint decision of the Ministers of Interior and Administrative Reconstruction and National Defence[134], apply exceptionally the following rules:

- "The registration of an application for international protection, the handover of judgments and other procedural documents, as well as the receipt of appeals may be carried out by personnel of the Greek Police or personnel of the Armed Forces.
- The interview with applicants for international protection may also be carried out by personnel available from the European Asylum Support Office.
- The time limit referred to in Article 52 (5), Law 4375/2016, shall be one (1) day: "Prior to the interview, the applicant shall, if he / she so desires, be given reasonable time to prepare properly and consult a legal or other adviser to assist him / her during the proceedings…"The time limit of Article 62 (2) (c), Law 4375/2016 is two days: ¨. By submission of an appeal, the receiving authority shall inform the applicant on the date of its discussion on the same day. The appeal shall be discussed: (...) c. At least

[133] L.4375/2016, Article 56.
[134] Joint Ministerial Decision 13257/2016, GG 3455/B/26.10.2016, Implementation of the provisions of paragraph 4, article 60, L.4375/2016.

five (5) days after the submission of an appeal against a decision rejecting an application for international protection in the cases referred to in Article 60 or submitted while the applicant is at a Reception and Identification Centre. The applicant and the Asylum Authority may present any additional information or memorandum until the day before the hearing of the appeal.

- The time limit of Article 62 (3), for the notification of the applicant in the case of an oral hearing and for the submission of any memorandum after the examination of the appeal is one day.
- d. The decision on the application for international protection is issued no later than the next day of the interview and is delivered no later than the day following the date of the interview.
- e. Appeals are reviewed within three (3) days of their submission. The decision on the appeal shall be issued no later than two (2) days from its examination or submission of the statement of claim and shall be handed no later than the day following its issue. In the case of a request to be heard by the applicant as provided for in Article 62 (1) (e) of Law 4375/2016, the Appeals Committee may, in its opinion, invite the applicant to a hearing."

The "Fast track" procedure does not apply according to Article 60, paragraph 4 (f), Law 4375/2016, on applicants who are subject to the provisions of Articles 8 – 11, Regulation 604/2013/EU (unaccompanied minors, family members who are beneficiaries of international protection or who are applicants for international protection or subject to family procedure) and applicants belonging to vulnerable groups according Article 14(8), Law 4375/2016: a) unaccompanied minors; b) persons with disabilities or suffering from an incurable or serious illness; c) elderly people; d) pregnant or postpartum women; e) single parent families (f) victims of torture, rape or other serious forms of psychological, physical or sexual violence or exploitation, persons with post-traumatic stress syndrome, in particular survivors and relatives of wreck victims; and (g) victims of trafficking.

4.4 Case law of the Supreme Administrative Court of Greece on the Status of Refugees

The Supreme Administrative Court of Greece in 2017, with its decisions 2347/2017 and 2348/2017 concluded that according to the provisions of Article 38 (1) (e) of Directive 2013/32 / EU and Article 56 (1) (e) of Law 4375/2016 respectively, the ratification of the Geneva Convention without a geographical limitation is not required for the third country concerned to be considered as a safe third country[135]. Furthermore it is not required for the third country concerned to introduce a system of protection of aliens under its national law, which guarantees not only the principle of *non-refoulement* but also all other rights provided in the mentioned Convention. Finally, sufficient protection in that country, including benefiting from the principle of *non – refoulement*, is considered to be equivalent to enjoyed protection for recognized refugees. Reasons for this conclusion are inter alia the following:

a) The comparison of Article 38, Directive 2013/32/EU (Article 56 of Law 4375/2016), which does not provide that in order for a third country concerned to be considered safe, is required the ratification of the Geneva Convention, the application of a specific asylum procedure provided by its national legislation or the establishment of a list of certain rights, with Article 39 (2) of the Directive 2013/32/EU regarding the concept of European safe third country which expressly provides that a European country can be considered as a safe third country within the meaning of Article 39 (1) only if (a) it has ratified and respects the provisions of the Geneva Convention without geographical constraints; (b) an asylum procedure provided for by law, and (c) has ratified the ECHR and complies with its provisions, including rules on effective remedy.

b) The comparison of the provisions of Article 38, Directive 2013/32/EU with the provisions of Article 35 thereof (Article 55, Law 4375/2016,) which provide that a country may be considered as a 'first country of asylum' for a particular applicant if he or she has been recognised in that country as a refugee and he or she can still avail himself/herself of that protection, or he or she otherwise enjoys sufficient protection in that country, including benefiting from the principle of non – refoulement.

c) The Geneva Convention does not provide for the uniformly protection of aliens or stateless persons within its scope, since the rights recognized by that Convention differ from one State Party to the other considering the degree of connection between the refugees and

[135] Supreme Administrative Court of Greece, (Plenum), Decisions 2348/2017, 2347/2017.

the countries in which they live and that, on the other hand, most of the rights provided are not unconditionally secured but, on the contrary, they are subject to reservations by the States when signing, ratifying or acceding to the Convention. Therefore, in order to qualify a third country as safe, in terms of assisting criterion 38 (1) of Directive 2013/32/EU (Article 56 (1) (c), Law 4375/2016), it is sufficient to provide 'adequate' protection of certain fundamental rights of refugees, including, inter alia, the right of access to health care and the labour market.[136] The interpretation of the UN High Commissioner for Refugees on the concept of "safe third country" (Article 38, Directive 2013/32/EU) does not have any legal effect, because UNHCR views, as reflected in relevant texts and textbooks, are by no means binding, because they merely contain proposals for the observance of a certain procedure when examining asylum applications and thus they set "soft" law. The Independent Boards of Appeal and the Greek Courts remain the only ones responsible for interpreting the relevant rules of law.[137]

The majority of the Plenum noted that the Turkish legal framework laying down the protection status granted to Syrians and non-Syrians refugees is the Ministerial Decree 2014/6883 of 13 October 2014, as amended by Ministerial Decree 2016/8722 of 6 April 2016 regarding Temporary Protection Regulation, the Regulation on the work permit for Applicants for International Protection and Beneficiaries of International Protection and the Law on Aliens and International Protection. Since the returned Syrians to Turkey are expressly protected from *refoulement* and they automatically enjoy the protection of the "temporary protection" regime, have a legitimate right of residence while enjoying free access to basic health and education services in view of the fact that they are free to work under a regime similar to that of Turkish citizens without any discrimination, the Turkish legal framework, interpreted in the light of the Geneva Convention and the rules of international humanitarian law, appears to satisfy the conditions for determining that, in principle, it offers equivalent protection to the protection afforded, by the Geneva Convention.[138]

The minority of the Plenum argued that Article 78 (1) TFEU defines that the common policy of the European Union in the areas of, inter alia, asylum and subsidiary protection 'must be consistent with the Geneva Convention of 28 July 1951 and the Protocol of 31

[136] Supreme Administrative Court of Greece, (Plenum), Decision 2348/2017, (54).
[137] Supreme Administrative Court of Greece, (Plenum), Decision 2348/2017, (55).
[138] Supreme Administrative Court of Greece, (Plenum), Decision 2348/2017, (40), (55).

January 1967 on the status of refugees and other international conventions' and the provisions of the directives constituting the Common European Asylum System must be interpreted in the light of the general scheme and their objectives, in accordance with the Geneva Convention and the other Treaties referred to in Article 78 (1) TFEU'. Turkey does not meet the criterion of Article 38 (10) (e) of Directive 2013/32 / EU (Article 56 (1) (e) of Law 4375/2016), because (a) its legislation does not grant foreigners of Syrian origin the possibility of applying for refugee status in view of the geographical limitation under which the Republic of Turkey has signed the Geneva Convention, and (b) the "temporary protection" regime provided by the Turkish legislation for Syrian applicants for international protection cannot be considered to be "protection under the Geneva Convention", insofar as it is massive, not individualized and abolished at any time by a decision of the Council of Ministers, which does not even recognize to its solicitors all the rights and benefits provided by the Geneva Convention.[139]

4.4.1 The Role of EASO in the context of "fast track" procedure/ Article 60(4) of Greek Law 4375/2016

The impact of the "fast track" procedure has resulted in a de facto dichotomy of Greek asylum system, which according to the former director of the Greek Asylum Service, Maria Stavropoulou, undermines the guarantees of the asylum process: "Insufferable pressure is being put on us to reduce our standards and minimize the guarantees of the asylum process. We're asked to change our laws, to change our standards to the lowest possible under the EU directive on asylum procedures."[140]

The Greek Asylum Service shall inter alia, "be assisted, in the conduct of interviews with applicants for international protection as well as any other procedure, by staff and interpreters deployed by the European Asylum Support Office."[141] However, the intervention of the EASO the obligations remain those of the Greek Asylum Service. Article 60(4), Law 4375/2016, known as a "fast track" border procedure as an extraordinary measure, was adopted under urgent procedure for the implementation of the EU – Turkey agreement. The Joint Ministerial Decision regarding the "application of the provisions of paragraph 4 of this Article 60 of Law 4375/2016 (A51)", provides inter alia that, "the interview with applicants for international protection will be carried out by experts from the European Asylum Support

[139] Supreme Administrative Court of Greece, (Plenum), Decision 2348/2017, (60).
[140] IRIN, Greek asylum system reaches breaking point, 31/03/2016.
[141] Law 4375/2016, Art. 60 (4) (b).

Office (EASO), which have been specifically allocated for this purpose, according to the provisions of Chapter 3 of No. 439/2010".[142]

In accordance with Law 4375/2016, the role of the European Asylum Support Office is not limited there, as in its merits falls the research evaluation of applicants for international protection as well as the guarantee of "the quality of international protection decisions",[143] which may contradicts the purpose of the EASO under the Regulation 439/2010/EU of the European Parliament and the Council, where in Art. 2(6) underline that: "The Support Office shall have no powers in relation to the taking of decisions by Member States' asylum authorities on individual applications for international protection."[144] However when analyzing the EASO Special Operating Plan to Greece 2017, it is evident the essential intervention of the EASO through the way of conducting an interview and the impact of their opinions and recommendations in decisions making.

4.4.2 Quality of interviews

In practice, the way of functioning of the EASO raises serious concerns regarding the issues of competence.

Regarding the quality of the interview HIAS report on the "EASO's operation on the Greek hotspots" has addressed, among others, a crucial issue, which is the right to fair hearing.[145] The way of conducting interviews by the EASO's caseworkers, by using an inflexible questionnaire, fail to provide applicants the opportunity to present their personal and vulnerable experiences. Furthermore, the failure of the Agency's experts to give the opportunity to applicants to explain the inconsistencies which may be identified in the applications should also be mentioned. These inconsistencies play a crucial role as they are used in the recommendations, a fact that means that they can influence the applicant's statement in a negative way.

Another important element in functioning of the EASO's operation constitutes the fact that the opinions/recommendations submitted to the Asylum Service are written in English while the official language of the law underlying the decisions is Greek. The complex nature of the communication due to the language obstacle between asylum applicants – EASO experts – Greek Asylum Service, may entail obstacles regarding to the access of the

[142] Art. 1 (3-4), Joint Ministerial Decision 13257/2016, GG 3455/B/26.10.2016, Implementation of the provisions of paragraph 4, article 60, L. 4375/2016, (ΚΥΑ 13257/2016, ΦΕΚ 3455/Β΄/26.10.2016.
[143] Law 4375/2016, Art. 1 (f).
[144] Regulation.439/2010/EU.
[145] HIAS, "EASO's operation on the Greek hotspots", 2018.

applicants to the reasoning of the decision. A case – law example which highlights the crucial role of the language factor, constitutes the case of *M.S.S. v. Belgium and Greece* where the language accessibility was considered as an important part of the deficiencies of the Greek asylum system.[146] . According to the report of the European Council on Refugees and Exiles (ECRE), there are "a number of cases where the interview has been conducted exclusively by EASO staff not in the country's official language, but in English."[147] In this context, the Greek Asylum Service is based exclusively on EASO interviews and recommendations and it has no direct contact with asylum applicants in order to ask and verify the material provided by the EASO experts. At this point it could be argued that the language accessibility is of great importance as the access to information related to applicant's rights reflects also the right to an effective legal remedy.

Under the pressure of the "fast track" procedure with the massive influx of persons, the weakness to conduct an individualized comprehensive assessment under assumption of the "safe third country" may entail considerable risks to *refoulement*. According to the UN Special Rapporteur's statement "provisions under the fast track regime are problematic due to the lack of individual assessment of each case, and the risk of violating the *non-refoulement* is consequently very high."[148]

All things considered it could be argued that the involvement of the EASO in the asylum procedure in Greece does not only overstep its role that was envisaged in the Regulation 439/2010/EU but also undermines Article 4 of the European Code of Good Administrative Behaviour[149]. In particular, the extensive involvement of the EASO in the Greek Asylum Service raises serious concerns regarding the quality of the interviews and opinions/recommendation of decisions, which are considered to be at the heart of the asylum procedure. It could be argued that the way of functioning of the EASO entails many legal uncertainties and lack of effective legal remedy for the asylum applicants, a fact that can risk the infringement of their fundamental rights, and more specifically the right to *non-refoulement* as derives from Geneva Convention (Art.33), international conventions on the protection of human rights and the European Convention on Human Rights (Art.3). Regarding the implementation of functions of the EASO, the European Centre for

[146] Case of M.S.S. v. Belgium and Greece, Application No.30696/09, 2011.
[147] ECRE, Hotspots- Report 5/12/2016, pg:39.
[148] Human Rights Council (2017), Report of the Special Rapporteur on the human rights of migrants on his mission to Greece.
[149] The European Code of Good Administration, Article 4: "Civil servants should act respectfully to each other and to citizens. They should be polite, helpful, timely, and co-operative. They should make genuine efforts to understand what others are saying and express themselves clearly, using plain language."

Constitutional and Human Rights (ECCHR) has expressed its concerns by submitting a complaint to the European Ombudsman, where it criticizes that, "EASO exercise a de facto power on decisions in relation to applications for international protection by conducting admissibility interviews and making recommendations.[150]" This de facto delegation by the Greek authorities of its decision making powers undermines Greece's obligation to ensure asylum applicants a rigorous scrutiny and to provide an effective remedy against *refoulement* as enshrined in Article 3 and 13 of the European Convention on Human Rights.

[150] European Centre for Constitutional and Human Rights (ECCHR) (2018), "EASO's involvement in Greek Hotspots exceeds the agency's competence and disregards fundamental rights".

5 CONCLUSIONS

All things considered, despite the fact that there allegedly exists no uniform interpretation and understanding of the principle of *non-refoulement*, it is conspicuous that international law, in light of both its human rights and refugee law dimensions, has evolved to the point of ingraining the concept of no-return not just to torture, but also cruel, inhuman and degrading treatment or punishment. Regardless of the seeming fragmentation of the protection granted through a plethora of human rights instruments, all of them complement each other, rather than contradict, and are to be seen and treated as a synthesis, given that its inherent and underlying purpose is, first and foremost, the protection of the individual.

The analyzed judicial practice, with the primary focus on the case law of the ECtHR, has underlined the undisputed nature of the right to seek asylum, which forms part of the all-encompassing human rights regime. The application of *safe third country* concept, however, appears to be frequently not in conformity with the comprehensive human rights system proclaimed on paper. It has been especially noticeable through the example of the EU - Turkey Agreement, which can be regarded as a manifestation of *indirect refoulement*. It has highlighted how political considerations and principles of state discretion and sovereignty are effectively negating human rights. Furthermore, this research has foregrounded that the Agreement has not been an incidental occurrence of unlawfulness and non-adherence to the international law commitments of the EU states, as the concept of 'safety' there intrinsically incorporates countries who are not contractually bound by the 1951 Geneva Convention.

It is at this point that the referral to the local Greek context demonstrates the unaddressed and evaded deficiencies of the common European system, which were one of the reasons behind the ascendance of the refugee 'crisis', which, as this paper has demonstrated, was rather a 'crisis' of mismanagement, legal vagueness and unwillingness to conform to international law norms. By way of example, the described involvement of the EASO and its appropriation of the refugee determination procedure in Greece shows the failings and dangerousness of the bureaucratization of the institute of asylum, rendering refugee claims to be stripped of its human component, objectified and turned into faceless statistics.

Thus, while answering the questions posed at the beginning of my research, whether Greek and European asylum legal framework as a whole are in compliance with the incurred obligations, one might have to consider a negative option, given that its ambiguities open the stage for outright misuse. Therefore, the primary recommendation arising from the study

would be the elimination of all possible uncertainties, and re-assessment of the relationship between the internal asylum system vis-à-vis the external one. Moreover, any policy affecting refugees, but most importantly, designed to protect them and alleviate their predicament, should be guided by humaneness, which was the bulwark of the human rights law and refugee law in particular.

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