



The meaning of ‘protection in accordance with the Geneva Convention’ under Article 38(1)(e) EU Procedures Directive in the light of the safe third country concept

with a case study of Turkey

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ABBREVIATIONS

ASAM	Association for Solidarity with Asylum Seekers and Migrants
CEAS	Common European Asylum System
CFR	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
DGMM	Turkish Directorate General of Migration Management
ECHR	European Convention on Human rights
ECtHR	European Court of Human Rights
ECRE	European Council on Refugees and Exiles
EU	European Union
FCA	First country of asylum
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ILC	International Law Commission
LFIP	Turkish Law on Foreigners and International Protection
NOAS	Norwegian Organisation for Asylum Seekers
PD	Recast of the EU Procedures Directive (2013/32/EU)
PDMM	Turkish Provincial Directorate for Migration Management
QD	Recast of the EU Qualification Directive (2011/95/EU)
RC	1951 Convention relating to the Status of Refugees
RP	1967 Protocol relating to the Status of Refugees
RWPF	Turkish Regulation on Work Permits of Foreigners under Temporary Protection
STC	Safe third country
TFEU	Treaty on the Functioning of the European Union
TPR	Turkish Temporary Protection Regulation
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees

1. Introduction

1.1 Background

States parties to the Refugee Convention (RC)¹ and Refugee Protocol (RP)² do not have an obligation to grant asylum,³ but are at the same time prohibited under Article 33 RC from expelling or returning persons to territories where their ‘life or freedom would be threatened on account of (...) race, religion, nationality, membership of a particular social group or political opinion’. This prohibition of *refoulement* protects *all* refugees, since it is well-accepted that the definition of persecution in Article 33 RC resembles the one in Article 1A(2) RC.⁴ In theory, Article 33 RC excludes from its protective scope all groups other than refugees. Nonetheless, it also protects asylum-seekers in practice. This derives from the declaratory nature of refugee status. In other words, one ‘does not become a refugee because of recognition, but is recognized because he is a refugee’.⁵ Potentially, all asylum-seekers are therefore refugees. When a state returns an asylum-seeker to his country of origin without examining whether he⁶ is as refugee, the state thus risks to violate the prohibition of *refoulement*.

The simultaneous non-existence of an obligation to grant asylum and the existence of the prohibition of *refoulement* entail in practice that the state under which’ jurisdiction a refugee presents himself should either provide protection against persecution itself or transfer the refugee to another country where protection could be provided. The latter is also referred to as ‘protection elsewhere’.⁷ This encompasses both the concepts of ‘first country of asylum’ (FCA)⁸ and ‘safe third country’ (STC).⁹ ‘Third’ refers to the fact the STC is neither the

¹ Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).

² Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 (Refugee Protocol).

³ Stephen Legomsky, ‘Addressing Secondary Refugee Movements’ in Ryszard Cholewinski, Richard Perruchoud and Euan MacDonald (eds), *International Migration Law: Developing Paradigms and Key Challenges* (TMC Asser Press 2007) 177, 182; Michelle Foster, ‘Responsibility Sharing or Shifting? “Safe” Third Countries and International Law’ (2008) 25(2) *Refuge: Canada’s Periodical on Refugees* 64, 66; Savitri Taylor, ‘The Pacific Solution or a Pacific Nightmare? The Difference Between Burden Shifting and Responsibility Sharing’ (2005) 6 *Asian-Pacific Law & Policy Journal* 1, 3.

⁴ James Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press 2005) 304-305.

⁵ UNHCR, ‘Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees’ UN Doc HCR/IP/4/Eng/Rev.3 (2011) 28.

⁶ For the sake of readability, the masculine form is used throughout this thesis. However, this encompasses both men and women.

⁷ The Michigan Guidelines on Protection Elsewhere (2007) 28 *Michigan Journal of International Law* 207; see also James Hathaway and Michelle Foster, *The Law of Refugee Status* (Cambridge University Press 2014) 31.

⁸ See on the notion of first countries of asylum e.g. UNHCR, ‘Considerations on the “Safe Third Country Concept” in Asylum Legislation’ (1996) para 1; Joanne van Selm, ‘Access to Procedures: “Safe Third Countries”, “Safe Countries of Origin” and “Time Limits”’ in UNHCR Global Consultations on International Protection (2001) para 15; Jens Vedsted-Hansen, ‘Non-Admission Policies and the Right to Protection: Refugees’ Choice Versus States’ Exclusion?’ in Frances Nicholson and Patrick Twomey (eds), *Refugee Rights and Realities: Evolving International Concepts and Regimes* (Cambridge University Press 1999) 269, 272.

country of origin ('first'), nor the country where asylum is sought ('second'). An FCA refers to the place where the asylum-seeker *has already obtained* protection, while an STC refers to the place where the asylum-seeker *could have obtained* protection.¹⁰ This thesis will focus on the latter.

With regard to this notion of safe third countries, it is important to point out that – equally to the second country - the third country is not obliged to grant asylum. In theory, this means that a refugee could be sent from pillar to post as long as the principle of *non-refoulement* is complied with. The European Union (EU) stopped this practice of 'refugees in orbit',¹¹ within the EU by adopting the Dublin Convention,¹² which is now the Dublin Regulation.¹³ For each individual application for international protection, the Regulation designates a single EU Member State responsible for the application.¹⁴ To maintain states' sovereign right *not* to grant asylum, they retain the right to send an applicant to an STC.¹⁵ Subsequently, in order to prevent that states – being responsible under *Dublin* – maintain the practice of refugees in orbit by employing the STC concept, Article 38(1)(e) Procedures Directive (PD)¹⁶ requires that it must be possible to request refugee status in the third country.¹⁷

However, that particular provision does not stop there. Article 38(1)(e) PD also states that an asylum-seeker 'found to be a refugee' must 'receive protection in accordance with the Geneva Convention'. Considering the STC concept as described above, this 'protection' would imply that the refugee must only be protected against persecution and *refoulement*. However, such protection is already provided by, respectively, Article 38(1)(a) and (c) PD. Hence, assuming that the scope of Article 38(1)(e) PD consists of non-persecution and non-*refoulement*, would render Article 38(1)(a) and (c) PD superfluous. Therefore, the exact meaning of Article

⁹ See on the notion of safe third countries e.g. María-Theresa Gil-Bazo, 'The Safe Third Country Concept in International Agreements on Refugee Protection: Assessing State Practice' (2015) 33(1) Netherlands Quarterly of Human Rights 42; Mark Krikorian, 'Expand the "Safe Third Country" Idea for Asylum Seekers' *The New York Times* (3 October 2011) <<https://www.nytimes.com/roomfordebate/2011/07/12/how-can-the-asylum-system-be-fixed/expand-the-safe-third-country-idea-for-asylum-seekers>> accessed 23 March 2018; Ashifa Kassam, 'Activists Challenge "Unsafe" US-Canada Pact that Prompts Refugees to Fly by Foot' *The Guardian* (6 July 2017) <<https://www.theguardian.com/world/2017/jul/06/canada-us-refugees-safe-third-country-agreement-border-crossing>> accessed 23 March 2018.

¹⁰ Van Selm (n 8) para 15.

¹¹ See Pieter Boeles and others, *European Migration Law* (Intersentia 2014) 257.

¹² Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities [1997] OJ C254/1 (Dublin Convention).

¹³ Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L180/31 (Dublin Regulation).

¹⁴ *Ibid* art 3(1).

¹⁵ *Ibid* art 3(3).

¹⁶ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L180/60 (Procedures Directive).

¹⁷ See also Procedures Directive, art 38(4).

38(1)(e) PD is ambiguous.¹⁸ This ambiguity becomes clear when one considers the application of the STC concept in practice.

Currently the STC concept is applied in relation to Turkey. The EU-Turkey Statement has revived the entire STC concept by providing for the direct return of all migrants coming from Turkey to the Greek islands as from 20 March 2016.¹⁹ Such a direct return presumes that Turkey qualifies as an STC in accordance with Article 38 PD. However, many NGOs have argued that Turkey should not be considered safe.²⁰ If Turkey were indeed not an STC, then the direct return of migrants from Greece to Turkey would be incompatible with EU law. Bearing this in mind, a number of scholars has researched the question whether Turkey indeed qualifies as an STC.²¹ However, rather than clearly defining and assessing the full range of requirements of Article 38 PD, such research either focuses merely on Turkey's protection against persecution and *refoulement*,²² or on Turkey's performance with respect to various other substantive rights without first determining the scope of these rights.²³ If one interprets 'protection in accordance with the Geneva Convention' of Article 38(1)(e) PD as encompassing all sorts of rights, one should at least be very clear in defining the exact scope of such rights.

As to date, there has been a lack of such a definition. Therefore, it is complicated to determine whether a potential STC fulfils the requirements of Article 38 PD.

¹⁸ See also UNHCR, 'Legal Considerations on the Return of Asylum Seekers and Refugees From Greece to Turkey as Part of the EU-Turkey Cooperation in Tackling the Migration Crisis under the Safe Third Country and First Country of Asylum Concept' (2017) 29(3) International Journal of Refugee Law 498, 506.

¹⁹ Council of the European Union, 'EU-Turkey Statement' (18 March 2016) <<http://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>> accessed 23 March 2018.

²⁰ See e.g. Amnesty International, 'A Blueprint for Despair: Human Rights Impact of the EU-Turkey Deal' EUR 25/5664/2017 (14 February 2017) <<https://www.amnesty.org/download/Documents/EUR2556642017ENGLISH.PDF>> accessed 16 May 2018; Bill Frelick, 'Is Turkey Safe for Refugees?' Human Rights Watch (22 March 2016) <<https://www.hrw.org/news/2016/03/22/turkey-safe-refugees>> accessed 11 April 2018; ECRE, 'Debunking the "Safe Third Country" Myth: ECRE's Concerns About EU Proposals for Expanded Use of the Safe Third Country Concept' (2017) <<https://www.ecre.org/wp-content/uploads/2017/11/Policy-Note-08.pdf>> accessed 11 April 2018.

²¹ See e.g. Mariana Gkliati, 'The EU-Turkey Deal and the Safe Third Country Concept before the Greek Asylum Appeals Committees' (2017) 3 Journal for Critical Migration and Border Regime Studies 213; Emanuela Roman, Theodore Baird and Talia Radcliffe, 'Why Turkey is Not a "Safe Country"' (February 2016) <<http://www.statewatch.org/analyses/no-283-why-turkey-is-not-a-safe-country.pdf>> accessed 30 April 2018; UNHCR 2017 (n 18); European University Institute: Migration Policy Centre, 'Post-deportation Risks Under the EU-Turkey Statement: What Happens After Readmission to Turkey?' (2017) <<https://publications.europa.eu/en/publication-detail/-/publication/45f52a11-f4f1-11e7-be11-01aa75ed71a1/language-en>> accessed 30 April 2018; Refugee Support Aegan and Pro Asyl, 'UNHCR has Failed to Stand Up for Refugee Rights During Crucial EU-Turkey Deal Judgement' (2017) <<https://www.proasyl.de/wp-content/uploads/2015/12/2017-10-20-Legal-note-PRO-ASYL-and-RSA-concerned-over-the-silence-of-UNHCR-in-EU-Turkey-Deal.pdf>> accessed 30 April 2018.

²² See e.g. Jenny Poon, 'EU-Turkey Deal: Violation of, or Consistency with, International Law?' (2016) 1(3) European Papers 1195.

²³ See e.g. Gkliati (n 21) 218; Amnesty International 2017 (n 20) 22-25, Roman, Baird & Radcliffe (n 21) 18-19.

1.2 Research question and sub-questions

I will attempt to define and delineate the protection that is required by Article 38(1)(e) PD. As a case study, I will subsequently examine to what extent Turkey provides such protection.

The research question is therefore as follows: *what is the meaning of 'protection in accordance with the Geneva Convention' under Article 38(1)(e) PD and to what extent does Turkey provide such protection?* The sub-questions are as follows:

- 1) What are the origins and content of the STC concept in general?
- 2) What protection standards are required to qualify as STC within the context of the Refugee Convention?
- 3) What protection standards are required to qualify as STC under Article 38(1)(e) PD?
- 4) To what extent does Turkey provide such protection?

1.3 Aim and limitations

The main aim of this thesis is to clarify the meaning of Article 38(1)(e) PD. This should make the determination of the safety of potential STCs less troublesome. Answering the question of the scope of 'protection in accordance with the Geneva Convention' sheds light on the legal validity of STC arrangements – such as the EU-Turkey Deal – from an unusual perspective, which is exactly where the academic value of this thesis lies. Subsequently, the case study of Turkey aims to concretize the findings of this thesis. Nevertheless, the structure and approach of this document should make it possible to apply the findings of this thesis to any other potential STC.

Taking into account the background set out above, I will primarily examine substantive rights, rather than procedural rights. Moreover, I will limit myself here to the Convention rights, instead of examining human rights in other international instruments.²⁴ I consider such human rights to be outside the scope of this thesis, which is to clarify the meaning of 'protection in accordance with the Geneva Convention'.²⁵

1.4 Methodology and outline

In this thesis, I will apply the *doctrinal* research method. In general, this means that I will use legal sources to work towards an answer to the main research question. Divided into chapters, the structure and methodology are specified as follows.

Chapter 2: I will first analyse the origins and content of the STC concept in general. This will serve as a background for the subsequent chapters. It will mainly focus on the legal basis of the concept, which is constituted by two seemingly opposite notions: the notion of state sovereignty versus the prohibition of *refoulement* (chapter 2.2). Thereafter, this chapter will

²⁴ See for an comprehensive analysis of relevant human rights Stephen Legomsky, 'Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection' (2003) 15 International Journal of Refugee Law 567, 645-654.

²⁵ Emphasis added.

look more into the content of the STC concept by comparing it to another form of ‘protection elsewhere’, namely the FCA concept (chapter 2.3).

As to the methodology and sources, the origins and meanings of the STC concept will be assessed mainly through scholarly writing, since the notions of sovereignty and non-*refoulement* have been researched by scholars in detail. Furthermore, documents issued by the United Nations High Commissioner for Refugees (UNHCR) will have an authoritative status with respect to the interpretation of the prohibition of non-*refoulement* of Article 33 RC, taking into account the UNHCR’s supervising role ‘in the application of the provisions of [the] Convention’.²⁶ Where necessary, case law of the International Court of Justice (ICJ) will be consulted.²⁷ This Court (which may also settle seemingly insoluble disputes between States parties about the interpretation of the Convention)²⁸ has authoritative status with regard to the interpretation of international law,²⁹ and has provided some important judgments on the notion of state sovereignty.

Chapter 3: Having clarified the meaning of the STC concept in general, chapter 3 focuses on the required protection of the STC concept within the context of the Refugee Convention. This is necessary, since the Common European Asylum System (CEAS)³⁰ – and thus the Procedures Directive – is directly based on the Refugee Convention.³¹ Moreover, Article 38(1)(e) PD explicitly requires treatment to be in accordance with the Refugee Convention. To elucidate the required protection, I will first examine the system of the Refugee Convention (chapter 3.2). A good overview of this complex system helps illuminating the exact meaning and value of the different Convention rights, some of which might prove to be part of the required protection of the STC concept. Using the system of the Convention, I will subsequently elaborate on different theories of prominent scholars on the required treatment of ‘protection elsewhere’ notions (chapter 3.3). I will try to find a theory that does the most justice to the Refugee Convention. This theory will be applied to the STC concept by first examining the *procedural* protection requirements, but only the ones that are essential for compliance with the substantive requirements (chapter 3.4). Afterwards, I will examine the *substantive* protection requirements itself (chapter 3.5).

²⁶ Refugee Convention, art 35.

²⁷ This also includes the ICJ’s predecessor, which is the Permanent Court of International Justice (PCIJ).

²⁸ Refugee Convention, art 38.

²⁹ As to date, 66 States parties to the United Nations have declared to recognize, mostly on the condition of reciprocity, the compulsory jurisdiction of the International Court of Justice (ICJ) under Article 36(2) of the Statute of the International Court of Justice (adopted 24 October 1945), which comprises among others the ICJ’s jurisdiction in any questions of international law. Moreover, according to Article 36(1) Statute, states parties, consisting of all members of the United Nations, may always refer questions of international law to the ICJ. See United Nations Treaty Collection, Depositary, Declarations recognizing as compulsory the jurisdiction of the International Court of Justice under Article 36, paragraph 2, of the Statute of the Court <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=I-4&chapter=1&clang=_en> accessed 10 July 2018.

³⁰ See European Commission, ‘The Common European Asylum System (CEAS): Factsheet’ <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/20160713/factsheet_the_common_european_asylum_system_en.pdf> accessed 11 April 2018.

³¹ Procedures Directive, recital 3.

As to the methodology and sources, one should be aware that there is no case law on the provisions of the Convention. Therefore, scholarly writing will again be essential. Especially concerning the system of the Convention, I will primarily use the findings of a few scholars whose research has been very influential. As stated above, this also applies to the theories on protection elsewhere. I will analyse theories of Hathaway and Foster on the one hand, and Legomsky on the other hand, who have very different ideas about the correct application of the Convention for ‘protection elsewhere’ purposes. For the same reason as stated above, UNHCR documents will have special authoritative status.

Chapter 4: Having assessed the required protection within the context of the Refugee Convention, I will subsequently assess the required protection under Article 38(1)(e) PD. To provide some context, I will first elaborate on the explicit inclusion of the STC concept in EU law (chapter 4.2). Thereafter, I will elaborate on the required protection as stipulated in Article 38(1)(a)-(d) (chapter 4.3). This elaboration will be rather brief and descriptive in nature, because this thesis mainly focuses on an analysis of the meaning of Article 38(1)(e). Nonetheless, the meaning of Article 38(1)(a)-(d) might raise a corner of the veil as to the required protection in Article 38(1)(e). Subsequently, I will assess the protection requirements of Article 38(1)(e) PD (chapter 4.4).

As to the methodology and sources, I will use a different approach than in the preceding chapters. Especially in relation to the meaning of Article 38(1)(e) PD, there are very few sources available that indicate or clarify its meaning. There is no CJEU case law on the interpretation of this specific provision, and the legislative history of both the *original* and the *recast* of the Procedures Directive do not explain the inclusion of this provision. Therefore, I chose to apply the CJEU’s general methods of interpretation myself. Using this method also prevents a one-sided interpretation that is, for example, limited to textual interpretation.

Chapter 5: As a case study, I will examine whether Turkey provides the protection as required by Article 38(1)(e) PD. Firstly, I will consider the EU-Turkey Statement, which constitutes the context of Turkey as a potential STC (chapter 5.2). Having considered this context, I will actually assess whether Turkey qualifies as safe third country in accordance with Article 38(1)(e) PD (chapter 5.3).

As to the methodology and sources, the Procedures Directive itself provides different useful methods of assessment. According to recital 48 PD, the sources that should be consulted to assess the safety of any third country include ‘in particular information from other Member States, EASO, UNHCR, the Council of Europe and other relevant international organisations’. I will apply the aforementioned method, which mainly consists of an examination of country of origin information. Contrary to recital 48 PD, this will not include information from other Member States, since I do not consider this information to be sufficiently objective.³²

³² Member States of the EU could have an interest in considering Turkey as a safe third country, because it prevents irregular migrants from coming to their territories. Nevertheless, if interested, see e.g. United Kingdom Home Office, ‘Country Policy and Information Note: Turkey: Gülenist Movement (February 2018)

2. Origins and content of the safe third country concept

2.1 Introduction

As stated in chapter 1, a state under which' jurisdiction a refugee presents himself could transfer the refugee to another state where protection could be provided. This chapter will analyse this possibility more in detail by examining the opposing interests that underlie the STC concept: the lack of an obligation to grant asylum as deriving from the notion of state sovereignty on the one hand and the prohibition of *refoulement* on the other hand (Chapter 2.2).³³ Thereafter, this chapter will look more into the content of the STC concept by comparing it to another form of 'protection elsewhere', namely the FCA concept (Chapter 2.3).

2.2 Sovereignty versus non-refoulement

2.2.1 State sovereignty and granting asylum

The starting point of international law is a state's sovereign character: it is not subordinate to any higher authority.³⁴ Hence, states are in principle free to do whatever they want: they cannot be subjected to any obligation against their will. Nonetheless, states may decide *for themselves* to participate in all sorts of international agreements, which will subsequently bind them. Using the words of the Permanent Court of International Justice (PCIJ) in its landmark-case *Lotus*, 'the rules of law binding upon States (...) emanate from their own free will'.³⁵ '[E]very State remains free to adopt the principles which it regards as best and most suitable',³⁶ unless expressly prohibited by international law. A state's sovereignty is thus not absolute, but limited by the international obligations to which the state explicitly consents.³⁷ An important exception to this requirement of explicit consent are the obligations deriving

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/682868/Turkey_-_Gulenists_-_CPIN_-_v2.0.pdf> accessed 3 July 2018.

³³ I am aware that some authors argue that the STC concept derives from Article 31 RC. They emphasize the phrase 'coming directly from a territory where life or freedom was threatened (...)'. In case of previous transit through a third country, the asylum seeker would then no longer come *directly* from an unsafe territory. I reject this view, since Article 31 merely prohibits sanctioning of illegal entry. Returning an asylum seeker to a third country is not a sanction, although the asylum-seeker might experience it differently. See e.g. Cathryn Costello, 'The Asylum Procedures Directive and The Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection' (2005) 7 European Journal of Migration and Law 35, 40; Guy Goodwin-Gill, *The Refugee in International Law* (Oxford University Press 1996) 88-91.

³⁴ James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press 2012) 12; see also more philosophical texts as Immanuel Kant, *Eternal Peace and Other International Essays* (Boston: The World Peace Foundation 1914) 81-86.

³⁵ *Case of the SS Lotus* (Merits) [1927] PCIJ Rep Series A No 10, 18.

³⁶ *Ibid* 19.

³⁷ See also Linda Bosniak, 'Human Rights, State Sovereignty and the Protection of Undocumented Migrants Under the International Migrant Workers Convention' (1991) 25(4) The International Migration Review 737, 742-743.

from customary law. Such obligations consist of ‘general practice accepted as law’.³⁸ This means that there must be generally consistent state practice and *opinio juris* – the belief that acting in conformity with this state practice is compulsory.³⁹ Norms of customary law in principle bind all states regardless of their explicit consent. Nonetheless, consent remains important, since norms of customary law arguably do not bind states that have persistently objected those norms.⁴⁰ After all, such states have not consented to be bound, neither explicitly, nor implicitly. Only one set of norms binds all states irrespective of any consent: norms of customary law that have reached the level of *jus cogens*.⁴¹ Such norms do not allow for any derogation and thus preclude the possibility of persistent objectors.⁴² The abovementioned differences between positive laws, customary law and *jus cogens* are important to examine the existence of an obligation to grant asylum.

Since the PCIJ issued its judgment in *Lotus* in 1927, the international obligations limiting sovereignty have grown to enormous proportions. Many treaties have come into being and multiple international bodies have been established. For example, the United Nations (UN), the EU and the Council of Europe were created, and treaties as the Refugee Convention and the European Convention on Human Rights (ECHR)⁴³ came into existence. In all these international instruments, no positive obligation to grant asylum exists.⁴⁴ Despite the comprehensive set of international obligations, states thus remain in principle free to control the entry, stay and deportation of non-nationals.⁴⁵ The *travaux préparatoires* of the Refugee Convention indeed emphasize that this sovereign right to ‘remove’ foreigners is indisputable.⁴⁶ Nonetheless, some scholars argue that a positive obligation to grant asylum can be found in Article 18 of the Charter of Fundamental Rights of the European Union (CFR).⁴⁷ It is, however, difficult to see how this provision could be interpreted as encompassing such an obligation. After all, in defining the scope of the right of asylum, Article 18 refers to the Refugee Convention and Protocol, which do not encompass a right to *be granted* asylum. Next to positive law, there is broad agreement that the right to be granted asylum does not amount to customary law,⁴⁸ let alone *jus cogens*.

³⁸ Statute of the ICJ, art 38(1).

³⁹ *North Sea Continental Shelf Cases* (Merits) [1969] ICJ Rep 3, para 77.

⁴⁰ See Olufemi Elias, ‘Persistent Objector’ (2006) Max Planck Encyclopedia of Public International Law.

⁴¹ See Jochen Frowein, ‘Ius Cogens’ (2013) Max Planck Encyclopedia of Public International Law.

⁴² *Ibid* para 1.

⁴³ Convention for the Protection of Human Rights and Fundamental Freedoms (1950, as amended) (ECHR).

⁴⁴ Legomsky (n 3) 182; Taylor (n 3) 3; Foster (n 3) 66; Vasilava Stoyanova, ‘The Principle of Non-Refoulement and the Right of Asylum-Seekers to Enter State Territory’ (2008) 3 Interdisciplinary Journal of Human Rights Law 1, 4; UNHCR, ‘“Lawfully Staying” – A Note on Interpretation’ (1988) paras 4 and 14.

⁴⁵ Vedsted-Hansen (n 8) 273; see also *Abdulaziz, Cabales and Balkandali v the United Kingdom* App nos 9214/80, 9473/81, 9474/81 (ECtHR, 28 May 1985) para 67.

⁴⁶ UNHCR, ‘The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary by Dr Paul Weis’ (1990) 202.

⁴⁷ Charter of Fundamental Rights of the European Union [2000] OJ C 364/1; Salvatore Nicolosi, ‘Going Unnoticed? Diagnosing the Right to Asylum in the Charter of Fundamental Rights of the European Union’ (2017) 23 European Law Journal 94, 116; María-Teresa Gil-Bazo, ‘The Charter of Fundamental Rights of the European Union and the Right to Be Granted Asylum in the Union’s Law’ (2008) 27(3) Refugee Survey Quarterly 33, 52.

⁴⁸ See e.g. Roman Boed, ‘The State of the Right of Asylum in International Law’ (1994) 5 Duke Journal of Comparative & International Law 1, 15; Felice Morgenstern, ‘The Right of Asylum’ (1949) 26 British Yearbook

The absence of a right to be granted asylum does not only derive from the lack of a clearly expressed prohibition to control the entry, stay and deportation of non-nationals. It is the very fact that this control is one of the ‘core features of sovereignty’,⁴⁹ that states probably never intended to agree on an obligation to grant asylum. Following this line of reasoning, it is quite far-fetched to conceive Article 18 CFR as encompassing such an obligation. Due to the lack of that obligation in any instrument of international law, refugees who present themselves on the territory of a state party to the Refugee Convention are not automatically guaranteed a form of international protection on that territory.⁵⁰ Nonetheless, states’ right to control the entry, stay and deportation of non-nationals has been significantly eroded by other international obligations.⁵¹ The prohibition of *refoulement* is the most evident limitation on this sovereign right.

2.2.2 The prohibition of *refoulement*

Article 33(1) RC defines the prohibition of *refoulement* as follows:

‘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 prohibition of *refoulement* is also explicitly contained in Article 3 of the Convention against Torture (CAT)⁵² and implicitly⁵³ in Article 3 ECHR. As stated in the introduction, Article 33 RC covers all refugees as defined in Article 1A(2) RC. Accordingly, this provision precludes the expulsion or return of refugees and asylum-seekers to territories where they would be at risk of persecution.⁵⁴ Article 33 RC also prohibits so-called ‘chain’⁵⁵ or ‘indirect’⁵⁶ *refoulement*: the expulsion or return of refugees or asylum-seekers to states that would subsequently expel or return them to territories where they would be at risk of persecution.⁵⁷ Arguably, the prohibition of *refoulement* has acquired the status of (regional) customary law.⁵⁸ Some even contend that the prohibition of *refoulement* amounts to *jus*

of International Law 327, 342; Patricia Hyndman, ‘Asylum and Non-Refoulement: Are These Obligations Owed to Refugees Under International Law?’ (1982) 57 *Philippine Law Journal* 44, 67-68.

⁴⁹ Vedsted-Hansen (n 8) 273.

⁵⁰ Hathaway & Foster (n 7) 30.

⁵¹ Vedsted-Hansen (n 8) 274.

⁵² Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT).

⁵³ *Soering v the United Kingdom* App no 14038/88 (ECtHR, 7 July 1989) para 88.

⁵⁴ See Sir Elihu Lauterpacht and Daniel Bethlehem, ‘The Scope and Content of the Principle of Non-Refoulement: Opinion’ in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Cambridge University Press 2003) 87, paras 115-119.

⁵⁵ Legomsky (n 3) 184.

⁵⁶ See e.g. Foster (n 3) 70; Michigan Guidelines (n 7) para 6.

⁵⁷ See also Bhupinder Chimni (ed), *International Refugee Law: A Reader* (Sage Publications 2000) 123.

⁵⁸ Florentino Feliciano, ‘The Principle of Non-Refoulement: A Note on International Legal Protection of Refugees and Displaced Persons’ (1982) 57 *Philippine Law Journal* 598, 608; Hyndman (n 48) 68-69; Jerry Vang, ‘Limitations of the Customary International Principle of Non-Refoulement on Non-States parties: Thailand

cogens,⁵⁹ thus favouring a non-derogable interpretation of Article 33(1) RC. Nonetheless, the very existence of an exception in Article 33(2) RC renders the non-derogable character of *non-refoulement* highly unconvincing, if not untenable.⁶⁰

The foregoing demonstrates that, at the very least, all states parties to the Refugee Convention must respect the prohibition of *refoulement*. Bearing in mind that Article 33 RC covers all refugees and asylum-seekers, states parties cannot expel or return any asylum-seeker present on their territory before assessing the risk of (indirect) persecution. If this assessment indicates that expulsion or return would threaten the life or freedom of the asylum-seeker, on account of race, religion, nationality, membership of a particular social group or political opinion, the expulsion or return may not take place.

Additionally, according to Article 32(1) RC, once refugees are ‘lawfully in the territory’,⁶¹ expulsion is prohibited even without a risk of (indirect) persecution in the receiving country. A refugee lawfully present could be expelled only ‘on grounds of national security or public order’⁶² and in compliance with strict procedural safeguards.⁶³ Furthermore, while the formal expulsion order must comply with the requirements of Article 32 RC, the subsequent (factual) removal must also comply with Article 33 RC.⁶⁴ Expulsion of refugees lawfully in the territory is thus only allowed in very exceptional cases.⁶⁵ Even in these rare cases, expulsion must be proportionate in relation to the interests of national security and public order.⁶⁶ As will be demonstrated below, Article 33 RC leaves states much more leeway to expel (or return) refugees.

2.2.3 Reconciling sovereignty and *non-refoulement*

Due to the prohibition of *refoulement* as formulated in Article 33 RC, states are no longer entirely free to deny asylum to refugees present on their territory. States must either provide protection against (indirect) persecution itself, or expel the refugee to another state that takes responsibility to grant protection. The latter option is also called ‘protection elsewhere’.⁶⁷ This could take the form of expelling refugees to STCs or returning them to FCAs, both of

Repatriates the Remaining Hmong-Lao Regardless of International Norms’ (2014) 32 Wisconsin International Law Journal 355, 371.

⁵⁹ Jean Allain, ‘The Jus Cogens Nature of Non-Refoulement’ (2001) 13 International Journal of Refugee Law 533, 557; Phil Chan, ‘The Protection of Refugees and Internally Displaced Persons: *Non-Refoulement* under Customary International Law?’ (2006) 10 International Journal of Human Rights 231, 236.

⁶⁰ See also Nils Coleman, ‘Non-Refoulement Revisited: Renewed Review of the Status of the Principle of Non-Refoulement as Customary International Law’ (2003) 5 European Journal of Migration and Law 23, 65.

⁶¹ See chapter 2.3.1.1. of this thesis for an analysis of the incremental system of the Refugee Convention, including the qualifying conditions ‘lawfully in the territory’ or ‘lawfully present’.

⁶² Refugee Convention, art 32(1).

⁶³ Ibid, art 32(2) and (3); see also UNHCR, ‘Commentary on the Refugee Convention 1951 (Articles 2-11, 13-37)’ (1997) 116.

⁶⁴ Andreas Zimmermann, Felix Machts and Jonas Dörschner (eds), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press 2011) 1294.

⁶⁵ UNHCR EXCOM Conclusion No 7 (XXVIII) ‘Expulsion’ (1977) paras (a) and (c).

⁶⁶ UNHCR 1990 (n 46) 232.

⁶⁷ See footnote 7.

which concern the ‘allocation of protection responsibility’.⁶⁸ States employ these concepts if – to put it bluntly – they consider the refugee determination of particular asylum-seekers as somebody else’s business.⁶⁹ In other words, they consider someone else to be ‘responsible’.⁷⁰ The option of protection elsewhere could only be employed *until* the refugee is ‘lawfully in the territory’,⁷¹ as stipulated in Article 32 RC.⁷²

Under Article 33 RC, the possibility to apply the STC/FCA concept demonstrates the narrow margin that is left of the sovereign right to control the entry, stay and deportation of non-nationals and refugees in particular.⁷³ Within this narrow margin, the UNHCR further recommends that ‘[g]overnments (...) act in concert in a true spirit of international co-operation in order that these refugees may find asylum (...)’.⁷⁴ If states refuse to grant protection to refugees, they should thus *ascertain* ‘protection elsewhere’.⁷⁵ It seems that this recommendation predominantly originates from the fear of ‘refugees in orbit’⁷⁶: if a second country expels a refugee present on its territory to a third state that *could* provide protection, this third country also has the sovereign right to expel the refugee once again to a ‘fourth’ country. This could become an incessant process of shifting and dodging protection responsibility. The UNHCR therefore stated that the third country must enable the refugee to ‘seek and enjoy asylum’.⁷⁷ Readmission agreements between the second and third country (i.e. agreements that the third country guarantees access to the asylum procedure) serve this purpose.⁷⁸ Only in the presence of such agreements of consent,⁷⁹ one could truly speak of *protection elsewhere*.

Besides, the question of protection elsewhere has nothing to do with the question of refugee determination. States only come to the former if the latter has been answered in the affirmative. After all, the refugee definition of Article 1A(2) RC does not require any asylum seeker to ‘choose the right state’ to qualify as refugee.⁸⁰ A refugee can thus not be *denied* protection on the basis of a duty to seek protection elsewhere.⁸¹ Hence, the notions of ‘STC’

⁶⁸ Michigan Guidelines (n 7) Introduction.

⁶⁹ Egbert Vierdag, ‘The Country of “First Asylum”: Some European Aspects’ in Daniel Martin (ed), *The New Asylum Seekers: Refugee Law in the 1980s: The Ninth Sokol Colloquium on International Law* (Nijhoff 1988) 73, 73.

⁷⁰ See in this light the application of the safe third country concept in the Dublin Regulation, referring in Article 3(1) to the Member State which is ‘responsible’ for the examination of an individual application for international protection.

⁷¹ See chapter 3.2.2 of this thesis.

⁷² Hathaway & Foster (n 7) 33; UNHCR 1997 (n 63) 117, see also chapter 2.2.2 of this thesis.

⁷³ See also Vedsted-Hansen (n 8) 274.

⁷⁴ UNHCR, ‘Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons’ (1951) sub D.

⁷⁵ See footnote 7.

⁷⁶ See e.g. Legomsky (n 24) 584.

⁷⁷ UNHCR EXCOM Conclusion No 85 (XLIX) ‘Conclusion on International Protection’ (1985) para (aa).

⁷⁸ Van Selm (n 8) para 156.

⁷⁹ Ibid.

⁸⁰ Hathaway & Foster (n 7) 31.

⁸¹ Ibid 33.

and ‘FCA’ are not to be confused with the notion of ‘safe country of origin’ which *does* concern the question of refugee determination.⁸²

2.3 Safe third country versus first country of asylum

The main difference between the STC and the FCA is the question whether protection has been granted before. Under the STC concept, a second country can reject asylum applications if the applicant *could* – or, in the state’s perception, *should*⁸³ – have sought protection elsewhere.⁸⁴ This is to be distinguished from the FCA, which refers to the country where protection has already been granted before.⁸⁵

Related to this question of previous protection is the ‘link’ or ‘connection’ between the state and the refugee. With regard to this link, there should at least be ‘some connection’ between the third country and the refugee, for example previous transit or family links.⁸⁶ According to the UNHCR, the connection and links with the third country must be such as to render it reasonable to seek asylum in that country.⁸⁷ The fact that FCAs have provided protection before, demonstrates a strong link between the country and the refugee. Return to such countries is therefore generally considered legitimate, subject to the prohibition of *refoulement*.⁸⁸ For STCs, the link is often much weaker. If, for instance, transit through the third country suffices as link, it is entirely uncertain whether the third country is willing and prepared to grant protection. Thus, the main difference between FCA and STC lies in the *degree of certainty* of (future) acceptance of responsibility. Using the words of the UNHCR, ‘(...) the “first country of asylum” has accepted responsibility for the protection of the individual in question, while a “safe third country” has not done so’.⁸⁹

The risk of ‘mere presumption’⁹⁰ that the STC will accept responsibility and grant protection, could be partially overcome by readmission agreements. Such, preferably written,⁹¹ bilateral or multilateral agreements increase the chance that the third country will guarantee access to refugee determination and protection.⁹² Nonetheless, some countries, such as Australia,⁹³ apply the STC concept unilaterally, thus maintaining the uncertainty as to future acceptance

⁸² A ‘safe country of origin’ affects an individual’s well-founded fear of being persecuted for one of the Convention grounds mentioned in Article 1A(2) RC.

⁸³ Legomsky (n 24) 570; Vedsted-Hansen (n 8) 272.

⁸⁴ Legomsky (n 24) 570; Zimmermann (n 64) 1382.

⁸⁵ Vedsted-Hansen (n 8) 272; Van Selm (n 8) para 15.

⁸⁶ Hathaway (n 4) 295; Van Selm (n 8) para 15; Cf. Kees Wouters, *International Legal Standards for the Protection from Refoulement* (Intersentia 2009) 143; Norwegian Refugee Council, ‘What is a Safe Third Country?’ <<https://www.nrc.no/news/2016/march/what-is-a-safe-third-country/>> accessed 17 May 2018.

⁸⁷ UNHCR EXCOM Conclusion No 15 (XXX) ‘Refugees Without an Asylum Country’ (1979) para (h-iv).

⁸⁸ See UNHCR EXCOM Conclusion No 58 (XL) ‘Problems of Refugees and Asylum-Seekers Who Move in an Irregular Manner from a Country in Which They Had Already Found Protection’ (1989) paras (a) and (f).

⁸⁹ Van Selm (n 8) para 15.

⁹⁰ Vedsted-Hansen (n 8) 270.

⁹¹ Michigan Guidelines (n 7) 16.

⁹² See also Foster (n 3) 70.

⁹³ Australian Migration Act 1958, section 36(3); see on the Australian practice also Savitri Taylor, ‘Protection Elsewhere/Nowhere’ (2006) 18 *International Journal of Refugee Law* 283.

of responsibility. Bearing this uncertainty in mind, the STC concept remains fundamentally different from the FCA concept.

2.4 Sub-conclusion

This chapter analysed the origins and content of the STC concept in general. This analysis demonstrated that the STC concept originates from the co-existence of state sovereignty and the prohibition of *refoulement*. Due to state sovereignty, there is no existing right for refugees to be granted asylum, but because of the prohibition of *refoulement*, they may not be expelled or returned to their country of origin. The options that remain for the second country are either granting asylum to the refugee present on its territory, or expelling or returning him to another safe country. The latter option is called ‘protection elsewhere’, which could take the form of returning the refugee to a first country of asylum or expelling him to a safe third country. The former concerns the country where protection has been granted before, while the latter concerns the country where protection *could*, and in the opinion of the second country, *should* have been obtained. This perception of the second country is often based on a connection between the third country and the refugee, for example previous transit or family links. However, this connection is not decisive for the third country’s acceptance of responsibility for protection in the future. Accordingly, there must be an effective possibility to obtain protection in the third country. The lack of such a possibility would seriously undermine the very meaning of *protection* elsewhere. Then, the second state would not be dealing with *allocation* of protection responsibility, but with *evasion* of protection responsibility.

The question whether the transfer of an asylum seeker to a third state amounts to allocation or evasion is very much dependent on the meaning of ‘protection’. The following chapters will examine this protection in detail.

3. The required protection within the context of the Refugee Convention

3.1 Introduction

Having elaborated on the origins and the content of the STC concept, this chapter will assess the required protection of the STC concept within the context of the Refugee Convention. First, I will analyse the system of the Refugee Convention (Chapter 3.2). Subsequently, different theories on protection elsewhere will be set out, after which I will provide my own view on those theories (Chapter 3.3). Thereafter, I will apply that view to examine the required protection for STC purposes, both concerning procedural protection (Chapter 3.4) and substantive protection (Chapter 3.5).

3.2 System of the Refugee Convention

Refugees under Article 1A(2) Refugee Convention are not only entitled to the benefits of the prohibition of *refoulement*, but also to multiple other rights of the Refugee Convention. Nonetheless, these rights, ranging from Articles 2 to 34, do not apply equally to all refugees.⁹⁴

Firstly, the rights of a refugee depend on his attachment to the asylum country.⁹⁵ The stronger his ties to the country become, the stronger his rights will be.⁹⁶ The Refugee Convention is therefore also considered to be an ‘incremental’ system,⁹⁷ meaning ‘happening gradually’.⁹⁸ Only the ‘core’ rights accrue to all refugees in the territory,⁹⁹ while further rights are preserved for refugees ‘lawfully present/lawfully in the territory’,¹⁰⁰ refugees ‘residing’ in the territory,¹⁰¹ and refugees ‘lawfully staying’ in the territory.¹⁰² Due to the ‘incremental system’, the levels overlap each other: the refugee merely present only has the first level of rights, while the refugee *lawfully* present has the first and second level of rights. The UNHCR also acknowledged that the entitlement to Convention rights depends on ‘the degree to which the rights in question carry with them financial or social responsibilities or multilateral implications for the granting State’.¹⁰³

Secondly, the rights of refugees are dependent on ‘contingent criteria’.¹⁰⁴ These criteria ‘compare’ the situation of refugees within the asylum country with the nationals of that

⁹⁴ Hathaway (n 4) 154.

⁹⁵ Ibid.

⁹⁶ Lieneke Slingenberg, *The Reception of Asylum Seekers under International Law: Between Sovereignty and Equality* (Hart Publishing 2014) 107.

⁹⁷ Ibid; Hathaway (n 4) 155; see also Ruth Rubio-Marín, *Human Rights and Immigration* (Oxford University Press 2014) 43.

⁹⁸ Cambridge Dictionary ‘Incremental’ <<https://dictionary.cambridge.org/dictionary/english/incremental>> accessed 21 May 2018.

⁹⁹ Refugee Convention, arts 3, 4, 13, 16(1), 20, 22, 27, 31, 33.

¹⁰⁰ Ibid, arts 18, 26, 32.

¹⁰¹ Ibid, arts 14, 16(2) and (3), 25.

¹⁰² Ibid, arts 15, 17, 19, 21, 23, 24, 28.

¹⁰³ UNHCR 1988 (n 44) para 11.

¹⁰⁴ Hathaway (n 4) 155; Slingenberg (n 96) 106.

country. Some rights are absolute,¹⁰⁵ rendering the nationals' position irrelevant, while there are also rights where refugees must be accorded the same treatment as nationals,¹⁰⁶ the *most* favourable treatment accorded to aliens,¹⁰⁷ or treatment at least as favourable as aliens generally in the same circumstances.¹⁰⁸ Whereas the incremental character of the Convention affects the *quantity* of refugee rights, the contingent criteria affect the *quality*. For now, general remarks on the contingent criteria are not very useful, because the meaning of these criteria is fully dependent on the third country in question. Therefore, the contingent criteria will only be dealt with under chapter 5.

Since the STC concept could be invoked *until* the refugee is lawfully present in the territory, an analysis of the conditions 'mere presence in the territory' and 'lawful presence in the territory' helps illuminating at what point the application of the STC concept will be prohibited. It also helps to clarify what rights must be granted in a third country before that country could be considered 'safe'. For this clarification, a brief discussion of the conditions 'lawful stay' and '(habitual) residence' is also necessary.

3.2.1 Mere presence in the territory

The first level of rights depends on mere presence. This might seem contradictory to the declaratory character of refugee status.¹⁰⁹ On this basis, one automatically becomes a refugee after fulfilling the criteria set out in Article 1A(2) RC. From that very moment, he is entitled to refugee protection, regardless of the fact whether he is in or outside the jurisdiction of a state party to the Convention.¹¹⁰ Although this means that a refugee does not have to enter any territory or jurisdiction to be *entitled* to protection, he must do so to *claim* protection.¹¹¹ This relates to the jurisdictional power of the state: only within the limits of sovereignty could a state grant protection. For most core rights in the Refugee Convention, the refugee must not only be within the jurisdictional territory of the state,¹¹² but also within its physical territory.¹¹³ For the sake of asylum applications, the border area also belongs to a state's territory.¹¹⁴ Accordingly, asylum-seekers applying at the state's border or inside its territory could claim all core rights, such as access to courts¹¹⁵ and elementary education.¹¹⁶

¹⁰⁵ Refugee Convention, arts 16 and 25.

¹⁰⁶ Ibid, arts 23 and 24.

¹⁰⁷ Ibid, art 17.

¹⁰⁸ Ibid, arts 18 and 21.

¹⁰⁹ UNHCR 2011 (n 5) 28.

¹¹⁰ UNHCR, 'Note on Determination of Refugee Status under International Instruments' EC/SCP/5 (1977) para 5.

¹¹¹ See also Atle Grahl-Madsen, *The Status of Refugees in International Law. Vol. II. Asylum, Entry and Sojourn* (A.W. Sijthoff 1972) 358.

¹¹² E.g. the prohibition of *refoulement* is also applicable outside the physical territory of a state, for example in case of so-called 'push-backs' on the high seas. See e.g. Mariagiulia Giuffr , 'State Responsibility Beyond Borders: What Legal Basis for Italy's Push-backs to Libya?' (2012) 24 *International Journal of Refugee Law* 692.

¹¹³ See e.g. Refugee Convention, art 16(1).

¹¹⁴ Hathaway (n 4) 315.

¹¹⁵ Refugee Convention, art 22(1).

¹¹⁶ Ibid, art 16(1).

3.2.2 Lawful presence in the territory

The second level of rights is granted to refugees lawfully (present) in the territory. What this means depends on who you ask. Multiple prominent scholars – most notably Battjes,¹¹⁷ Grahl-Madsen,¹¹⁸ Hathaway,¹¹⁹ and Slingenberg¹²⁰ – have done research on the implications of the incremental system of the Refugee Convention and thus on lawful presence. I agree with Slingenberg that the different levels of rights in the Convention must bear some autonomous meaning to maintain the Convention's incremental character.¹²¹ A different reading would indeed imply that states could, for instance, make 'lawful presence' and 'lawful stay' conditional upon the exact same requirements, thereby rendering the incremental system meaningless.

Taking into consideration its partially autonomous character, what would lawful presence then mean? As to the meaning of 'lawful', Article 31 RC states in paragraph 1 that refugees are *unlawfully* present in the territory if their presence is not authorized. Paragraph 2 states that necessary restrictions to the movement of refugees could 'only be applied until their status in the country is regularized. *A contrario* reasoned, one could thus deduce from Article 31 RC that 'lawful' means 'regularized' or 'authorized', hence requiring positive action from the state.¹²² Accordingly, the definition of lawful presence is 'positive authorization or regularization to be present on the territory'.¹²³

According to Hathaway, such positive authorization could include admitting asylum-seekers to the asylum procedure on a state's territory.¹²⁴ Admittance on this basis is, however, not intended to authorize one's presence on the territory, but rather to enable the determination of one's refugee status – for the duration of that determination – for the purpose of complying with the prohibition of (indirect) *refoulement* and the right to an effective remedy.¹²⁵ Understanding this admittance to the determination procedure as *lawful* presence is also inconsistent with the fact that it includes refugees who just *unlawfully* entered the territory.¹²⁶ Article 31 RC is not intended to consider every refugee's presence on a state's territory as 'lawful', but to provide for unpunished access to legal procedures that may *lead* to lawful presence.¹²⁷ Hence, refugees who *unlawfully* entered a state's territory could only become *lawfully* present if they obtain explicit authorization or regularization to be present on the territory by being granted a residence permit (i.e. by being recognized as refugee).¹²⁸

¹¹⁷ Hemme Battjes, *European Asylum Law and International Law* (Martinus Nijhoff Publishers 2006).

¹¹⁸ Grahl-Madsen (n 111).

¹¹⁹ Hathaway (n 4).

¹²⁰ Slingenberg (n 96).

¹²¹ Ibid 151; cf Battjes (n 117) 451.

¹²² Slingenberg (n 96) 154.

¹²³ Ibid 155; cf Battjes who argues that lawful presence means presence on the basis of 'domestic titles to remain'. Battjes (n 117) 451.

¹²⁴ Hathaway (n 4) 658.

¹²⁵ Slingenberg (n 96) 120.

¹²⁶ Refugee Convention, art 31; Grahl-Madsen (n 111) 365.

¹²⁷ Grahl-Madsen (n 111) 362; see also Slingenberg (n 96) 123; UNHCR 1990 (n 46) 219.

¹²⁸ Slingenberg (n 96) 117; Grahl-Madsen (n 111) 363-364.

Nonetheless, not all refugees enter a state's territory *unlawfully*. If refugees lawfully *entered* the territory (e.g. by being granted a visa), and comply with the conditions for admission during their stay, their *presence* should also be considered lawful.¹²⁹ Non-compliance with the conditions for admission could consist of overstaying a visa (i.e. continuation of a stay after the visa has expired),¹³⁰ or, arguably, acting contrary to the intended purpose of stay (i.e. applying for asylum while having a visa for another purpose, such as tourism or work).¹³¹ In states that attach such importance to compliance with the intended purpose of stay, the entry of asylum-seekers will almost always be unlawful.¹³²

Besides, refugees who are detained at the border¹³³ are not lawfully present.¹³⁴ Indeed, such refugees are only permitted to stay for the purpose of the detention itself. Moreover, the very character of detention demonstrates the unlawful character of their presence.

Considering the aforementioned, a refugee could only be lawfully present in a state's territory by having explicit authorization or regularization to be present on that territory. If an asylum-seeker has *unlawfully* entered the territory, such authorization could be obtained by being granted a residence permit on the basis of recognition of his refugee status. If an asylum-seeker has already *lawfully* entered the territory, his presence remains lawful as long as he complies with the conditions for admission during his stay.

As stated before, Article 32 RC forbids the application of the STC concept to refugees who are lawfully present in the territory. Taking into account Article 32 RC and the definition of lawful presence, the application of the STC concept is thus permissible only in two cases: in relation to refugees who *unlawfully* entered the state's territory, until the moment they are granted a residence permit (i.e. by being recognized as refugee); and in relation to refugees who *lawfully* entered the state's territory, but violated the conditions for admission during their stay. The disadvantage of this narrow scope of the STC concept is that states might tend to maintain the possibility to apply the STC concept and thus endlessly prolong the refugee status determination procedure. Nonetheless, this disadvantage is relieved by the fact that refugees are, after a certain lapse of time, automatically entitled to Convention rights connected to 'lawful stay' and '(habitual) residence', as will be explained below.

3.2.3 Lawful stay in the territory

According to Slingenbergh and Grahl-Madsen, a refugee who unlawfully *entered* a state party's territory, will at the same point in time be lawfully *present* and lawfully *staying*.¹³⁵

¹²⁹ Slingenbergh (n 96) 115-116, 118; Grahl-Madsen (n 111) 348.

¹³⁰ For instance in Schengen, a short-term visa expires after a stay of 90 days in a 180 days period. See Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders [2016] OJ L 77/1 (Schengen Borders Code) art 6.

¹³¹ See e.g. Vreemdelingenwet 2000 (Dutch Aliens Act) art 16(1)(a); see for the importance of the purpose of stay also Case C-638/16 PPU *X and X* [2017] CJEU, paras 40-44.

¹³² After all, states are generally not willing to grant visas for the purpose of asylum applications, rendering unlawful entry the only possibility to apply for asylum.

¹³³ The border also belongs to the territory of the state. See chapter 3.2.1 of this thesis.

¹³⁴ Grahl-Madsen (n 111) 361.

¹³⁵ Slingenbergh (n 96) 125; Grahl-Madsen (n 111) 365.

Just as for legal *presence*, the authorization to *stay* is obtained by being granted a residence permit.¹³⁶ Lawful *presence* and *stay* does not necessarily coincide for refugees who *lawfully* entered a state party's territory (e.g. by being granted a visa), since they could be lawfully present without being granted a residence permit. Arguably after three years of mere presence on the territory, refugees are automatically entitled to the rights connected to lawful stay in the territory.¹³⁷

3.2.4 (Habitual) residence in the territory

Most authors agree that, contrary to the condition 'lawful stay', 'automatic' entitlement is the only way to acquire the rights connected to (habitual) residence in the territory.¹³⁸ Hence, interference of the state (e.g. by granting a residence permit) is not required. Rather, the decisive criterion is the length of (factual) residence in the territory.¹³⁹ Arguably after three months of mere presence on the territory, a refugee is entitled to the rights connected to (habitual) residence in the territory.¹⁴⁰

3.3 Theories on protection elsewhere

Having elucidated the temporal and personal scope of the required protection, the substantive scope is now to be elaborated upon. If one would follow the logic of the co-existence of state sovereignty and the prohibition of *refoulement*, one could assume that the allocation of protection responsibility should merely comply with the prohibition of *refoulement*. However, it would be irreconcilable with the Refugee Convention if the remaining provisions of that Convention would suddenly cease to apply at the very moment the second state employs the STC concept.

But if non-*refoulement* is not the only requirement, what would be the others? Since non-*refoulement*, expressed in Articles 32 and 33 RC, is the only 'right' within the Refugee Convention that deals directly with the expulsion or return of refugees, the quest for the correct interpretation of 'protection' has been an intensive one. This is demonstrated by the existence of multiple theories on the required protection in the third country, of which Hathaway and Foster's 'deprivation of acquired rights'¹⁴¹ and Legomsky's 'complicity principle'¹⁴² are the most important.

¹³⁶ See Slingenbergh (n 96) 125.

¹³⁷ Ibid 132; Battjes (n 117) 467-468.

¹³⁸ Battjes (n 117) 452; Hathaway (n 4) 756; Slingenbergh (n 96) 126-128.

¹³⁹ Battjes (n 117) 452.

¹⁴⁰ Ibid 452.

¹⁴¹ Hathaway & Foster (n 7) 34 and 45; Hathaway (n 4) 331-332; see also Wouters (n 86) 142; Catherine Phuong, 'The Concept of Effective Protection in the Context of Irregular Secondary Movements and Protection in Regions of Origin' (2005) 26 Global Migration Perspectives 1, 9-10.

¹⁴² Legomsky (n 24) 633-634; Legomsky (n 3) 183-184.

3.3.1 Deprivation of acquired rights

3.3.1.1 *Theory*

According to Hathaway and Foster, any refugee expelled on the basis of the STC concept should maintain the rights in the third country to which he was already entitled in the second country.¹⁴³ By invoking the incremental character of the Refugee Convention, they underline that this protection consists of all Convention rights depending on mere ‘presence on the territory’, rather than only the ‘right’ to non-*refoulement*.¹⁴⁴

Hathaway and Foster’s argument that refugees should not be deprived of their rights upon the application of the STC concept, is primarily based on the *absence* of any state right to deprivation.¹⁴⁵ They substantiate this argument by stating that deprivation of rights is at odds with the principle of good faith to fully implement the obligations of the Refugee Convention.¹⁴⁶ Indeed, the expulsion of a refugee to a third country that merely respects the prohibition of *refoulement* undermines the Convention’s effectiveness¹⁴⁷ and its object and purpose to ‘assure refugees the widest possible exercise of (...) fundamental rights and freedoms’.¹⁴⁸ It would simply ‘defeat the *raison d’être* of the Convention’ if the full implementation of the Convention could be circumvented by applying the STC concept.¹⁴⁹

3.3.1.2 *Critique*

Although such circumvention would indeed be undesirable, the theory of Hathaway and Foster is not the most appropriate method to achieve full implementation of the Refugee Convention. Firstly, the legal basis of their theory (the absence of any state right to deprivation) directly contradicts and opposes the *Lotus* case as discussed above – to which they even refer themselves¹⁵⁰ – that states are free to do whatever they want unless expressly prohibited by international law.¹⁵¹ Secondly, again referring to the incremental system, the rights of refugees are *dependent* on their presence on the state’s territory. If they are expelled to a third country in compliance with Article 32 and 33 RC, they are no longer present on the second country’s territory, nor within its jurisdiction, and therefore *automatically* lose their rights within the second country’s territory.¹⁵² Albeit absent as state *right*, there thus exists at least a legal *consequence* of deprivation of acquired rights. Indeed, this is an highly undesirable and unacceptable consequence in relation to the full implementation of the

¹⁴³ Hathaway & Foster (n 7) 34; see also Michigan Guidelines (n 7) para 8.

¹⁴⁴ Hathaway & Foster (n 7) 40-41; Foster (n 3) 67.

¹⁴⁵ Hathaway & Foster (n 7) 34.

¹⁴⁶ Ibid.

¹⁴⁷ Ibid 45.

¹⁴⁸ Refugee Convention, preamble.

¹⁴⁹ Foster (n 3) 67; Phuong (n 141) 9.

¹⁵⁰ Hathaway & Foster (n 7) footnote 96.

¹⁵¹ *Lotus* (n 35) 19.

¹⁵² This is different for refugees who leave the asylum country only for a short period, for reasons unrelated to their refugee status, such as holidays or family visits. Such refugees are still under the jurisdiction of the asylum country, since that country remains the one that has the authority and control in granting refugee protection. In other words, in that case the protection responsibility has not shifted to another country.

Refugee Convention. It is to be seen whether other existing theories could overcome these problems.

3.3.2 Complicity principle

3.3.2.1 Theory

According to Legomsky, the second country may not apply the STC concept if it ‘knows’ that the third country violates the rights it ‘is itself obligated to respect’.¹⁵³ If the third country violates such rights, the second country is perceived as ‘assisting’ in this violation, thereby becoming an ‘accomplice’ in the violation of those rights.¹⁵⁴ Similar to the prohibition of *refoulement* in Article 33 RC, the second country *indirectly* violates the Convention rights by expelling the refugee to a third country that *directly* violates the relevant right.¹⁵⁵ Legomsky argues that the fact that these other Convention rights must be respected does not flow from Article 33 RC itself, but from the incremental system of the Refugee Convention.¹⁵⁶

Legomsky’ theory is primarily based on Article 16 of the International Law Commission (ILC)’s Articles on State Responsibility.¹⁵⁷ This Article states that:

‘[a] State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) the State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State.’¹⁵⁸

An important aspect of Article 16 and thus the complicity principle is the element of knowledge. This ‘knowledge’ does not mean that the second country has a ‘desire to *facilitate* the violation’¹⁵⁹ and therefore *aims to be* an accomplice, but rather means that the second country ‘knows’ of the violation committed by the third country.¹⁶⁰ But what does that knowledge mean? Should the second country, for example, be absolutely certain that the third country does not violate any of the Convention rights? According to Legomsky, requiring absolute certainty for all Convention rights would raise pragmatic concerns. The spectrum of Convention rights is so ‘vast’, that an unconditional application of the complicity principle would render almost every third country unsafe.¹⁶¹ In his view, it will be a rare case where a third country complies with all the Convention rights.

Therefore, Legomsky argues that the required knowledge depends on the importance of the rights involved.¹⁶² Core rights would require a low standard of proof, while less critical rights

¹⁵³ Legomsky (n 24) 677.

¹⁵⁴ Ibid 633; Legomsky (n 3) 183.

¹⁵⁵ Legomsky (n 24) 634.

¹⁵⁶ Ibid.

¹⁵⁷ Ibid 620-622.

¹⁵⁸ International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts (2001) UNGA Res 56/83, art 16.

¹⁵⁹ Legomsky (n 61) 622.

¹⁶⁰ Ibid.

¹⁶¹ Ibid 641.

¹⁶² Ibid 645.

would require a higher standard.¹⁶³ Legomsky suggests that for non-*refoulement*, the third country would not be safe if there are ‘substantial grounds for believing’¹⁶⁴ that the person would be subjected to persecution on the basis of one of the Convention grounds. For the least important rights, violation should be ‘a practical certainty’ to render the third country unsafe.¹⁶⁵ Legomsky argues that the incremental system of the Refugee Convention helps to establish the importance of a right: the rights accruing to refugees *merely present* on the territory would be the most important, while the rights accruing to refugees *lawfully staying* on the territory would be the least important.¹⁶⁶ This is only a guideline; states are required in every individual case to weigh ‘both the likelihood and the gravity of any foreseeable violations by the third country’.¹⁶⁷ The question is; does a *foreseeable* violation of *any* of the Convention rights bar return to a third country (provided that the variable standards of proof are met)?

According to Legomsky, it does: ‘destination countries may not knowingly return asylum seeker to third countries that will violate rights recognized in the Convention’. Nonetheless, he makes one reservation: the question whether or not the expelled refugee will be entitled to rights linked to ‘lawful stay’ in the third country would be too speculative.¹⁶⁸ Hence, second countries could not foresee the violation of such rights. In other words, they would not ‘knowingly’ assist in the violation of the right.

3.3.2.2 Critique

This theory of the complicity principle is, in my opinion, far more convincing than the theory of the deprivation of acquired rights. After all, whereas expulsion to a third country automatically leads to loss of Convention rights (due to the fact that the refugee is no longer present on the second country’s territory), the complicity principle provides an indirect right to reacquire these Convention rights in the third country.

Nevertheless, there are also major downsides to Legomsky’s theory. Firstly, the indirect right to reacquire the Convention rights in the third country rests on a weak legal basis. Here, I again refer to *Lotus*, stating that states are free to do whatever they want unless expressly prohibited by international law. The ILC Articles qualify as soft law,¹⁶⁹ since the instrument is written and issued by highly valued legal experts.¹⁷⁰ It is not an agreement between states: they did not consent to it and are, accordingly, not bound to it. Secondly, I strongly disagree with Legomsky that some of the Convention rights are more important than others. The incremental system does not classify, either directly or indirectly, the Convention rights on the basis of importance, but merely matches ‘the character of the various rights in question to the

¹⁶³ Ibid 624.

¹⁶⁴ See also CAT, art 3.

¹⁶⁵ Legomsky (n 24) 624.

¹⁶⁶ Ibid 643.

¹⁶⁷ Ibid 623.

¹⁶⁸ Ibid 643.

¹⁶⁹ See the Statute of the ICJ, art 38(1)(d), providing an authoritative list of the sources of international law.

¹⁷⁰ See ILC, About the Commission: Organization, programme and methods of work <<http://legal.un.org/ilc/work.shtml>> accessed 11 July 2018.

degree of residence required'.¹⁷¹ Thirdly, Legomsky's claim that a third country will only in rare cases comply with all Convention rights, overlooks the importance of the contingent criteria of the Convention. For example, the rights connected to lawful stay are seldom absolute.¹⁷² Their content is often contingent on treatment accorded to aliens generally in the same circumstances.¹⁷³ Due to these contingent criteria (and therefore often relatively low protection standards), it is more plausible that a third country could adhere to all Convention rights. Fourthly, it is unclear why Legomsky believes that the rights connected to 'lawful stay' are too speculative. There is simply no reason to assume that such rights are more speculative than others. The second country could just consult country of origin information about the third country for general information on that country's compliance with rights connected to lawful stay. Since this is also true for all other Convention rights, a 'varying' level of knowledge is unnecessary.

Because of my critique on Legomsky and the lack of any further theories on 'protection elsewhere', I deem it necessary to introduce a new theory. This theory, which I call 'the potentiality principle', will be discussed below. It aims to address and counter the problems mentioned for the two other existing theories on protection elsewhere.

3.3.3 Potentiality principle

As stated above, the rights in the Refugee Convention are dependent only on two sets of criteria: the criteria deriving from the incremental system of the Convention and the contingent criteria. Accordingly, also the application of the STC concept should be dependent only upon those sets of criteria. Any other system or classification – such as Hathaway's non-deprivation of acquired rights, or Legomsky's varying knowledge on the basis of the importance of rights – does not appear from (at least the text of) the Convention.

A more straightforward theory on protection elsewhere could be the potentiality principle. Under this principle, the third country is safe as long as there is a *potential* to acquire all Convention rights. An argument in favour of this principle is that the lack of such a potential would render many of the substantive provisions of the Convention meaningless. The potentiality principle thus adheres to the object and purpose of the Convention, which is to offer refugees 'the widest possible exercise of (...) fundamental rights and freedoms'.¹⁷⁴ The legal basis for this principle does *not* appear from the Refugee Convention itself, which indeed only stipulates the prohibition of *refoulement* to limit state sovereignty. Rather, it is the regional level, most notably EU law, that gives rise to the potentiality principle. According to Article 38(1)(e) PD, which lays down one of the preconditions for the STC concept, recognized refugees must have the possibility to 'receive protection in accordance with the Geneva Convention'. As the following chapter will demonstrate, this protection encompasses all Convention rights. *Lotus*, used as a basis for criticism on the other theories, does not oppose the potentiality principle. After all, EU Member States explicitly consented to the

¹⁷¹ UNHCR 1988 (n 44) para 11.

¹⁷² See Refugee Convention, arts 15, 17(1), 19(1), 21, 23 and 24(1).

¹⁷³ See e.g. Refugee Convention, arts 17(1) and 19(1).

¹⁷⁴ Refugee Convention, preamble.

treaties of the EU and thereby implicitly accepted all the rights and obligations relating to the EU asylum acquis.¹⁷⁵

As to the potentiality principle, the concrete interpretation of the term ‘potential’ fully depends on the incremental system of the Convention. This means that, upon expulsion to a *third* country, a refugee will automatically lose his rights connected to his presence on the territory of the *second* country. Once present on the *third* country’s territory, he starts all over again with acquiring the Convention rights. For example, this entails that an asylum-seeker merely present in a third country’s territory, will not be entitled to a right of association, until he is lawfully staying in that country.¹⁷⁶ The right of association is thus a *potential* right. On the other hand, the same asylum-seeker will *immediately* be entitled to the Convention rights connected to (lawful)¹⁷⁷ presence at the moment he enters the territory of the third country.

Using merely the existing sets of criteria as stipulated in the Convention, the potentiality principle endeavours to equate the protection in the *third* country to the required protection in the *second* country. The application of the STC concept could then no longer be a disguised deprivation of Convention rights. Only if the protection in the third country is at least similar to the protection in the second country, one could truly speak of ‘protection elsewhere’.

Does the potentiality principle mean that a third country’s violation of *any* of the Convention rights bars the application of the STC concept? According to the potentiality principle, it does. This might seem an undesirable result, since Legomsky argued that this would render almost every country unsafe. Nonetheless, I would like to emphasize here the contingent criteria of the Convention. Returning to the example of the right to association, refugees lawfully staying in a third country’s territory, would be entitled only to ‘the most favourable treatment accorded to nationals of a foreign country, in the same circumstances’.¹⁷⁸ It is difficult to see why a third country could not comply with this relatively low standard of protection.

Nevertheless, I am aware that protection in practice might be more difficult than protection in theory. Requiring a literal application of the potentiality principle would mean that second countries must verify in each individual case whether all Convention rights will be granted. Such a requirement would put a tremendous workload on the tiny shoulders of the domestic refugee status determination procedures. Therefore, I suggest that the burden of proving a violation of one of the Convention rights partly shifts to the applicant.¹⁷⁹ In practice, this means that states could make lists of *generally* safe countries, on the basis of accurate and recent country of origin information.¹⁸⁰ At the moment an applicant claims, and has some evidence, that one of the Convention rights will be violated in the third country in his or her particular case, the second country must prove otherwise. Hence, the second country remains

¹⁷⁵ This also relates to the EU’s supranational character. See Case C-26/62 *Van Gend en Loos v Administratie der Belastingen* [1963] CJEU; Case C-6/64 *Costa v ENEL* [1964] CJEU; see also Treaty on the Functioning of the European Union [2008] OJ C 115/47 (TFEU) art 78(1) and (2)(d).

¹⁷⁶ Refugee Convention, art 15.

¹⁷⁷ See chapter 3.5 of this thesis.

¹⁷⁸ Refugee Convention, art 15.

¹⁷⁹ See also Legomsky (n 24) 641.

¹⁸⁰ What ‘generally safe’ entails, will be discussed in chapter 3.4.3.

responsible for ensuring the safety of the third country in each individual case,¹⁸¹ but the administrative burden is relieved to manageable proportions. This form of ensuring safety is also used by the EU, to which they refer as the rebuttable presumption of safety.¹⁸²

The next section will apply the potentiality principle to assess the relevant protection requirements, both concerning the procedural requirements and the substantive requirements themselves. With respect to the procedural requirements, I will deal only with those requirements that are inextricably linked to the substantive requirements.

3.4 Procedural protection requirements

3.4.1 Consent to admit

The application of the potentiality principle primarily entails the obligation to obtain *guarantees* that refugees will be treated in accordance with the Convention. Most importantly, states have to satisfy themselves that the obligations of the Refugee Convention are respected *in practice*.¹⁸³ Consent to admit is a good indication of this practice: it illustrates the third country's willingness to protect the expelled refugees.

Assurances should be incorporated in an admission agreement in written form between the second and third country.¹⁸⁴ This agreement should include as a bare minimum the guarantees that the refugee will be admitted to the territory of the third country and will be provided the possibility to seek and enjoy asylum.¹⁸⁵ In this way, an admission agreement does not only facilitate compliance with Convention rights, but it is also essential in preventing the situation of 'refugees in orbit'.¹⁸⁶ Indeed, a third country's consent to admit a refugee on its territory prevents that this country could *also* apply the STC concept, potentially leading to an incessant process of dodging and evading protection responsibility, letting the refugee fall between two stools.

3.4.2 Access to a refugee status determination procedure

As discussed in the previous paragraph, an admission agreement should include the guarantee that the third country offers a possibility to seek and enjoy asylum.¹⁸⁷ This requirement is an absolute necessity to assure that refugees will be treated in accordance with the Convention, save in cases where the third country adheres to the full panoply of Convention rights without

¹⁸¹ See also UNHCR, 'Observations on the European Commission's proposal for a Council Directive on Minimum standards on procedures for granting and withdrawing refugee status' (2001) para 36.

¹⁸² I will discuss this presumption in the chapter 4.4.2.3 of this thesis.

¹⁸³ Michigan Guidelines (n 7) para 3; Zimmermann (n 64) 1385-1386, UNHCR Lisbon Expert Roundtable, 'Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers' (2002) para 15(e).

¹⁸⁴ Michigan Guidelines (n 7) para 16.

¹⁸⁵ UNHCR EXCOM 'Note on International Protection' A/AC.96/914 (1999) para 19; see also Van Selm (n 8) para 13; Legomsky (n 24) 578; Wouters (n 86) 141-142.

¹⁸⁶ Legomsky (n 24) 584; Van Selm (n 8) para 156.

¹⁸⁷ See also Michigan Guidelines (n 7) para 4; Michelle Foster, 'Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State' (2007) 28 Michigan Journal of International Law 223, 250.

requiring any recognition of refugee status.¹⁸⁸ The latter also applies to refugees who could obtain access to the substance of the Convention rights on another basis than their refugee status, such as family reunification.¹⁸⁹ In other words, access *in practice* to the substance of the Convention rights is decisive, if necessary under a different heading.

At least in cases where recognition is a precondition for the possibility to *claim* Convention rights, the refugee status determination procedure could provide the essential means to assess the asylum-seeker's risk of *refoulement* and his entitlement to all other Convention rights.¹⁹⁰ Without a fair and proper assessment within such a procedure, the fundamental prohibition of *refoulement* is less likely to be observed.¹⁹¹ In other words, 'only by examining the application can the [third] state ascertain that an eventual decision to return the individual will not result in *refoulement*'.¹⁹²

In principle, the refugee status determination procedure could also be undertaken by the UNHCR,¹⁹³ but only if the government of the third country respects the outcome of that procedure. After all, the government is the institution who could ultimately provide protection to persons recognised as refugee. Although, for instance, the UNHCR might be perfectly capable of providing for elementary education, this is certainly not the case for refugees' access to courts.

Regardless of the question who should undertake the refugee status determination procedure, the procedure should always be 'fair, effective and efficient', under humane reception conditions.¹⁹⁴ This includes the asylum-seeker's possibility to appeal the decision on his refugee status. The possibility to appeal must be an effective remedy,¹⁹⁵ provided on an individual basis. This individual assessment is a requirement not only for the effective remedy, but also for the decision on refugee status itself.¹⁹⁶ This encompasses the obligation to assess every case on its own merits, including the personal and individual circumstances of the asylum-seeker.¹⁹⁷

3.4.3 Character of the third country as party to the Refugee Convention

The aforementioned raises the question whether the third country admitting the refugee to its territory and granting him access to the substance of the Convention rights, should be a (full) party to the Refugee Convention. Building on the potentiality principle, the obligation for the second country to guarantee that the third country respects the Convention rights, normally entails that the third country is also a (full) party to the Convention. This is different in cases

¹⁸⁸ Ibid.

¹⁸⁹ See e.g. Dutch Aliens Act, art 1, providing the exact same treatment to all persons without Dutch nationality, thus equating recognized refugees and other foreigners with a residence permit.

¹⁹⁰ Zimmermann (n 64) 1386.

¹⁹¹ Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press 2007) 396.

¹⁹² Vedsted-Hansen (n 8) 275.

¹⁹³ See Foster (n 3) 70.

¹⁹⁴ Van Selm (n 8) para 25.

¹⁹⁵ Michigan Guidelines (n 7) para 12.

¹⁹⁶ Wouters (n 86) 142.

¹⁹⁷ Vedsted-Hansen (n 8) 272; Van Selm (n 8) para 13; Phuong (n 141) 4.

where the third country ‘has developed a practice akin to the 1951 Convention and/or its 1967 Protocol’.¹⁹⁸ In other words, the decisive criterion is not whether the third country is a party to the Convention,¹⁹⁹ but whether it provides the Convention rights *in practice*.²⁰⁰ The second country must always examine this practice in the third country, also when the third country is a party to the Convention.²⁰¹ One’s *theoretical* status as party to the Convention is simply not sufficient to prove such *practice* of compliance. Only if the Convention rights are granted in practice, one could truly speak of effective ‘protection’ elsewhere. This also entails that ‘generally safe’ countries, as discussed in chapter 3.3.3, do not necessarily have to be party to the Refugee Convention. Rather, countries are generally safe if they normally comply in practice with all the Convention rights, based on accurate and recent country of origin information.

Hence, whether the third country is a party or not, the third country must in all cases deliver effective protection *in practice*, in a manner akin to the terms of the Refugee Convention. What this effective protection entails will be discussed in the next section.

3.5 Substantive protection requirements

As discussed above, the second country may only apply the STC concept if it believes that the refugee has a potential to acquire all of the Convention rights in the third country. But how is this potential to be assessed?

The Convention rights connected to mere presence in a state’s territory *immediately* accrue to refugees at the very moment they enter the territory of the third country.²⁰² The second country must therefore satisfy itself that the third country grants the substance of these Convention rights immediately upon arrival of the refugee. Elementary education, access to courts, and non-discrimination, are only a few of these core rights.²⁰³

However, also the rights dependent on a refugee’s *lawful* presence in the territory *immediately* accrue to refugees at the moment of entering the territory of the third country. Indeed, since the application of the STC concept always requires the third country’s *consent* to admit the refugee, he obtained *authorization* to be present on the territory. Hence, he became, through the very application of the STC concept, lawfully present for Convention purposes. From the moment of entering the third country’s territory, the refugee is thus also entitled to self-employment and freedom of movement.²⁰⁴ By consenting to admit the refugee on its territory, Article 32 RC also became applicable, thereby prohibiting any further application of the safe third country concept.

¹⁹⁸ UNHCR 2002 (n 183) para 15(e).

¹⁹⁹ Hathaway (n 4) 328; Wouters (n 86) 142.

²⁰⁰ Hathaway (n 4) 330; Foster (n 146) 286; Goodwin-Gill & McAdam (n 191) 394.

²⁰¹ Vedsted-Hansen (n 8) 272; Phuong (n 141) 4 and 11.

²⁰² See chapter 3.2.1 of this thesis.

²⁰³ Refugee Convention, arts 3, 4, 13, 16(1), 20, 22, 27, 31, 33.

²⁰⁴ Refugee Convention, arts 18 and 26.

Only the Convention rights connected to lawful stay and (habitual) residence accrue to refugees at a later moment. For these rights, there should be a *potential* to acquire them in the third country. This potential should not be a mere possibility, but an actual entitlement *in the future*. There should thus at least be the ‘automatic’ qualification as refugee lawfully *staying* in the territory.²⁰⁵ Preferably, there should also be an opportunity to obtain a residence permit to increase the likelihood that lawful stay will be recognized on shorter notice. The ‘automatic’ qualification is also an absolute requirement for rights connected to (habitual) residence. Arguably after three months of presence/residence in the third state,²⁰⁶ refugees should be entitled to the relevant Convention rights.

3.6 Sub-conclusion

This chapter analysed the required protection of the STC concept within the context of the Refugee Convention. In expelling a refugee who is not yet lawfully present, the second country is under the Convention only required to examine the third country’s observance of Article 33 RC. However, under regional law, other requirements may apply. In EU law, Article 38(1)(e) PD sets as a precondition for the safety of a third country that persons ‘found to be a refugee’ must ‘receive protection in accordance with the Geneva Convention’. On this basis, the potentiality principle was introduced. This principle mainly takes account of the incremental system of the Convention, on the basis of which the third country should offer the substance of all Convention rights to the expelled refugee, either in the present or in the future. A third country is safe as long as there is a *potential* for a refugee to acquire the substance of all Convention rights. This seemingly high standard is relieved to a great extent by the contingent criteria of the Convention and the rebuttable presumption of safety.

²⁰⁵ See chapter 3.2.3 of this thesis.

²⁰⁶ See chapter 3.2.4 of this thesis.

4. The required protection under Article 38(1) EU Procedures Directive

4.1 Introduction

Having analysed the required protection of the STC concept within the context of the Refugee Convention, this chapter will assess the required protection under Article 38(1)(e) PD. To provide some context, I will first briefly set out the legal framework focused on its origins, object and purpose, and the aim of the safe third country concept (chapter 4.2). Thereafter, this chapter will elaborate on the required protection related to non-persecution and non-*refoulement*, as stipulated in Article 38(1)(a)-(d) (chapter 4.3). This elaboration will be rather descriptive in nature, since this thesis mainly focuses on an analysis of the meaning of Article 38(1)(e). Nonetheless, the meaning of Article 38(1)(a)-(d) might raise a corner of the veil as to the required protection in Article 38(1)(e). In order to analyse the latter subparagraph, this thesis will apply the CJEU's general methods of interpretation (chapter 4.4). This methodology is used on account of the CJEU's status as the highest authority in the interpretation of EU law.²⁰⁷ Because there is no CJEU case law on the interpretation of Article 38(1)(e) PD itself, nor any other authoritative source, I decided to apply the general methods of interpretation myself. The application of these methods of interpretation is central to this chapter and is a helpful instrument to carry out an analysis as complete as possible, taking into account all relevant aspects affecting the meaning of Article 38(1)(e) PD.

4.2 Origins, object and purpose of the safe third country concept

Over the years, the STC concept in EU law has taken many different forms. Currently, the concept is moulded in the form of Article 38 PD. Besides this 'pure' form,²⁰⁸ the STC concept could also be recognized in the FCA concept stipulated in Article 35 PD, the 'European safe third country' concept as laid down in Article 39 PD and, most notably, as basis for the Dublin Regulation.²⁰⁹

The current widespread application of variations of the STC concept did not come as a surprise. Already back in 1979, the UNHCR supported the similar FCA concept.²¹⁰ In 1986, Denmark introduced the STC variation in Europe, leading to its proliferation throughout Western Europe.²¹¹ In 1992, the European Council sought to harmonize these national practices of the EU Member States by means of the so-called 'London Resolution'.²¹² This non-binding instrument laid down multiple STC-related 'obligations' upon Member States,

²⁰⁷ TFEU, arts 267(a) and 274; see also Battjes (n 117) 41.

²⁰⁸ See also Battjes (n 117) 385.

²⁰⁹ Dublin Regulation, recital 3.

²¹⁰ UNHCR 1979 (n 87); see also Rosemary Byrne and Andrew Shacknove, 'The Safe Country Notion in European Asylum Law' (1996) 9 Harvard Human Rights Journal 185, 190.

²¹¹ Costello (n 33) 40.

²¹² Council Resolution of 30 November 1992 on a harmonized approach to questions concerning host third countries ('London Resolution') [1992] <<http://www.refworld.org/docid/3f86c3094.html>> accessed 7 June 2018; see also Costello (n 33) 41; Byrne & Shacknove (n 210) 191-192; Jacqueline Bhabha, 'European Harmonisation of Asylum Policy: A Flawed Process' (1994) 35 Virginia Journal of International Law 101, 109-110.

such as the obligation to ensure that an asylum-seeker will be admitted in the third country.²¹³ Nonetheless, the standard of procedural protection in ‘London’ was soon reduced to a bare minimum in the 1995 Resolution on Minimum Guarantees for Asylum Procedures.²¹⁴ By that time, the STC concept was already included as basis for the Dublin Convention.²¹⁵ Both the London Resolution and the 1995 Resolution failed completely in achieving a harmonized interpretation of the STC concept, which led to ‘chain refoulement’ of asylum-seekers and exclusion from an examination on the merits of their claim.²¹⁶ Despite these deficiencies, an EU intervention was not yet forthcoming.

It lasted until 2005 before the EU presented the original Procedure Directive²¹⁷ as last element of the implementation of the CEAS.²¹⁸ Although this binding instrument sought to harmonize the divergent state practices,²¹⁹ practice proved otherwise. Since the Directive’s drafting process was surrounded by compromises and disagreement,²²⁰ the protection standards of the STC concept provided for by the final text of Article 27 were considered rather minimal.²²¹ Ultimately, the value of the Directive as a whole was contested and was considered to be an ‘*a-la-carte* instrument’ and ‘a catalogue of national practices’.²²² All criticism on the Directive focused on what the Directive itself tried to achieve: harmonisation of the STC concept.

In 2009,²²³ the European Parliament and the Council made a new attempt to harmonize the divergent state practices.²²⁴ In 2013, this attempt resulted in a recast of the Procedures Directive, providing for common standards rather than minimum ones.²²⁵ The new provision

²¹³ London Resolution, para 2(c).

²¹⁴ Council Resolution of 20 June 1995 on minimum guarantees for asylum procedures (‘1995 Resolution’) [1996] <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3A133103>> accessed 8 June 2018; see also Costello (n 33) 41; Bhabha (n 212) 110.

²¹⁵ Dublin Convention, art 3(2).

²¹⁶ Rosemary Byrne, Gregor Noll and Jens Vedsted-Hansen (eds), *New Asylum Countries? Migration Control and Refugee Protection in an Enlarged European Union* (Kluwer Law International 2002) 25.

²¹⁷ Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ L 326/13 (original Procedures Directive).

²¹⁸ See Costello (n 33) 36.

²¹⁹ Explanatory Memorandum on the Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status (2000) COM [2000] 578, para 3.3.

²²⁰ See Maria Michelogiannaki, ‘The Negotiations of Directive 2005/85/EC’ in Karin Zwaan (ed), *The Procedures Directive: Central Themes, Problem Issues, and Implementation in Selected Member States* (Wolf Legal Publishers 2007) 21-22 and 24; Doede Ackers, ‘The Negotiations on the Asylum Procedures Directive’ (2005) 7 *European Journal of Migration and Law* 1; Steve Peers and others (eds), *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition* (Brill Nijhoff 2015) 211.

²²¹ Ackers (n 220) 28-31; ECRE, ‘Information Note on the Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status’ <https://www.ecre.org/wp-content/uploads/2016/07/ECRE-Information-Note-on-the-Asylum-Procedures-Directive_October-2006.pdf> accessed 7 June 2018, 23.

²²² Nils Coleman, *European Admission Policy: Third Country Interests and Refugee Rights* (Martinus Nijhoff Publishers 2009) 287.

²²³ Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (Recast) COM [2009] 554.

²²⁴ Explanatory Memorandum on the Amended Proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (Recast) COM [2011] 319, para 1.2.

²²⁵ Procedures Directive, art 1.

on the safe third country concept in Article 38 introduced the requirement that ‘there is no risk of serious harm as defined in Directive 2011/95/EU’ in the third country,²²⁶ and the right to challenge ‘the presumption of [the third country’s] safety’ for persons having subsidiary protection.²²⁷ In this recast, the procedural requirements are stipulated in Article 38(2)-(5). Furthermore, the Directive’s recitals provide procedural guidance by requiring ‘effective access to procedures’ of every applicant,²²⁸ a ‘rigorous examination of applications for international protection’,²²⁹ and examination of ‘all applications on the substance’.²³⁰ The substantive protection requirements are listed in Article 38(1)(a)-(e), the content of which will be discussed in the next sections.

4.3 Protection relating to non-persecution and non-*refoulement*

The requirements laid down in Article 38(1)(a)-(d) derive from different international legal frameworks, but all come down to non-persecution and non-*refoulement*.

4.3.1 Article 38(1)(a) and (c): the Convention’s prohibition of persecution and *refoulement*

Firstly, sub (a) and (c) reiterate, respectively, the Convention’s prohibition of persecution and *refoulement*. Since sub (a) is an exact copy of Article 33(1) RC, one can assume that they have the exact same meaning. After all, the CEAS – and therefore the Procedure Directive – is directly based on the Geneva Convention and must thus be interpreted in that light.²³¹ This also follows from the general methods of interpretation as used by the CJEU, which require that account must be taken of an instrument’s object and purpose.²³²

Bearing in mind the existence of Article 38(1)(a) Procedures Directive, sub (c) should also concern the *indirect* prohibition of *refoulement* as laid down in Article 33 RC. This reading is confirmed by the legislative history of the original Procedures Directive, which states that the safety of a third country partly depends on the risk of ‘chain’ *refoulement*.²³³ Moreover, the London Resolution, which is one of the Directive’s predecessors, already stipulated a direct and indirect prohibition of *refoulement*.²³⁴

But what do the prohibition of persecution and *refoulement* entail? Firstly, in contrast to Article 33 RC, the prohibition of *persecution* does not relate to persecution in the country of origin (the ‘first’ country), but to persecution in the third country. Subsequently, the prohibition of *refoulement* aims to prevent expulsion of asylum-seekers to ‘fourth’ countries where they would be at risk of persecution. Thus, also this prohibition does not necessarily

²²⁶ Procedures Directive, art 38(1)(b).

²²⁷ Procedures Directive, art 38(2)(c).

²²⁸ Procedures Directive, recital 25.

²²⁹ Ibid, recital 34.

²³⁰ Ibid, recital 43.

²³¹ Ibid, recital 3.

²³² See chapter 4.4.3 of this thesis.

²³³ European Parliament, Report on the Amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status (2005) A6-0222/2005, 54; Explanatory Memorandum (n 219) Annex I.

²³⁴ London Resolution, art 2; see also Costello (n 33) 41.

concern the country of origin: it covers any country where the asylum seeker would be at risk. This lack of an assessment of persecution in the *first* country makes sense in the light of Article 33(2)(c) PD, which permits a Member State to ‘consider an application for international protection as inadmissible (...) if (...) a country is considered as a safe third country, pursuant to Article 38’. Thus, when applying the STC concept, the second country does not have to examine whether the asylum-seeker qualifies as a refugee.²³⁵

Self-evidently, the substance of the refugee claim must be assessed at least *somewhere* to protect the prohibition of *refoulement* effectively.²³⁶ Therefore, the asylum seeker must have access to a refugee status determination procedure, unless he has access *in practice* to the substance of the Convention rights, as discussed in chapter 3.4.2. of this thesis.²³⁷ The refugee status determination procedure must be fair, efficient and rigorous.²³⁸ Furthermore, there must be a possibility to appeal against a negative decision on a refugee claim.²³⁹ This appeal must have suspensive effect.²⁴⁰ As discussed in chapter 3.4.1, effective protection of non-*refoulement* and access to a refugee status determination procedure also requires the third country’s consent to admit the asylum seeker to its territory, preferably by means of an admission agreement.

Furthermore, the third country must offer effective protection against *refoulement in practice*, in a manner akin to the terms of the Refugee Convention. A third country’s ratification of the Convention is a good indicator of such practice, but is not decisive.²⁴¹ Hence, even if a third country is a full party to the Convention, the asylum seeker should have the possibility to rebut the presumption of safety in his or her particular circumstances.²⁴² This rebuttable presumption partly arises from case law relating to the Dublin Regulation,²⁴³ which will be discussed more in detail in chapter 4.4.2.3.

4.3.2 Article 38(1)(b): serious harm as defined in Directive 2011/95/EU

Subsequently, sub (b) stipulates a prohibition of *refoulement* outside the scope of the Refugee Convention. It was introduced in the recast of the Procedures Directive and covers all persons entitled to so-called ‘subsidiary protection’, as defined by the EU Qualification Directive (QD).²⁴⁴ Such persons are not refugees according to the Refugee Convention, but need

²³⁵ Battjes (n 117) 397.

²³⁶ See also *Hirsi Jamaa and Others v Italy* App no 27765/09 (ECtHR, 23 February 2012) para 147.

²³⁷ See also Procedures Directive, recital 25; *TI v the United Kingdom* App no 43844/98 (ECtHR, 7 March 2000) 16.

²³⁸ Procedures Directive, recital 4 and 34; see also Peers and others (n 220) 267; Battjes (n 117) 418; EASO, ‘An Introduction to the Common European Asylum System for Courts and Tribunals: A Judicial Analysis’ (2016) <<https://www.easo.europa.eu/sites/default/files/public/BZ0216138ENN.PDF>> accessed 13 June 2018, 14.

²³⁹ Procedures Directive, art 46(1)(a)(i).

²⁴⁰ Procedures Directive, recital 25; see also Battjes (n 117) 418.

²⁴¹ See chapter 3.4.3. of this thesis.

²⁴² Procedures Directive, art 38(2)(c).

²⁴³ See e.g. Case C-411/10 *NS and Others* [2011] CJEU, paras 100-104.

²⁴⁴ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection

protection against persecution because of other reasons than the limited Convention grounds.²⁴⁵ These reasons are listed exhaustively in Article 15 QD. They relate to multiple aspects of protection against persecution as laid down in the ECHR and case law of the European Court of Human Rights (ECtHR).²⁴⁶ The main reason underlying the existence of subsidiary protection is Article 3 ECHR (and its equivalent Article 4 CFR), which is expressed in Article 15(b) and arguably (c) QD.²⁴⁷ This absolute right,²⁴⁸ which includes a prohibition of *refoulement*,²⁴⁹ states that '[n]o one shall be subjected to torture or to inhuman or degrading treatment'. As long as alleged harm amounts to torture or to inhuman or degrading treatment, Article 3 ECHR does not only protect against direct persecution, but also against so-called socio-economic harm, such as 'dire' living conditions.²⁵⁰ Taking this into account, protection against 'serious harm' implies a duty to grant asylum-seeker their 'most basic needs'.²⁵¹ This also includes protection against 'systemic flaws in the asylum procedure and in the reception conditions' of the third country,²⁵² which will be discussed more in detail in chapter 4.4.2.3. Furthermore, expulsion to a third country could also amount to 'serious harm' if the asylum seeker is seriously ill.²⁵³ Bearing this in mind, the protection against 'serious harm' is broader than the limited prohibition of *refoulement* in Article 33 RC, which only provides protection against persecution itself.

4.3.3 Article 38(1)(d): non-*refoulement* in international law

The last definition of the prohibition of *refoulement* includes international law other than the Refugee Convention. It formulates '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 (...)'.²⁵⁴ In the original Procedures Directive,²⁵⁵ this also covered Article 3 ECHR, since the provision on protection against 'serious harm' came not yet into existence.²⁵⁶ Nowadays, Article 38(1)(d) covers primarily the prohibition of *refoulement* outside the ECHR. Most notably, Article 3 of the Convention against Torture and Article 7 of the International Covenant on Civil and Political Rights²⁵⁷ lay down such a prohibition of *refoulement*.²⁵⁸

granted (recast) [2011] OJ L 337/9 (Qualification Directive) art 2(f); see also Kay Hailbronner and Daniel Thym, *EU Immigration and Asylum Law: A Commentary* (C.H. Beck/Hart Publishing/Nomos 2016) 1362-1363.

²⁴⁵ See Boeles and others (n 11) 341-343.

²⁴⁶ See e.g. Ibid 353-360.

²⁴⁷ See e.g. Ibid 360.

²⁴⁸ *Chahal v the United Kingdom* App no 22414/93 (ECtHR, 15 November 1996) para 79.

²⁴⁹ *Soering* (n 53) para 91.

²⁵⁰ See e.g. *MSS v Belgium and Greece* App no 30696/09 (ECtHR, 21 January 2011) para 263; *Tarakhel v Switzerland* App no 29217/12 (ECtHR, 4 November 2014) paras 118-122.

²⁵¹ *MSS v Belgium and Greece* (n 250) para 254.

²⁵² *NS and Others* (n 243) para 94; see also Dublin Regulation, art 3(2).

²⁵³ Case C-578/16 PPU *CK and Others* [2017] CJEU, para 73; see also *Paposhvili v Belgium* App no 41738/10 (ECtHR, 13 December 2016).

²⁵⁴ Procedures Directive, art 38(1)(d).

²⁵⁵ Original Procedures Directive, art 27(1)(c).

²⁵⁶ See original Procedures Directive, art 27(1).

²⁵⁷ International Covenant on Civil and Political Rights (adopted 19 December 1966, entry into force 23 March 1976) 999 UNTS 171 (ICCPR).

4.4 Protection in accordance with the Refugee Convention

The exact meaning of ‘protection in accordance with the Geneva Convention’, as laid in Article 38(1)(e) PD is less clear than the meaning of protection against persecution and *refoulement*. Nonetheless, the general methods of interpretation as used by the CJEU provide sufficient methods to illuminate the meaning of Article 38(1)(e) PD. These methods will be applied in the next sections, and consist of the textual, the contextual and the purposive method.²⁵⁹

4.4.1 Textual method of interpretation

The textual method has to do with linguistics and analyses the literal wording of provisions. According to the CJEU, interpretations should normally not be ‘contrary to the express wording of the provision’.²⁶⁰ Terms should be interpreted in line with their ordinary meaning.²⁶¹ It is therefore appropriate to consult some dictionaries. After all, they are the primary source for the ordinary meaning of any term.

With regard to ‘the possibility to request refugee status’, one may consider two very different meanings. According to the online Cambridge Dictionary, one definition of ‘possibility’ is ‘a *chance* that something will happen or be true’, while the other is ‘something that you can *choose* to do in a particular situation’.²⁶² The difference between the two is highly important for the protection of individual asylum-seekers. Adopting the definition of ‘chance’ leads to Battjes’ conclusion that ‘it is not required that [the third country] should examine the refugee status of the applicant’.²⁶³ Instead, I would rather support the definition of ‘choice’, adopting Costello’s conclusion that ‘there is (...) no explicit requirement to demonstrate that the protection standards are actually adhered to, merely that the possibility exists to seek (...) such protection’.²⁶⁴ In this light, ‘possibility’ would only mean that it is not *mandatory* to request refugee status; it is always the individual choice of the asylum-seeker to request refugee status.

²⁵⁸ See e.g. Human Rights Committee General Comment No 31, ‘The Nature of the General Legal Obligation Imposed on States Parties to the Covenant’ (26 March 2004) UN Doc CCPR/C/21/Rev.1/Add.13, para 12; Santhosh Persaud, ‘Protecting Refugees and Asylum Seekers under the International Covenant on Civil and Political Rights’ in UNHCR Research Paper No 132 (2006) 6-12.

²⁵⁹ See Gunnar Beck, *The Legal Reasoning of the Court of Justice of the EU* (Hart Publishing 2012) 187; Jan Komárek, ‘Legal Reasoning in EU Law’ in Anthony Arnall and Damian Chalmers, *European Union Law* (Oxford University Press 2015) 28, 45-46; Gerard Conway, *The Limits of Legal Reasoning and the European Court of Justice* (Cambridge University Press 2012) 2-3; Battjes (n 117) 41-46.

²⁶⁰ Case C-376/98 *Germany v Parliament and Council* [2000] CJEU, para 83; Case C-310/98 *Met-Trans and Sagpol* [2000] CJEU, paras 28 and 32.

²⁶¹ Case C-11/76 *Netherlands v Commission* [1979] CJEU, para 19; Case C-253/99 *Bacardi* [2001] CJEU, para 37.

²⁶² Cambridge Dictionary, ‘Possibility’ <<https://dictionary.cambridge.org/dictionary/english/possibility>> accessed 29 June 2018, emphasis added.

²⁶³ Battjes (n 117) 422.

²⁶⁴ Cathryn Costello, ‘The European Asylum Procedures Directive in Legal Context’ in UNHCR Research Paper No 134 (2006) 11.

Furthermore, the ‘possibility’ is, at least textually, also linked to the phrase ‘to receive protection in accordance with the Geneva Convention’. Therefore, interpreting ‘possibility’ as ‘choice’, would imply that it is entirely at the discretion (or the choice) *of the third country* to decide whether it grants ‘protection in accordance with the Geneva’ to persons ‘found to be a refugee’. Such an interpretation is highly undesirable, since it would not offer any protection to the refugees concerned. Article 38(1)(e) PD would be rendered completely meaningless. It would also contradict the ‘full and inclusive application’ of the Refugee Convention.²⁶⁵ In such cases, where the textual method of interpretation contradicts the contextual or purposive method, the CJEU is not hesitant to discard the former.²⁶⁶ The textual method is often considered to be of secondary importance in relation to those other methods.²⁶⁷ Indeed, the literal meaning is a mere starting point for interpretation.²⁶⁸ Therefore, contrary to the literal text of the provision, I assume that ‘the possibility’ does *not* relate to the ‘protection in accordance with the Geneva Convention’. Once ‘found to be a refugee’, the refugee *must* be accorded protection.

With regard to ‘in accordance with’ the Cambridge Dictionary provides the definition ‘following or obeying a rule, law, wish, etc’.²⁶⁹ The online Oxford Dictionary defines the term similarly as: ‘in a manner conforming with’.²⁷⁰ These definitions entail that the protection of Article 38(1)(e) should ‘obey’, ‘follow’ or ‘conform with’ the Refugee Convention. Thus, the phrase ‘in accordance with’ is not a mere guideline, but concerns a *strict requirement*. This is consistent with the contextual method of interpretation, as will be demonstrated in chapter 4.4.2.1.

4.4.2 Contextual method of interpretation

The ‘context’ of a term encompasses the system surrounding that term.²⁷¹ Hence, this does not only include Article 38 PD as a whole, but also the Directive as a whole,²⁷² including its recitals.²⁷³ Moreover, the STC concept must be seen in the context of the CEAS,²⁷⁴ which also provides for the STC concept by means of the Dublin Regulation. Finally, the context of Article 38(1)(e) PD includes the Refugee Convention, since the CEAS is based ‘on the full

²⁶⁵ Procedures Directive, recital 3.

²⁶⁶ Case C-9/70 *Grad/Finanzamt Traunstein* [1970] CJEU, paras 12-14; Case C-20/70 *Transports Lesage & cie/Hauptzollamt Freiburg* [1970] CJEU, paras 13-16.

²⁶⁷ Battjes (n 117) 43; Beck (n 259) 189-190.

²⁶⁸ Beck (n 259) 190.

²⁶⁹ Cambridge Dictionary, ‘Accordance’ <<https://dictionary.cambridge.org/dictionary/english/accordance>> accessed 26 June 2018.

²⁷⁰ English Oxford Living Dictionaries, ‘Accordance’ <<https://en.oxforddictionaries.com/definition/accordance>> accessed 26 June 2018.

²⁷¹ See e.g. Case C-283/81 *CILFIT v Ministero della Sanità* [1982] CJEU, para 20; see also Beck (n 259) 191; Komárek (n 259) 46.

²⁷² Case C-66/99 *D Wandel* [2001] CJEU, paras 47-49; Case C-383/99P *Procter & Gamble v OHIM* [2001] CJEU, para 37; see also Conway (n 259) 3.

²⁷³ See Komárek (n 259) 46; Beck (n 259) 191.

²⁷⁴ Case C-102/86 *Apple and Pear Development Council v Commissioners of Customs and Excise* [1988] CJEU, para 10; Case C-30/00 *William Hinton & Sons* [2001] CJEU, para 50; see also Beck (n 259) 192-193.

and inclusive application of the Geneva Convention Relating to the Status of Refugees (...).²⁷⁵

4.4.2.1 Article 38 PD as a whole

In the context of Article 38 PD as a whole, the textual interpretation of the phrase ‘in accordance with’ remains valid. Most notably, Article 38(1)(c) requires that ‘the principle of *non-refoulement* in accordance with the Geneva Convention is respected’.²⁷⁶ The prohibition of *refoulement* in the Convention is not a mere guideline; it is a fundamental prohibition in international refugee law.²⁷⁷ Also here, the phrase ‘in accordance with’ thus implies a *strict requirement*. Hence, the use of the word ‘principle’ is unfortunate, to say the least. This unfortunate choice of words also appears in the broader context of Article 38 PD.

Indeed, Article 38(1) stipulates that ‘Member States may apply the safe third country concept only where the competent authorities are satisfied that a person seeking international protection will be treated *in accordance with* (...)’ the ‘principles’ laid down in Article 38(1)(a)-(e).²⁷⁸ These ‘principles’ are not mere concepts, of which one could deviate, but are *strict preconditions* for the safety of a third country. If one would *not* interpret the phrase ‘in accordance with’ as a strict requirement, states would be left with a great margin of appreciation in assessing the safety of a third country. Such an approach would contradict the purpose of the STC concept in the Directive, which is to harmonize the national STC practices.²⁷⁹

Taking into account the abovementioned ‘strict requirements’ of Article 38 PD as a whole, it thus seems that a person, who is recognized as a refugee in the third country, should receive protection *exactly* as provided for by the Refugee Convention. This protection consists of all Convention rights except for the prohibition of *refoulement*, since another reading would render Article 38(1)(c) superfluous. The wide variety of Convention rights implies that second countries may only apply the STC concept if the third country is a full party to the Geneva Convention and its 1967 Protocol, unless the non-party provides *in practice* the substance of all Convention rights without geographical or temporal limitation.²⁸⁰

4.4.2.2 The Procedures Directive as a whole

Article 38 PD is not the only formulation of the STC concept within the Procedures Directive. Another STC formulation is the ‘European safe third country’ concept, as laid down in Article

²⁷⁵ Procedures Directive, recital 3.

²⁷⁶ Emphasis added.

²⁷⁷ See chapter 2.2.2 of this thesis.

²⁷⁸ Procedures Directive, art 38(1), emphasis added.

²⁷⁹ See chapter 4.2 of this thesis.

²⁸⁰ See also chapter 3.4.3 of this thesis.

39 PD. Also the similar²⁸¹ FCA concept of Article 35 PD could provide guidance in the interpretation of Article 38(1)(e) PD.²⁸²

According to the recitals of the Procedures Directive, European safe third countries ‘observe particularly high human rights and refugee protection standards’.²⁸³ In contrast to Article 38,²⁸⁴ previous transit through the third country is required as link between the asylum-seeker and the third country.²⁸⁵ Moreover, a European safe third country ‘has ratified and observes the provisions of the Geneva Convention without any geographical limitations.’²⁸⁶ Bearing in mind the absence of such a provision in Article 38 PD, ratification of the Geneva Convention is not required for the application of the ‘normal’ safe third country concept.²⁸⁷ Another reading would render the European safe third country concept superfluous, which could never have been the intention of the drafters.

Returning to the recitals of the Directive, ‘Member States should not be obliged to assess the substance of an application for international protection where a first country of asylum has granted the applicant refugee status or otherwise *sufficient protection* and the applicant will be readmitted to that country’.²⁸⁸ According to Article 35 PD, such ‘sufficient protection’ includes ‘benefiting from the principle of *non-refoulement*’.²⁸⁹ The term ‘including’ implies that ‘sufficient protection’ under the Directive means protection against *refoulement*, but not *only* against *refoulement*. Reading Article 38 PD in conjunction with Article 35 PD thus leads to the conclusion that also Convention rights other than Article 33 RC are necessary to qualify as ‘sufficient protection’. This reflects the potentiality principle as discussed above, requiring a third country’s potential compliance with all Convention rights. Furthermore, also the FCA concept of Article 35 PD demonstrates that ratification of the Geneva Convention is *not* required to qualify as safe country, since sufficient protection could also be provided ‘otherwise’. Self-evidently, protection must be available in one way or another to qualify as ‘protection elsewhere’.²⁹⁰ This means that protection must be ‘in accordance with the Geneva Convention’ *in practice*,²⁹¹ regardless of the third country’s status as party to the Refugee Convention. This also entails that refugees could have access to the substance of the

²⁸¹ On the similarities between the STC and FCA concept, at least in relation to the required protection in the third country, see Legomsky (n 24) 571.

²⁸² See also chapter 2.3 of this thesis.

²⁸³ Procedures Directive, recital 45.

²⁸⁴ Article 38(2)(a) PD merely requires ‘(...) a connection between the applicant and the third country concerned on the basis of which it would be reasonable for that person to go to that country’.

²⁸⁵ Article 39(1) PD states: ‘(...) the applicant is seeking to enter or has entered illegally into its territory from a safe third country (...)’.

²⁸⁶ Procedures Directive, art 39(2)(a).

²⁸⁷ See also Hailbronner & Thym (n 244) 1363; Coleman (n 222) 289.

²⁸⁸ Procedures Directive, recital 43, emphasis added.

²⁸⁹ Procedures Directive, art 35.

²⁹⁰ See Hathaway & Foster (n 7) 31.

²⁹¹ See Coleman (n 222) 289.

Convention rights on another basis than their refugee status, such as family reunification.²⁹² The emphasis on actual practice will further be discussed within the context of the CEAS.

4.4.2.3 The CEAS and the Dublin Regulation

As stated above, the Procedures Directive is not the only instrument within the CEAS that lays down the STC concept, because the Dublin Regulation is also based on that premise.²⁹³ The difference between the two is that Article 38 PD applies the safe country concept *outside* the EU, while the Dublin Regulation applies the safe country concept *within* the EU.²⁹⁴ Since both instruments apply the safe country concept within the context of the CEAS, the required protection within the Dublin-framework is relevant for the meaning of Article 38(1)(e) PD.

For each individual application for international protection filed on the territory of the Union, the Dublin Regulation designates a single Member State which shall be responsible for the examination of that application.²⁹⁵ The Regulation does not elaborate on the meaning of ‘international protection’, because the content of international protection is regulated in the Qualification Directive.²⁹⁶ The problem is that the Dublin Regulation simply *presumes* the safety of designated Member States by means of their status as party to the Geneva Convention, without examining whether that state provides sufficient protection in practice.²⁹⁷

This presumption used to be unconditional, and blindly followed the principle of mutual trust.²⁹⁸ Ultimately, the ECtHR opposed to this unconditional presumption in *MSS*, because the presumption resulted in violations of Article 3 ECHR.²⁹⁹ Therefore, the ECtHR issued that the presumption of safety is *rebuttable* in case of alleged violations of Article 3 ECHR.³⁰⁰ The CJEU interpreted this judgment very narrowly in *NS and Others*,³⁰¹ stating that the presumption of safety is merely rebuttable in case of ‘systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State that amount[s] to (...)’³⁰² a violation of Article 4 CFR, which is the equivalent of Article 3 ECHR. The ECtHR seems to strongly disagree with this narrow reading of *MSS*, since it emphasized in *Tarakhel* that the presumption of safety ‘can validly be rebutted’ in case a person ‘faces a real risk of being subjected to treatment contrary to Article 3’.³⁰³ Quite recently, the CJEU more or less agreed with the ECtHR, by stating in *CK and Others* that ‘it would be manifestly incompatible with the absolute character of that prohibition [Article 4 CFR] if the Member

²⁹² See e.g. Dutch Aliens Act 2000, art 1, providing the exact same treatment to all persons without Dutch nationality, thus equating recognized refugees and other foreigners with a residence permit.

²⁹³ Dublin Regulation, recital 3.

²⁹⁴ See Dublin Regulation, art 3(1).

²⁹⁵ Dublin Regulation, art 3(1).

²⁹⁶ Qualification Directive, art 2(b).

²⁹⁷ Dublin Regulation, recital 3.

²⁹⁸ See on the principle of mutual trust Koen Lenaerts, ‘The Principle of Mutual Recognition in the Area of Freedom, Security and Justice’ in The Fourth Annual Sir Jeremy Lever Lecture (2015).

²⁹⁹ *MSS v Belgium and Greece* (n 250).

³⁰⁰ *Ibid*, para 300.

³⁰¹ *NS and Others* (n 243).

³⁰² *Ibid*, para 94.

³⁰³ *Tarakhel v Switzerland* (n 250) para 104.

States could disregard a real and proven risk of inhuman or degrading treatment affecting an asylum seeker under the pretext that it does not result from a systemic flaw in the Member State responsible'.³⁰⁴ Hence, also in other exceptional circumstances than systemic flaws could the presumption of safety be rebutted,³⁰⁵ for example in case the 'state of health of the asylum seeker concerned does not permit his transfer'.³⁰⁶

These Dublin-cases once again demonstrate the importance of *practice* with respect to the third country's safety. Regardless of a country's ratification of the Refugee Convention, it is ultimately the safety in practice that is decisive. For the safe country concept *outside* the EU, Article 38(2)(c) PD therefore allows applicants, 'as a minimum (...) 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'. It thus reiterates the rebuttable presumption of safety, in which a third country is not necessarily a party to the Geneva Convention. Self-evidently, the safety of a third country may also be assessed on a case-by-case basis, hence without any presumption of safety.³⁰⁷

4.4.2.4 The Refugee Convention

Reading Article 38(1)(e) PD in the context of the Refugee Convention is highly important for an accurate interpretation. After all, the Procedures Directive is part of the CEAS, which is in its turn based 'on the full and inclusive application of the Geneva Convention (...)'.³⁰⁸ 'Full and inclusive application' indicates that not only the prohibition of *refoulement* must be protected, but the Convention as a whole. This is consistent with the required protection *within* the EU, as laid down in the Qualification Directive.³⁰⁹ The potentiality principle, as introduced above, is thus an appropriate instrument to regulate the required protection of Article 38 PD in the context of the Refugee Convention. The application of this principle aims to safeguard the protection of all Convention rights, either immediately or in the future.

4.4.3 Purposive method of interpretation

The importance of the purposive method of interpretation should not be underestimated. The CJEU is even known for its tendency to attach decisive importance to the purpose of a provision,³¹⁰ considered in the context of the whole system surrounding that provision.³¹¹ Even if the textual method of interpretation provides sufficient clarity, the CJEU will also turn to the purposive method.³¹²

³⁰⁴ *CK and Others* (n 253) para 93.

³⁰⁵ Cf. Procedures Directive, art 3(2) second paragraph.

³⁰⁶ *CK and Others* (n 253) para 87.

³⁰⁷ Procedures Directive, art 38(2)(b).

³⁰⁸ Procedures Directive, recital 3.

³⁰⁹ Qualification Directive, arts 3-15.

³¹⁰ Conway (n 259) 22; Battjes (n 117) 42; Komárek (n 259) 46.

³¹¹ Case C-68/94 *France and Société commerciale des potasses and de l'azote and Entreprise minière and chimique v Commission* [1998] CJEU, para 168; Case C-245/01 *RTL Television* [2003] CJEU, para 60.

³¹² Beck (n 259) 207.

The purpose of Article 38 PD is neither principled, nor idealistic. Rather, the only idea behind the introduction of the STC concept in EU law was to provide common EU standards for already existing STC practices in the different EU Member States.³¹³ Thus, the main aim is to ‘establish a common (...) procedure in the Union’.³¹⁴ Since this main objective does not affect the meaning of Article 38(1)(e) PD, it will not be discussed further. However, the aforementioned objective to fully implement the Refugee Convention has its impact on the meaning of Article 38(1)(e) PD. On this basis, not only *non-refoulement* should be protected, but also all other Convention rights.³¹⁵ As discussed above,³¹⁶ this objective of the full implementation of the Refugee Convention also excludes that persons ‘found to be a refugee’ should have a mere ‘possibility’ to receive protection. Recognized refugees *must* receive protection, thus discarding the literal wording on this matter.

4.5 Sub-conclusion

This chapter assessed the required protection under Article 38(1)(e) PD. Having used the CJEU’s general methods of interpretation, I can conclude the following.

- The ‘possibility’ to request refugee status means the ‘choice’ rather than the ‘chance’. An asylum seeker is free to choose whether he wants to request refugee status; he is not obligated to do so. Once found to be a refugee, he must be treated ‘in accordance with the Geneva Convention’.
- ‘In accordance with’ means ‘obeying’ or ‘in a manner conforming with’. Reading this in the context of Article 38 PD as a whole suggests that a recognized refugee should receive protection *exactly* as provided for by the protection standards of the Geneva Convention.
- This does not mean that a third country should be a full party to the Geneva Convention. Nonetheless, a third country should provide *in practice* the substance of all Convention rights without geographical or temporal limitation to recognized refugees. A third country’s status as full party to the Geneva Convention merely *indicates* such practice. The substance of Convention rights could also be provided under a different heading than refugee status, for example family reunification.
- The required protection of Article 38(1)(e) PD consists of all substantive Convention rights other than Article 33. Building on the potentiality principle, a third country is safe if all Convention rights are granted either immediately or in the future, in observance with the incremental system of the Refugee Convention and the contingent criteria set out therein. Practice, rather than theory, is decisive.
- Since this comprehensive approach is less manageable in practice, second countries may use the rebuttable presumption of safety. This means that refugees have as a

³¹³ Explanatory Memorandum (n 219) para 3.3; see chapter 4.2 of this thesis.

³¹⁴ Directive, recital 12.

³¹⁵ See chapter 3.5 and 4.4.2.4 of this thesis.

³¹⁶ See chapter 4.4.1 of this thesis.

minimum the right to rebut the presumption of safety in their particular case, despite the fact that a third country could be *generally safe* on the basis of country of origin information. Self-evidently, the safety of a third country may also be assessed on a case-by-case basis, hence without any presumption of safety.

The abovementioned findings could be applied to any potential STC to examine its performance with regard to Article 38(1)(e) PD. As a case study, the next chapter will demonstrate this application by assessing the safety of Turkey.

5. Case study – Turkey as safe third country

5.1 Introduction

Having assessed the required protection under Article 38(1)(e) PD, this chapter will make the protection standards more concrete by applying them in practice. As a case study, I will examine whether Turkey provides the protection as required by Article 38(1)(e) PD. The STC concept is very relevant in relation to Turkey, since it is presumed to be safe through the EU-Turkey Statement.³¹⁷ The idea behind this deal of 2016 is currently at the heart of EU migration policy, now that the EU (wants to) conclude(s) comparable agreements with other third countries bordering EU territory, such as Libya and Tunisia.³¹⁸ Furthermore, the EU recently indicated that it is willing to reinforce Fortress Europe by partly closing down the right to seek asylum in Europe.³¹⁹ Using the EU-Turkey Statement as a blueprint, most asylum requests would then be dealt with *outside* the EU. Only recognized refugees would be resettled to the EU. Accordingly, countries in Northern Africa such as Morocco, Tunisia, Libya and Egypt should qualify as safe for STC purposes. Bearing these ideas in mind, the EU-Turkey Statement has gained all the more importance. In this context, the safety of Turkey will be assessed.

To assess this safety, I will consult accurate and recent country of origin information. After all, recital 48 PD requires that the sources to be consulted to assess the safety of any third country include ‘in particular information from (...) EASO, UNHCR, the Council of Europe and other relevant international organisations’. The emphasis will be more on the UNHCR and those ‘other relevant international organisations’ than on the EASO and the Council of Europe, since the information of the latter mainly covers Turkey’s performance with regard to the prohibition of persecution and *refoulement*.³²⁰

Furthermore, because a detailed examination of Turkey’s compliance with each individual Convention right would go beyond the purpose of this thesis, only a few Convention rights

³¹⁷ EU-Turkey Statement (n 19) para 1.

³¹⁸ See Jon Henley, ‘What is the Current State of the Migration Crisis in Europe?’ *The Guardian* (15 June 2018) <<https://www.theguardian.com/world/2018/jun/15/what-current-scale-migration-crisis-europe-future-outlook>> accessed 17 July 2018; Laura Smith-Spark and Salma Abdelaziz, ‘3 Babies Among 100 Dead off Libya as Europe Hails New Migrant Deal’ *CNN* (29 June 2018) <<https://edition.cnn.com/2018/06/29/europe/libya-migrant-boat-deaths-intl/index.html>> accessed 2 July 2018; ECRE, ‘EU Eyeing Up Tunisia for Next Migration Deal?’ (3 March 2017) <<https://www.ecre.org/eu-eyeing-up-tunisia-for-next-migration-deal/>> accessed 2 July 2018.

³¹⁹ See e.g. Steven Erlanger and Katrin Bennhold, ‘EU Reaches Deal on Migration at Summit, but Details Sketchy’ *The New York Times* (28 June 2018) <<https://www.nytimes.com/2018/06/28/world/europe/germany-angela-merkel-migration-eu.html>> accessed 2 July 2018; Jennifer Rankin, ‘EU Leaders Hail Summit Victory on Migration but Details Scant’ *The Guardian* (29 June 2018) <<https://www.theguardian.com/world/2018/jun/29/eu-leaders-summit-migration-doubts>> accessed 2 July 2018.

³²⁰ EASO, ‘Country of Origin Information Report: Turkey: Country Focus’ (2016) <https://coi.easo.europa.eu/administration/easo/PLib/EASOCOI_Turkey_Nov2016.pdf> accessed 16 July 2018; Council of Europe, ‘Report to the Turkish Government on the visit to Turkey carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment’ (2017) CPT/Inf[2017]32 <<https://rm.coe.int/pdf/168075ec0a>> accessed 16 July 2018.

will be elaborated upon. This elaboration concerns the right to wage-earning employment (Article 17 RC), the right to elementary education (Article 22(1) RC), and the right to freedom of movement (Article 26 RC). The idea behind this selection of rights is that it demonstrates the findings of this thesis, since the selected rights set different criteria as regards the incremental system of the Convention, ranging from ‘mere presence’ to ‘lawful stay’. Moreover, the selection covers multiple chapters of the Refugee Convention, including ‘gainful employment’,³²¹ ‘welfare’,³²² and ‘administrative measures’.³²³ This approach aims to demonstrate the comprehensiveness of ‘protection in accordance with the Geneva Convention’: not only socio-economic rights, but *all* rights of the Convention must be protected.

Below, I will first consider the EU-Turkey Statement, which constitutes the context of Turkey as a potential STC (chapter 5.2). Having considered this context, I will actually assess whether Turkey qualifies as safe third country in accordance with Article 38(1)(e) PD (chapter 5.3).

5.2 The EU-Turkey Statement

At the peak of the so-called migration crisis in 2015, 1,300,000 people applied for asylum in the EU.³²⁴ Due to this mass influx, the EU felt compelled to intervene. Hence, the EU started negotiations with Turkey to curb the flow of migrants. It made only sense to do this with Turkey, since 856,723 of the 1,015,078 migrants arriving in 2015 at the Mediterranean EU Member States arrived at the Greek islands.³²⁵ The negotiations between the EU and Turkey resulted in 2015 in a Joint Action Plan, which expressed the intention to ‘address the crisis created by the situation in Syria (...) by strengthening cooperation to prevent irregular migration flows to the EU’.³²⁶ This intention was further elaborated in the EU-Turkey Statement of March 2016, which was communicated as a life-saving instrument by having the purpose to ‘break the business model of the smugglers and to offer migrants an alternative to putting their lives at risk’.³²⁷ At first glance, the EU-Turkey Statement has been very successful in curbing the influx of irregular migrants to acceptable proportions. After all, ‘only’ 29,718 people arrived on the Greek islands in 2017, while 856,723 people arrived in 2015.³²⁸ Nonetheless, a closer look at the same statistics shows that the numbers had already

³²¹ Refugee Convention, chapter III.

³²² Refugee Convention, chapter IV.

³²³ Refugee Convention, chapter V.

³²⁴ Eurostat, ‘Asylum Statistics 2006-2017’ <http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics> accessed 2 July 2018.

³²⁵ UNHCR Operational Portal, ‘Mediterranean Situation’ <<https://data2.unhcr.org/en/situations/mediterranean>> accessed 3 July 2018.

³²⁶ European Commission, ‘EU-Turkey Joint Action Plan’ (2015) <http://europa.eu/rapid/press-release_MEMO-15-5860_en.htm> accessed 1 July 2018.

³²⁷ EU-Turkey Statement (n 19) Introduction; see also European Commission, Communication from the Commission to the European Parliament, the European Council and the Council: Second Report on the Progress Made in the Implementation of the EU-Turkey Statement [2016] COM (2016) 349, para 2.

³²⁸ UNHCR Operational Portal, ‘Mediterranean Situation: Greece’ <<https://data2.unhcr.org/en/situations/mediterranean/location/5179>> accessed 2 July 2018; see also European Commission, ‘EU-Turkey Statement: Two Years On’ (2018) <<https://ec.europa.eu/home->

significantly dropped *before* the EU-Turkey Statement came into existence.³²⁹ Furthermore, the percentage of ‘dead and missing’ persons as part of all migrants arriving at the Greek islands had even doubled from 0,09% in 2015 to 0,18 % in 2017.³³⁰

Bearing in mind these shocking figures, one must ask: what is the content of this EU-Turkey Statement? First of all, it provides for a safe third country arrangement by stipulating that ‘all new irregular migrants crossing from Turkey into Greek islands as from 20 March 2016 will be returned to Turkey’.³³¹ This means that Turkey is presumed to be (generally) safe for all asylum seekers, unless individual circumstances require otherwise. Secondly, the Statement contains a one-for-one-agreement: for every returned asylum seeker to Turkey, a Syrian refugee will be resettled within the EU.³³² Thirdly, Turkey agreed to prevent irregular migration to the best of their ability, both with regard to land routes and sea routes.³³³ In exchange, Turkey was promised visa liberalisation for Turkish nationals,³³⁴ was confirmed the intention to negotiate Turkey’s access to the EU,³³⁵ and was allocated three billion euros.³³⁶

From the very moment of publication, the EU-Turkey Statement has been a matter of controversy. For example, the ECRE emphasized that the resettlement program has not yet been implemented on a large scale.³³⁷ In April 2018, only 12,476 Syrian refugees had been resettled.³³⁸ This is mainly due to the fact that many Member States are unwilling to partake in any resettlement or relocation scheme.³³⁹ Most criticism, however, focuses on the safe third country arrangement. In this regard, many NGOs and scholars have contested the safety of Turkey.³⁴⁰ As stated before, this criticism mainly concentrates on Turkey’s performance with

affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20180314_eu-turkey-two-years-on_en.pdf> accessed 2 July 2018.

³²⁹ See also Thomas Spijkerboer, ‘Fact Check: Did the EU-Turkey Deal Bring Down the Number of Migrants and of Border Deaths?’ University of Oxford: Faculty of Law: Border Criminologies (28 September 2016) <<https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2016/09/fact-check-did-eu>> accessed 3 July 2018.

³³⁰ This is measured by calculating the ‘dead and missing’ persons as part of the so-called ‘sea arrivals’. See UNHCR Operational Portal (n 328).

³³¹ EU-Turkey Statement (n 19) para 1.

³³² Ibid, para 2.

³³³ Ibid, para 3.

³³⁴ Ibid, para 5.

³³⁵ Ibid, para 8.

³³⁶ Ibid, para 6.

³³⁷ ECRE, ‘Protection in Europe: Safe and Legal Access Channels: ECRE’s Vision on Europe’s Role in the Global Refugee Protection Regime: Policy Paper 1’ (2017) <<https://www.ecre.org/wp-content/uploads/2017/04/Policy-Papers-01.pdf>> accessed 3 July 2018, 47.

³³⁸ European Commission (n 328) 2.

³³⁹ See e.g. ‘Hungarian PM Steps Up Anti-Immigrant Campaign After By-Election Loss’ *Reuters* (2 March 2018) <<https://www.reuters.com/article/us-hungary-election-orban/hungarian-pm-steps-up-anti-immigrant-campaign-after-by-election-loss-idUSKCN1GE101>> accessed 3 July 2018; Lizzie Dearden, ‘Poland’s Prime Minister Says Country Will Accept No Refugees as EU Threatens Legal Action over Quotas’ *The Independent* (17 May 2017) <<https://www.independent.co.uk/news/world/europe/poland-no-refugees-eu-legal-action-infringement-quotas-resettlement-beata-szydlo-commission-a7741236.html>> accessed 3 July 2018.

³⁴⁰ See e.g. Charlotte Alfred and Daniel Howden, ‘Expert Views: The EU-Turkey Deal After Two Years’ in *Refugees Deeply* (20 March 2018) <<https://www.newsdeeply.com/refugees/community/2018/03/20/expert-views-the-e-u-turkey-deal-after-two-years>> accessed 3 July 2018; Kondylia Gogou, ‘The EU-Turkey Deal: Europe’s Year of Shame’ in Amnesty International (20 March 2017)

respect to non-persecution and non-*refoulement*.³⁴¹ However, as previous chapters have demonstrated, the safety of a country for STC purposes does not only consist of compliance with Article 33 RC, but of potential compliance with *all* Convention rights. In this light, I will assess the safety of Turkey on the basis of Article 38(1)(e) PD.

5.3 Protection in Turkey

5.3.1 The possibility to request refugee status

As noted in Chapter 4, the ‘possibility’ to request refugee status means the ‘choice’ rather than the ‘chance’. An asylum-seeker is free to choose whether he wants to request refugee status; he is not obligated to do so. Once found to be a refugee, he must be treated ‘in accordance with the Geneva Convention’.

5.3.1.1 Theory

According to the UNHCR guidelines on the EU-Turkey Statement, Turkey must allow asylum-seekers to request refugee status and must provide protection in accordance with the Convention to all persons found to be a refugee, including non-Europeans and stateless persons.³⁴² Preferably, this would mean that Turkey should apply the Refugee Convention without any limitations. As to date, however, Turkey maintains a geographical limitation.³⁴³ This means that Turkey only applies the Refugee Convention to persons from European countries of origin. Hence, persons from non-European countries are by definition not entitled to refugee status as defined in Article 1A(2) RC.³⁴⁴

This seems problematic in the light of the STC concept, which requires the possibility to request refugee status in the third country. Indeed, the lack of any other protection policy would render Turkey unsafe at least for non-Europeans. Nonetheless, chapters 3 and 4 demonstrated that a third country does not need to be a full party to the Geneva Convention if it provides *in practice* the substance of all Convention rights without geographical or temporal limitation to recognized refugees. In this light, it should be noted that Turkey has implemented a Law on Foreigners and International Protection (LFIP),³⁴⁵ which protects

<<https://www.amnesty.org/en/latest/news/2017/03/the-eu-turkey-deal-europes-year-of-shame/>> accessed 3 July 2018; Amnesty International, ‘International Report 2017/18: The State of the World’s Human Rights’ <<https://www.amnesty.org/download/Documents/POL1067002018ENGLISH.PDF>> accessed 3 July 2018, 367-371; Human Rights Watch, ‘World Report 2018: Events of 2017’ <https://www.hrw.org/sites/default/files/world_report_download/201801world_report_web.pdf> accessed 3 July 2018, 560-567.

³⁴¹ See Amnesty International 2018 (n 340); Human Rights Watch (n 340).

³⁴² UNHCR 1988 (n 18) 6.

³⁴³ UNHCR, ‘States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol’ (2015) 5.

³⁴⁴ See also IOM Migration Crisis Operational Framework, ‘IOM Turkey 2018-2019’ <<http://www.turkey.iom.int/sites/default/files/IOM%20Turkey%20MCOF%202018-2019.pdf>> accessed 3 July 2018.

³⁴⁵ Turkish Law on Foreigners and International Protection 2014 [translation] (LFIP).

asylum-seekers without geographical limitation.³⁴⁶ Nonetheless, non-Europeans are referred to as ‘conditional refugees (...) upon completion of the refugee status determination process’ and are only allowed to stay in Turkey until they will be ‘resettled to a third country’.³⁴⁷ Despite this temporary character, the LFIP thus allows non-Europeans to request a variation on refugee status. This status is to be examined by the Directorate General of Migration Management (DGMM), which assesses all asylum applications.³⁴⁸

For asylum-seekers of Syrian origin, Turkey implemented a different regime. They are granted temporary protection on the basis of Article 91 LFIP. Their protection is regulated by the Temporary Protection Regulation (TPR).³⁴⁹ Temporary protection is granted automatically.³⁵⁰ Hence, a refugee status determination procedure is not necessary for asylum seekers of Syrian origin. Nonetheless, Syrians must be registered before they can appeal in practice to the full range of rights connected to temporary protection status.³⁵¹

Taking into account the abovementioned, all asylum-seekers in Turkey have, at least in theory, the possibility to request (a variation on) refugee status. Hereinafter, I will refer to the different groups of ‘refugees’ as ‘European refugees’, ‘conditional refugees’ and ‘temporary refugees’. As repeatedly stressed, the fact that they all have a theoretical possibility to request (a variation on) refugee status, is not decisive. Rather, practice is decisive.

5.3.1.2 Practice

In cooperation with the UNHCR, the DGMM processes the applications for conditional protection status, which aims at the resettlement of the applicant to safe countries.³⁵² To submit an application for conditional protection, applicants have to travel to a remote location in the region of Ankara to register themselves by the Provincial Directorate for Migration Management (PDMM),³⁵³ in cooperation with the UNHCR and the Association for Solidarity with Asylum Seekers and Migrants (ASAM).³⁵⁴ There is no financial support for migrants to approach the remote location nearby Ankara.³⁵⁵ When registered, applicants are assigned to an area in Turkey where they must await their first asylum interview. During this interview, there is often no interpreter available.³⁵⁶ Ultimately, the first instance decision should be taken

³⁴⁶ LFIP, arts 2(1), 3(1)(ü) and 62.

³⁴⁷ LFIP, art 62.

³⁴⁸ LFIP, arts 103-104.

³⁴⁹ Turkish Temporary Protection Regulation 2014 [translation] (TPR) prov art 1(1) and (5).

³⁵⁰ TPR, prov art 1(1).

³⁵¹ See TPR, arts 22, 25 and 29.; AIDA, ‘Country Report: Turkey’ (2017) <http://www.asylumineurope.org/sites/default/files/report-download/aida_tr_2017update.pdf> accessed 3 July 2018, 123.

³⁵² UNHCR Turkey, ‘Refugee Status Determination’ <<http://www.unhcr.org/tr/en/refugee-status-determination>> accessed 3 July 2018; AIDA (n 351) 15.

³⁵³ LFIP, art 69(1).

³⁵⁴ AIDA (n 351) 27.

³⁵⁵ AIDA (n 351) 27.

³⁵⁶ Dutch Council for Refugees and ECRE, ‘The DCR/ECRE Desk Research on Application of a Safe Third Country and a First Country of Asylum Concepts to Turkey’ (2016) <<http://www.statewatch.org/news/2016/may/eu-turkey-DCR-ECRE.pdf>> accessed 4 July 2018, para 25.

within six months.³⁵⁷ However, often applicants for conditional protection have to wait up to several months before their first asylum interview takes place.³⁵⁸ Nonetheless, applicants may remain on Turkish territory throughout the procedure.³⁵⁹ According to Amnesty International, applicants for conditional refugee status do not have access to a fair and efficient refugee status determination procedure, since applicants have been forcibly returned to their country of origin.³⁶⁰ If finally granted conditional protection status, beneficiaries are planned to be resettled. In the most extreme case, which concerns Iraqi nationals, the dates for resettlement interviews are only scheduled in the year 2024.³⁶¹

For the temporary protection status of persons with Syrian origin, a pre-registration is required.³⁶² This phase examines the applicants' danger for public security,³⁶³ which also applies to Syrians returning from Greece to Turkey under the EU-Turkey Statement.³⁶⁴ This pre-registration phase delays the actual registration that is required to obtain a Temporary Protection Identification Card.³⁶⁵ This Card ensures effective access to rights connected to temporary protection status, such as health care.³⁶⁶ The registration process has also proved to be challenging on other grounds. As of November 2017, both the province Hatay and city Istanbul suspended the registration process of Syrians due to 'the high number of persons already registered and challenges in the provision of public services'.³⁶⁷ Hence, the Syrians living within these areas are, at least for the time being, not granted temporary protection in practice, even while they are entitled to that protection in theory. Despite these practical difficulties, 3,6 million Syrians managed to obtain their registration.³⁶⁸

Thus, is there an actual possibility *in practice* to request (a variation on) refugee status in Turkey for all asylum-seekers? For all non-European asylum-seekers, there is at least a theoretical possibility to obtain a variation on refugee status. Persons of Syrian origin are entitled to temporary protection upon registration, while other non-Europeans may apply for conditional refugee status. In practice, it has been challenging for Turkey to provide an effective possibility to request (a variation on) refugee status. Nonetheless, an enormous number of Syrians has succeeded in obtaining temporary protection. For Syrians, one could thus indeed argue that there is an effective possibility to obtain (a variation) on refugee status.

³⁵⁷ LFIP, art 78(1); AIDA (n 351) 22.

³⁵⁸ AIDA (n 351) 15.

³⁵⁹ LFIP, art 80(1)(e).

³⁶⁰ Amnesty International 2018 (n 340) 371; Amnesty International, 'No Safe Refuge: Asylum-Seekers and Refugees Denied Effective Protection in Turkey' (2016) <<http://www.refworld.org/type,COUNTRYREP,,TUR,575137984,0.html>> accessed 3 July 2018, 5.

³⁶¹ AIDA (n 351) 16 and 32.

³⁶² This follows from the combined application of Articles 8 and 22 TPR.

³⁶³ AIDA (n 351) 117.

³⁶⁴ UNHCR Greece, 'Response to Query Related to UNHCR's Observations on Syrians Readmitted to Turkey' (2016) <<http://statewatch.org/news/2017/jan/unhcr-letter-access-syrians-returned-turkey-to-greece-23-12-16.pdf>> accessed 3 July 2018.

³⁶⁵ TPR, art 22(1).

³⁶⁶ AIDA (n 351) 123.

³⁶⁷ AIDA (n 351) 16.

³⁶⁸ UNHCR Operational Portal, 'Syria Regional Refugee Response: Turkey' (Data of 28 June 2018) <<https://data2.unhcr.org/en/situations/syria/location/113>> accessed 4 July 2018.

This is different for non-Syrians. They face many practical difficulties in obtaining effective access to conditional refugee status, in particular significant, unacceptable delays, and a lack of financial support. Accordingly, Turkey is generally *not* safe for non-European, non-Syrian asylum seekers. Normally, these asylum-seekers should thus not be expelled to Turkey, unless there is an effective possibility to request refugee status in individual cases. Self-evidently, an asylum-seeker, regardless of his nationality, may always challenge the safety of Turkey in his particular circumstances, for example because the asylum-seeker knows that he will be assigned to a particular province in Turkey where the delays for access to conditional refugee status are significant.

If one would assume, regardless of the aforementioned, that there is an possibility in practice to request refugee status, the following question is: is that status linked to ‘protection in accordance with the Geneva Convention’?

5.3.2 Protection in accordance with the Geneva Convention

As noted in Chapter 4, ‘protection in accordance with the Geneva Convention’ consists of all substantive Convention rights other than Article 33. Building on the potentiality principle, a third country is safe if all Convention rights are granted either immediately or in the future, in observance with the incremental system and the contingent criteria of the Refugee Convention.

In dealing with the different rights, a distinction will be made where necessary between European refugees, conditional refugees and temporary refugees.

5.3.2.1 Wage-earning employment (Article 17 RC)

According to Article 17 RC, Turkey should ‘accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment.’ As repeatedly stated, non-compliance would not necessarily violate Turkey’s obligations (due to its geographical limitation to the Convention), but would render Turkey unsafe for STC purposes under Article 38(1)(e) PD. As stated in Chapter 3, a refugee is lawfully staying if he is granted a residence permit. The right to wage-earning employment thus only applies to *recognized* refugees. *A contrario* applied to Turkey, this would concern recognized European and conditional refugees and registered persons of Syrian origin under temporary protection. The contingent criterion in Article 17 RC forbids that refugees will be treated less favourably than nationals of another ‘foreign country in the same circumstances’.

In Turkey, European refugees have an automatic right to work.³⁶⁹ Upon recognition of their refugee status, they obtain identification papers, which also qualify as work permit. In contrast, conditional refugees have to apply for a work permit, which is possible after six months from the date of application for international protection.³⁷⁰ Work permits are only granted if a particular employer decides to hire a conditional refugee. Due to the extra costs, a

³⁶⁹ LFIP, art 89(4)(b).

³⁷⁰ LFIP, art 89(4)(a).

conditional refugee has very little chance of getting a job.³⁷¹ Illegal employment is therefore an enormous problem.³⁷² Exploitation is always lurking.³⁷³

For temporary refugees, applying for a work permit is possible after six months from the date of registration of their status.³⁷⁴ For them, it is not required to have any connection to a particular employer. Nonetheless, their working possibilities are geographically limited to the province where they live. Moreover, quotas limit the effective access to work, since the ratio Syrian/Turkish employees in a company may not exceed 10%.³⁷⁵ Accordingly, especially in provinces where many Syrians live, illegal employment is a major problem also for temporary refugees.³⁷⁶ Due to all the aforementioned hurdles, at the end of 2017 only 1,2% of the Syrian beneficiaries of temporary protection in Turkey managed to obtain a work permit.³⁷⁷

Hence, for both conditional refugees and temporary refugees, it is difficult in practice to access wage-earning employment. This would not be contrary to Article 17 RC if the most favoured foreign nationals would also face such difficulties. However, European refugees face less problems by having an automatic right to work. Therefore, both conditional and temporary refugees are not accorded the right to engage in wage-earning employment in compliance with Article 17 RC. For them, Turkey would *not* be a safe third country.

5.3.2.2 Elementary education (Article 22(1) RC)

According to Article 22(1) RC, Turkey should ‘accord to refugees the same treatment as is accorded to nationals with respect to elementary education’. Article 22 lacks any reference to the criteria of the incremental system of the Refugee Convention and should thus apply to all refugees present on Turkish territory.³⁷⁸ The right to public education therefore also applies to *applicants* for protection. *A contrario* applied to Turkey, this concerns both applicants and beneficiaries of European or conditional refugee status. It also concerns asylum-seekers of Syrian origin, whether they have registered themselves as temporary refugees or not. The contingent criterion in Article 22(1) RC forbids that either European refugees, conditional refugees, or temporary refugees will be treated less favourably than Turkish nationals.

In Turkey, all children have in theory the right to elementary education.³⁷⁹ This includes European,³⁸⁰ conditional,³⁸¹ and temporary³⁸² refugees, including applicants for such

³⁷¹ AIDA (n 351) 105.

³⁷² Norwegian Organisation for Asylum-Seekers (NOAS), ‘Seeking Asylum in Turkey: A Critical Review of Turkey’s Asylum Laws and Practices’ (2016) <<http://www.noas.no/wp-content/uploads/2016/04/NOAS-rapport-Tyrkia-april-2016.pdf>> accessed 4 July 2018, 28; DCR and ECRE (n 356) para 62.

³⁷³ Human Rights Watch (n 312) 566.

³⁷⁴ TPR, art 29; Turkish Regulation on Work Permits of Foreigners under Temporary Protection 2016 [translation] (RWPF) arts 4(1) and 5(1).

³⁷⁵ RWPF, art 8.

³⁷⁶ NOAS (n 372) 28-29; DCR and ECRE (n 356) para 65.

³⁷⁷ AIDA (n 351) 135; see also Amnesty International 2016 (n 360) 30.

³⁷⁸ See chapter 3.2.1 of this thesis.

³⁷⁹ NOAS (n 372) 27.

³⁸⁰ LFIP, art 89(1).

³⁸¹ Ibid.

³⁸² TPR, arts 26(1) and 28; see also AIDA (n 351) 137.

protection. However, practice is different. Both conditional and temporary refugees face obstacles in accessing education,³⁸³ such as child labour and exploitation.³⁸⁴ Language barriers are another obstacle, which remain a problem throughout primary and secondary education.³⁸⁵ All children, including asylum-seekers, are taught in the Turkish language, without having previously received any preparatory language classes.³⁸⁶ Despite these obstacles, 61,8% of all children of Syrian origin in Turkey in March 2018 was enrolled in school.³⁸⁷ This is a significant improvement compared to December 2015, when only 40% was enrolled.³⁸⁸ Divided into primary and secondary education, the enrolment rate for primary education is relatively high while the rate for secondary education is relatively low.³⁸⁹ Unfortunately, no numbers are known for the education of European or conditional refugees.³⁹⁰

Thus, for all groups of refugee children, there exists an unconditional right to primary education, as is the case for Turkish children. At least in theory, they are thus accorded ‘the same treatment as is accorded to nationals with respect to elementary education’. In practice, all groups of refugees may face difficulties in accessing education. However, significant improvements have been made for Syrians in accessing education, resulting in relatively high percentages of enrolment. Bearing this in mind, one could argue that Turkey generally accords temporary refugees protection in accordance with Article 22(1) RC. Self-evidently, this could be challenged in the particular circumstances of the asylum-seeker or refugee concerned. Due to the lack of statistics for European and conditional refugees, I am not able to examine their access to education. Accordingly, it is uncertain whether Turkey accords European and conditional refugees protection in accordance with Article 22(1) RC. This does not alter the fact that second countries themselves should consult recent and accurate country of origin information to examine refugees’ access to education in general.³⁹¹ If second countries are not able to obtain information or assurances of Turkey with regard to the access to education, Turkey should be considered generally *unsafe*. On the other hand, if second countries succeed in obtaining positive information or assurances, refugees maintain the right to challenge the safety of Turkey in their particular circumstances.

³⁸³ Amnesty International 2018 (n 340) 371.

³⁸⁴ UNICEF, ‘We Made a Promise: Ensuring Learning Pathways and Protection for Syrian Children and Youth’ (2018) <[http://wos-education.org/uploads/brussels_report_2018/180412_Brussels_conference_report_Web_\(hires\).pdf](http://wos-education.org/uploads/brussels_report_2018/180412_Brussels_conference_report_Web_(hires).pdf)> accessed 5 July 2018, 9; see also European Commission, Report from the Commission to the European Parliament and the Council: EU-Turkey Joint Action Plan: Third Implementation Report [2016] COM (2016) 144, 8.

³⁸⁵ NOAS (n 372) 27; AIDA (n 351) 73 and 137.

³⁸⁶ AIDA (n 351) 73.

³⁸⁷ UNHCR Turkey, ‘Education Sector Dashboard Quarter 1/2018’ <<https://data2.unhcr.org/en/documents/details/64599>> accessed 4 July 2018; UNICEF, ‘Brussels Conference Education Report: Preparing for the Future of Children and Youth in Syria and the Region through Education: London One Year On’ (2017) <http://wos-education.org/uploads/reports/170331_Brussels_paper.pdf> accessed 5 July 2018, 4; cf. DCR and ECRE (n 356) para 66.

³⁸⁸ UNICEF 2017 (n 387) 14.

³⁸⁹ UNICEF 2018 (n 384) 23.

³⁹⁰ NOAS (n 372) 27.

³⁹¹ Procedures Directive, recital 48.

5.3.2.3 Freedom of movement (Article 26 RC)

According to Article 26 RC, Turkey should ‘accord to refugees lawfully in its territory the right to choose their place of residence to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances’. As stated in Chapter 3, a refugee is lawfully (present) in the territory if his presence is authorized or regularized. Turkey’s consent to re-admit all refugees returning from Greece to Turkey under the EU-Turkey Statement qualifies as such authorization.³⁹² Therefore, all returned refugees are by definition lawfully in Turkish territory, whether they are European, conditional, or temporary refugees or applicants for such protection. The right to freedom of movement also applies to refugees in Turkey who have *not* been returned under a STC agreement, but who have been granted a residence permit in Turkey. Furthermore, it applies to refugees who lawfully *entered* the territory, for example by means of a visa. Their presence remains lawful as long as they comply with the conditions for admission during their stay. The contingent criterion in Article 26 RC forbids that refugees will be treated less favourably than ‘aliens generally in the same circumstances’.

In Turkey, applicants for conditional refugee status are assigned a ‘satellite city’.³⁹³ This is a region in Turkey where the applicant must reside to maintain its protection.³⁹⁴ Applicants must prove their presence in the satellite city by reporting themselves to the PDMM on regular basis.³⁹⁵ Leaving the satellite city three times without permission of the PDMM has severe consequences.³⁹⁶ Most notably, it is considered to be an implicit withdrawal of the application for refugee status.³⁹⁷ Moreover, the issued identification documents³⁹⁸ are only valid within the assigned satellite city. This means that the access to services, such as health care, is limited to the satellite city.³⁹⁹ In practice, these limitations remain once the applicant has been recognized as conditional refugee.⁴⁰⁰ In contrast, European refugees are subject to few restrictions.⁴⁰¹ They are, for example, allowed to leave the region without permission. On top of that, they are provided with travel documents, which remains an illusion for conditional refugees.⁴⁰²

Temporary refugees have similar restrictions as conditional refugees.⁴⁰³ They must stay in the region where they have registered themselves as temporary refugees.⁴⁰⁴ In theory, leaving the

³⁹² See chapter 3.5 of this thesis.

³⁹³ Turkish Implementing Regulation on the Law on Foreigners and International Protection 2016 [translation] art 72; AIDA (n 351) 66.

³⁹⁴ LFIP, art 71(1).

³⁹⁵ LFIP, art 71(1).

³⁹⁶ AIDA (n 351) 67.

³⁹⁷ LFIP, art 77(1)(ç).

³⁹⁸ LFIP, art 76; for beneficiaries see LFIP, art 83.

³⁹⁹ AIDA (n 351) 67.

⁴⁰⁰ AIDA (n 351) 103; see also LFIP, art 82.

⁴⁰¹ NOAS (n 372) 30.

⁴⁰² See LFIP, art 84.

⁴⁰³ See TPR, art 33.

⁴⁰⁴ TPR, art 33(2)(a); AIDA (n 351) 127.

region three times is also for them considered to be an implicit withdrawal of protection.⁴⁰⁵ In the past, temporary refugees often did not have to report themselves to the authorities.⁴⁰⁶ Such refugees were thus able to leave the assigned region in practice.⁴⁰⁷ However, the implementation of the EU-Turkey Statement has made things worse: restrictions have been reinforced, rendering movement outside the assigned region very difficult.⁴⁰⁸ Furthermore, also for them, the identification documents⁴⁰⁹ are only valid within the assigned region.⁴¹⁰ Access to services is limited to that region,⁴¹¹ thereby restraining the movement of temporary refugees in practice.

Thus, freedom of movement is restricted for all groups of refugees. This would not be contrary to Article 26 RC if all aliens generally in the same circumstances would face the same restrictions. However, European refugees face less restrictions in their freedom of movement. In contrast to conditional and temporary refugees, they are allowed to leave the region assigned to them. Hence, both conditional and temporary refugees are not accorded the right to freedom of movement in compliance with Article 26 RC. For them, Turkey would *not* be a safe third country.

5.4 Sub-conclusion

This chapter aimed to make the findings of this thesis more concrete by applying them to Turkey. In theory, only Europeans have ‘the possibility to request refugee status’. Nonetheless, non-European (but non-Syrian) persons have the theoretical possibility to request a variation on refugee status, namely ‘conditional’ refugee status. However, in practice this possibility has many shortcomings. Non-Syrian, non-European asylum-seekers do thus not have an effective ‘possibility (...) to request refugee status’ as required by Article 38(1)(e) PD. Even when they would have such an effective possibility, conditional refugee status must entitle its beneficiaries *in practice* with the substance of all Convention rights. For Syrians, the possibility to request refugee status is not necessary. They could obtain ‘temporary’ protection upon registration. Also this status could only comply with Article 38(1)(e) PD if it entitles its beneficiaries *in practice* with the substance of all Convention rights.

This practice turned out to be very problematic. Both conditional and temporary refugee status do not provide beneficiaries the right to engage in wage-earning employment in compliance with Article 17 RC. Although it could be argued that temporary refugees are provided the right to elementary education in compliance with Article 22(1) RC, it is uncertain whether this is the case for European and conditional refugees. With respect to the right to freedom of movement, as laid down in Article 26 RC, both conditional and temporary refugees are not accorded sufficient protection. Taking into account the aforementioned

⁴⁰⁵ See for other consequences TPR, art 35.

⁴⁰⁶ AIDA (n 351) 17; cf. TPR, art 33(2)(b).

⁴⁰⁷ NOAS (n 372) 30-31.

⁴⁰⁸ AIDA (n 351) 127.

⁴⁰⁹ TPR, art 22.

⁴¹⁰ NOAS (n 372) 30-31.

⁴¹¹ See e.g. TPR, art 29(2).

practice relating to the three Convention rights, Turkey does *not* grant all persons ‘found to be a refugee’ the substance of *all* Convention rights, thus opposing the potentiality principle. In other words, Syrians with temporary protection and non-Europeans with conditional refugee status do not ‘receive protection in accordance with the Geneva Convention’, contrary to Article 38(1)(e) PD. For them, Turkey is not a safe third country.

6. Conclusion

This thesis has worked towards an answer on the following research question: *what is the meaning of Article 38(1)(e) PD and to what extent does Turkey provide protection in accordance with this provision?*

The first step in answering this question was to examine the origins and content of the STC concept in general. This thesis demonstrated that the STC concept originates from the co-existence of state sovereignty and the prohibition of *refoulement*. Due to state sovereignty, there is no existing right for refugees to be granted asylum, but because of the prohibition of *refoulement*, they may not be expelled or returned to their country of origin. The options that remain for the second country are either granting asylum to the refugee present on its territory, or expelling him to another safe country. The latter option is called ‘protection elsewhere’, which could take the form expelling the refugee to a first country of asylum or to a safe third country. The former concerns the country where protection has been granted before, while the latter concerns the country where protection *could*, and in the perception of the second country, *should* have been obtained. This perception of the second country is often based on a connection between the third country and the refugee, for example previous transit or family links.

The second step was to analyse the required protection of the STC concept within the context of the Refugee Convention. In expelling a refugee who is not yet lawfully present, the second country is under the Convention only required to examine the third country’s observance of Article 33 RC. However, under regional law, other requirements may apply. In EU law, Article 38(1)(e) PD sets as a precondition for the safety of a third country that persons ‘found to be a refugee’ must ‘receive protection in accordance with the Geneva Convention’. On this basis, the potentiality principle was introduced. This principle mainly takes account of the incremental system of the Convention, on the basis of which the third country should offer the substance of all Convention rights to the expelled refugee, either in the present or in the future. A third country is safe as long as there is a *potential* for a refugee to acquire the substance of all Convention rights. This seemingly high standard is relieved to a great extent by the contingent criteria of the Convention and the rebuttable presumption of safety.

The third step was to assess the required protection of the STC concept within the context of Article 38(1)(e) PD. As starting point, the meaning of Article 38(1)(a)-(d) PD was examined to raise a corner of the veil as to the required protection of Article 38(1)(e). It appeared that those conditions of subs (a)-(d) primarily concern variations on the prohibitions of persecution and *refoulement*, thereby excluding that sub (e) encompasses such prohibitions. Subsequently, the CJEU’s general methods of interpretation were applied, consisting of the textual, the contextual and the purpose method. The following conclusions were drawn from the application of these methods of interpretation with respect to the meaning of Article 38(1)(e) PD.

- The ‘possibility’ to request refugee status means the ‘choice’ rather than the ‘chance’. An asylum seeker is free to choose whether he wants to request refugee status; he is not obligated to do so. Once found to be a refugee, he should be treated ‘in accordance with the Geneva Convention’.

- ‘In accordance with’ means ‘obeying’ or ‘in a manner conforming with’. Reading this in the context of Article 38 PD as a whole suggests that a recognized refugee should receive protection *exactly* as provided for by the protection standards of the Geneva Convention.

- This does not mean that a third country should be a full party to the Geneva Convention. Nonetheless, a third country should provide *in practice* the substance of all Convention rights without geographical or temporal limitation to recognized refugees. A third country’s status as full party to the Geneva Convention merely *indicates* such practice. The substance of Convention rights could also be provided under a different heading than refugee status, for example family reunification.

- The required protection of Article 38(1)(e) PD consists of all substantive Convention rights other than Article 33. Building on the potentiality principle, a third country is safe if all Convention rights are granted either immediately or in the future, in observance with the incremental system of the Refugee Convention and the contingent criteria set out therein. Practice, rather than theory, is decisive.

- Since this comprehensive approach is less manageable in practice, second countries may use the rebuttable presumption of safety. This means that refugees have as a minimum the right to rebut the presumption of safety in their particular case, despite the fact that a third country could be *generally safe* on the basis of country of origin information. Self-evidently, the safety of a third country may also be assessed on a case-by-case basis, hence without any presumption of safety.

The fourth and last step was to concretize the aforementioned findings by applying them to Turkey. To start with, in theory, only Europeans have ‘the possibility to request refugee status’. Nonetheless, non-European (but non-Syrian) persons have the theoretical possibility to request a variation on refugee status, namely ‘conditional’ refugee status. However, in practice applicants face many obstacles in accessing that possibility. Thus, they do not have an effective ‘possibility (...) to request refugee status’ as required by Article 38(1)(e) PD. For Syrians, the possibility to request refugee status is not necessary. They could obtain ‘temporary’ protection upon registration. Subsequently, the practice of ‘protection in accordance with the Geneva Convention’ to ‘persons found to be a refugee’ appeared to be very problematic. Having assessed a selection of Convention rights, namely wage-earning-employment, elementary education, and freedom of movement, Turkey does *not* grant all persons ‘found to be a refugee’ the substance of *all* Convention rights, thereby opposing the potentiality principle. In other words, Syrians with temporary protection and non-Europeans with conditional refugee status do not ‘receive protection in accordance with the Geneva Convention’, contrary to Article 38(1)(e) PD. For them, Turkey is not a safe third country.

The aforementioned demonstrates that the EU-Turkey Statement is in violation of Article 38(1)(e) PD. Considering the current developments relating to new STC arrangements, it is to be hoped that new violations of Article 38 PD will be prevented. In the future, states should be more aware of the importance of Article 38(1)(e) PD. Emphasis should not only be placed on *non-refoulement*, but on all rights of the Convention. Only then, second countries can no longer evade their responsibility under the guise of the safe third country concept. If due account will be taken of the meaning of Article 38(1)(e) PD, then due account will be taken of the Refugee Convention. This is extremely important, given the Convention's task in protecting one of the most vulnerable groups of humans on earth: refugees.

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