

EUROPEAN REFUGEE CRISIS:

LEGAL ANALYSIS OF LAWS RELATING TO BORDER CONTROL AND ASYLUM IN EUROPE

EXECUTIVE SUMMARY

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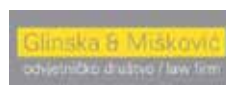
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FOREWORD – TRUSTLAW

There is little doubt around it: migration is one the defining challenges of our century. In the past few years, millions of desperate people have reached Europe's borders seeking a safe haven as they flee conflict, hunger and persecution.

War continues to ravage Syria leaving a bloody trail of more than a quarter of a million deaths. More than 6.6 million Syrians are currently internally displaced, with another 4.8 million seeking refuge in other countries. Of the 1.2 million refugees who have arrived in Europe since 2015, half are Syrian.

But Syria is not the only country in crisis. Refugees are coming to Europe's shores from countries as diverse as Iraq, Afghanistan, Yemen, Somalia, Pakistan, Mali, Niger, Chad and the Central African Republic.

The International Rescue Committee (IRC) is one of the exceptional NGOs providing round-the-clock support across Europe as several states front the refugee crisis. The organization's work on the ground is vital, lifesaving and logistically challenging. On top of that, the organization now faces many complex legal questions related to the emergency.

In February 2016, the IRC approached TrustLaw requesting urgent legal advice relating to issues ranging from border control, to boat push-backs, maritime rescue, discriminatory asylum procedures, and family reunification.

Within two weeks, a global team of pro bono lawyers had produced 42 memoranda of advice, ahead of the EU Council meeting on March 17. This report is an Executive Summary of extensive research from a global team of lawyers at Latham & Watkins, lawyers in Austria, Croatia, Macedonia, Serbia and Slovenia, and valuable contributions from international law experts. The IRC was able to use this advice to advocate for a humane response to the crisis, and to better tackle the emergency on the ground.

On March 20, the EU-Turkey deal came into force, effectively shutting the door on any new arrivals trying to seek asylum in Europe. Widely regarded by human rights advocates as illegal, the deal outlines an agreement by Turkey to take back all irregular migrants attempting to cross into the Greek islands, in exchange for political concessions and €6 billion. Months on, over 59,000 people remain trapped in precarious and uncertain circumstances in Greece.

There is an urgent need for legal support on the ground to protect the dignity and rights of vulnerable refugees in asylum reception centres, to ensure fairness in refugee status determination processes and to address issues such as arbitrary detention and the fundamental right to family unity.

This research is a remarkable example of collaborative efforts, showcasing - yet again - the essential role lawyers are called on to play to ensure that the application of regional and domestic law is consistent with international principles as this global crisis continues to unfold.

The refugee crisis' has already become the new normality. And that is why this study, together with the cooperation and dedication shown by the IRC and the pro bono lawyers, represents an encouraging starting point for further work that I am sure will inevitably need to be done.

A handwritten signature in black ink that reads "M. Villa". The signature is written in a cursive, slightly stylized font. Below the signature is a thin, horizontal line.

Monique Villa

CEO, Thomson Reuters Foundation



FOREWORD – IRC

The International Rescue Committee responds to the world's worst humanitarian crises and helps people whose lives and livelihoods are shattered by conflict and disaster to survive, recover, and gain control of their future. In 2015, the IRC assisted more than 23 million people in 40 countries and we continue to grow. We work across the arc of the global refugee crisis from inside Syria to Lebanon, Jordan and Turkey, through to Greece, Serbia and now Germany.

The IRC has been responding to the European refugee crisis in Greece since July 2015, initially on the island of Lesbos. In March 2016, as borders began to close across the Balkan route, the IRC expanded its response across eight sites on the Greek mainland. We provide support across four key areas: environmental health; protection of women and children; provision of advice and information; and economic recovery and development. This includes constructing and maintaining essential services in camps, such as water points, toilets and showers, creating safe spaces for women and children and providing counselling to vulnerable people, amongst many other vital tasks.

In addition to the essential work that the IRC carries out across the arc of the crisis, we also work with decision makers in European capitals, relaying our experience and advocating for critical changes that need to be made. This requires careful navigation of existing policies, legislation and bilateral agreements. We regularly find ourselves questioning where the most effective changes to current policy, practice or legislation could be made in order to have the greatest impact on the ground. We examine how current policies could be better used, for example, to ease blocks in relocation of refugees from Greece to other EU member states, which would help thousands of people who have fled brutal and bloody wars and conflicts, to at last find a place they can be safe and call home.

This is where the advice and international expertise from Trustlaw and Latham & Watkins is helping us immensely. Their legal advice provides answers to the most current questions around the refugee crisis, and allows us to map where our future policy asks could lie. The depth of their knowledge has strengthened our policy recommendations towards European leaders and beyond, to address today's refugee crisis and to put in place measures that better equip us for the new norm of global displacement.

Find out more about the IRC at Rescue-uk.org or follow us on Twitter: @IRCuk



Melanie Ward

Associate Director of Policy and Advocacy, International Rescue Committee



FOREWORD — LATHAM & WATKINS LLP

We are proud to maintain an active, vibrant pro bono program at Latham & Watkins.

While we strive to help address the most urgent unmet needs in each of our local communities, we also seek to leverage the strength, breadth and resources of our global platform in our pro bono practice. In doing so, we face a perpetual challenge: how to use our legal skills to help address larger-scale global crises in real time. We were therefore thrilled to collaborate with TrustLaw and the International Rescue Committee (IRC) in connection with one of the biggest and most urgent humanitarian crises of the 21st-century: the mass migration of Syrian refugees to Europe, its waters and its borders.

This project presented us with an exceptional opportunity to support IRC as it advocated for the rights of these refugees in the lead up to the March 2016 EU Council Meeting, following on from the EU-Turkey Summit held earlier that month. The EU Council Meeting convened in Brussels for the purpose of addressing Europe's worst refugee crisis since the Second World War. Our engagement was fast-paced and exciting - within a few hours of our mandate being confirmed, our large, cross-border team was mobilized and began working with TrustLaw and international law experts to address a variety of EU, domestic and international law questions posed by IRC. As reflected in the report that follows, this "rapid response" team worked collaboratively, across the globe, day and night, over the course of March to research, analyze, organize and convey information to IRC in real time in order to inform its ongoing advocacy.

This project is a case study of effective, collaborative, cross-border engagement in response to an evolving crisis. It is also a testament to the efforts and deep commitment of TrustLaw to bring pro bono legal services to bear in support of urgent global needs.

We are grateful to TrustLaw and IRC for the opportunity to assist.



Wendy Atrokhov
Public Service Counsel
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CONTENTS

ACKNOWLEDGEMENTS	2
DISCLAIMER	3
THOMSON REUTERS FOUNDATION	4
FOREWORD – TRUSTLAW	6
FOREWORD – IRC	8
FOREWORD – LATHAM & WATKINS LLP	9
1. SAFE COUNTRY OF ORIGIN AND SAFE THIRD COUNTRY	13
1.1. INTERNATIONAL LAW.....	14
1.2. EUROPEAN UNION	15
1.3. GERMANY	16
1.4. GREECE	16
1.5. TURKEY	17
1.6. SERBIA	17
1.7. MACEDONIA	18
2. PUSH-BACKS, AUTOMATIC RETURN OF BOATS TO TURKEY AND SUMMARY OF THE DUBLIN REGULATION	21
2.1 INTERNATIONAL LAW.....	22
2.2 EUROPEAN UNION	23
2.3 AUSTRIA	24
2.4 SWEDEN	24
2.5 GREECE	24
2.6 TURKEY	24
2.7 CROATIA	25
2.8 SERBIA	25
3. SELECTIVE DENIAL OF ENTRY, FILTERING AND PRE-SCREENING IN ASYLUM PROCEDURES	27
3.1 INTERNATIONAL LAW	28
3.2 EUROPEAN UNION.....	28
3.3 SERBIA	29
3.4 MACEDONIA	29
3.5 CROATIA.....	29

3.6 SLOVENIA	30
3.7 GREECE	30
4. SAFE PASSAGE	33
4.1 INTERNATIONAL LAW	34
4.2 EUROPEAN UNION	35
4.3 TURKEY	35
4.4 GREECE	36
5. LEGAL STATUS OF INDIVIDUALS RESCUED AT SEA	39
5.1 INTERNATIONAL LAW	40
5.2 EUROPEAN UNION	40
5.3 GREECE	41
6. REMOTE PROCESSING OF ASYLUM APPLICATIONS	43
6.1 INTERNATIONAL LAW	44
6.2 EUROPEAN UNION	44
6.3 TURKEY	45
6.4 JORDAN	45
6.5 LEBANON	45
7. RECEPTION CONDITIONS	47
7.1 INTERNATIONAL LAW.....	48
7.2 EUROPEAN UNION	48
7.3 GREECE	49
8. RELOCATION CRITERIA	51
8.1 INTERNATIONAL LAW	52
8.2 EUROPEAN UNION	52
9. GERMANY'S DECISION TO LIMIT THE RIGHT TO FAMILY REUNIFICATION	55
9.1 GERMANY	56
9.2 INTERNATIONAL LAW	56
9.3 EUROPEAN UNION.....	57
GLOSSARY.....	59

SAFE COUNTRY OF ORIGIN AND SAFE THIRD COUNTRY



1. SAFE COUNTRY OF ORIGIN AND SAFE THIRD COUNTRY

What are the legal implications of the EU and/or Member States deeming countries through which asylum seekers transit to Europe, such as Turkey, to be a “safe country of origin” and/or a “safe third country”?

The “safe country” label is effectively providing a justification for push backs to so-called “safe countries.” In practice, even though Turkey has not been deemed a “safe third country” by the EU, it is a deemed “safe country of origin” and therefore is effectively being considered a safe third country to which asylum seekers can be returned. Is this practice consistent with current international / EU / domestic law?

What legal implications are there for asylum seekers who have transited through a “safe” country and seek to claim asylum in another country? Does this impact their right to claim asylum in the other country? Does this impact their legal status in the other country? Can they be returned to the “safe” transit country?

1.1. INTERNATIONAL LAW

Although the SCO and STC concepts are established by and defined under EU law, there is nothing in international law that prohibits or controls such designations as long as the concepts are used as a procedural tool to prioritise and/or accelerate examination of an asylum application.¹

States applying the SCO or STC concepts routinely refuse entry to asylum seekers on the grounds that an SCO or STC is accessible to them. The Refugee Convention is silent as to the effect on asylum seekers who can theoretically avail themselves of the protection of an SCO or STC. However it does limit the ability of states to rely on the existence of an SCO or STC when refusing entry to asylum seekers or transferring them back to a state through which they have travelled. In particular, an individual cannot be sent to a state where, amongst other things:

¹ The SCO and STC concepts are not prohibited by the UNHCR.
<http://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=4bab55ea2>

- a. there is a risk that they will be denied entry;²
- b. their rights under the Refugee Convention will not be respected;³
- c. they will be at risk of being refouled to a place where they will be at risk of persecution;⁴
or
- d. their rights under international human rights law will not be respected.⁵

Further, blanket declarations that a country is safe for a group are prohibited.⁶ A case-by-case assessment must be performed and individuals must be able to present evidence that a country may not be safe for them.⁷

1.2. EUROPEAN UNION

EU law allows Member States, at their discretion, to designate SCOs and/or STCs, although such designation has to be in accordance with the Asylum Procedures Directive.⁸ Where such a designation is made, that Member State's authorities may presume that that third country is safe for a particular applicant, unless the applicant presents evidence to the contrary. Designating a country as an SCO and/or an STC does not lead to the automatic rejection of asylum applications from SCO residents or from individuals who have passed through an STC, but allows Member States to fast-track the application⁹ or consider the application inadmissible¹⁰ respectively.

A third country designated as an SCO by a Member State may only be considered an SCO for a particular applicant (i) after an examination of the applicant's case; (ii) if the applicant is a national of that country or is stateless and was "*formerly habitually resident*" in that country; and (iii) if the applicant has not submitted any serious grounds for considering the country not to be an SCO in their particular circumstances.¹¹

A third country may only be considered an STC if the relevant authorities are satisfied that a person seeking international protection will be treated in accordance with the following fundamental principles in the third country concerned: (i) no threat to life or liberty on account of race, religion, nationality, membership of a particular social group or political opinion; (ii) no risk of serious harm; (iii) no risk of *refoulement*; (iv) freedom from torture and cruel and inhuman or degrading treatment; and (v) a possibility to request refugee status and relevant protection.¹²

2. Goodwin-Gill and McAdam, *The Refugee in International Law* (3rd ed, Oxford University Press, 2007) 394-395; United Nations High Commissioner for Refugees, *Note on International Protection* U.N. Doc. A/AC.96/914 (7 July 1999) [19].

3. Michelle Foster, "*Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State*" (2007) *Michigan Journal of International Law* 223, 275-278.

4. Refugee Convention, Article 33.

5. See fn 4 above.

6. *Ibid.*

7. *Ibid.*

8. The Asylum Procedures Directive.

9. Article 31(8)(b) of the Asylum Procedures Directive.

10. Article 33(2)(c) of the Asylum Procedures Directive.

11. Article 36(1) of the Asylum Procedures Directive.

12. Article 38(1)(a)-(e) of the Asylum Procedures Directive.

Member States may consider an application inadmissible if the applicant has a “*connection*” with an STC and it would be “*reasonable*” for the applicant to return there.¹³ An applicant who had the opportunity to claim asylum in another country through which he or she passed may be returned there for their application to be determined.¹⁴

1.3. GERMANY

German law states that Germany may deem a country an SCO on the premise that there is no political persecution or inhuman or degrading punishment in that particular country.¹⁵ Turkey is not designated as an SCO. It is presumed that nationals of an SCO are not politically persecuted there and the burden is on the individual to show that they are politically persecuted. If political persecution cannot be established the individual’s application is manifestly unfounded and they can be returned to the SCO in question.¹⁶ At present Germany designates, amongst others, all Member States as SCOs.

German law states that Germany may deem a country an STC on the basis that the Refugee Convention or the ECHR is respected in that country.¹⁷ Entry into Germany through an STC would allow the German border authorities to refuse entry or push-back individuals.¹⁸ In practice German authorities are not currently exercising such powers and refugees who pass through an STC may be allowed to remain in Germany. Germany currently designates, amongst others, all Member States as STCs.¹⁹

1.4. GREECE

Greece does not currently have an SCO or STC list.

Under Greek law, a country can be designated an SCO where it can be clearly established that its nationals are not at risk of persecution or serious harm in that country. An individual can be returned to an SCO where (i) the applicant has their nationality or habitual residence in that SCO; and (ii) the applicant has not successfully submitted grounds for considering the country not to be an SCO in their particular circumstances.²⁰

Under Greek law, a country may be designated an STC when certain cumulative conditions closely based on the Asylum Procedures Directive are fulfilled.²¹ At present no STCs are designated so applications cannot be fast-tracked or deemed inadmissible on that basis.

¹³ Article 38(2)(a) of the Asylum Procedures Directive.

¹⁴ “Statewatch Analysis: Why Turkey is Not a Safe Country”, Emanuela Roman, Theodore Baird, Taia Radcliffe. <http://www.statewatch.org/analyses/no-283-why-turkey-is-not-a-safe-country.pdf>

¹⁵ Article 16a(3) of the German Basic Law. Available in English at http://www.gesetze-im-internet.de/englisch_gg/.

¹⁶ Section 29a(1) of the German Asylum Procedure Act. Available in English at https://www.gesetze-im-internet.de/englisch_asylvfg/index.html

¹⁷ Article 16a(2) of the German Basic Law.

¹⁸ Section 18(3) of the German Asylum Procedure Act.

¹⁹ Section 26a(2) of the German Asylum Procedure Act.

²⁰ Article 21(2) of Presidential Decree 114/2010 (Old Procedure); Article 21(2) of Presidential Decree 113/2013 (New Procedure).

²¹ Article 20(1) of Presidential Decree 114/2010 (Old Procedure); Article 20(1) of Presidential Decree 113/2013 (New Procedure).

1.5. TURKEY

Turkey does not have an SCO concept. Under the Law on Foreigners and International Protection (the “**Turkish Code**”), Turkey’s criteria for qualifying another country as an STC are very similar to the criteria set in the Asylum Procedures Directive. Turkey can return asylum seekers to (i) their first country of refuge, if they were previously accepted as a refugee in another country which has adopted the principle of *non-refoulement*; and (ii) STCs through which the applicant has transited before arriving in Turkey. Turkey has a bilateral readmission treaty with Syria, but is unlikely to be able to rely on it in the context of the present refugee crisis as that would likely be a breach of Turkey’s explicit respect for the non-refoulement principle.

Turkey has signed a readmission agreement with the EU whereby it shall readmit all third country nationals or stateless persons who are not eligible to enter the Member State to which they have arrived, if they have arrived via Turkey.²² Turkey theoretically fulfils the EU’s criteria for designation as an SCO or STC, however, the implementation of these principles is in practice inconsistent and some commentators state that Turkey should not be considered “safe”.²³

1.6. SERBIA

Serbia is designated as an STC by a number of Member States. Under the Asylum Procedures Directive²⁴ such a Member State could legitimately refuse an application for asylum if the applicant had passed through Serbia on their way to the EU.

The Serbian Asylum Act 2007 (the “**2007 Act**”) provides non-Serbians in the territory of Serbia a right to file an asylum application. The Serbian Asylum Office can reject an asylum application without examining the eligibility of an applicant for asylum if it has established, inter alia, that the applicant (i) can receive protection from an SCO; or (ii) has come from an STC, unless they can prove that it is not safe for them. The 2007 Act will likely be replaced with the new Law on Asylum and Temporary Protection (the “**Draft Law**”) in 2016. The Draft Law is designed to govern the definition and application of the SCO and STC concepts in a manner compliant with the Asylum Procedures Directive. The current SCO and STC lists used by Serbia have been criticised for being too broad and including countries such as Belarus, which still practice the death penalty and have not ratified the ECHR.²⁵

²² “Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation”. Available at [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22014A0507\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22014A0507(01)&from=EN)

²³ “Statewatch Analysis: Why Turkey is Not a Safe Country”, Emanuela Roman, Theodore Baird, Tala Radcliffe. Available at <http://www.statewatch.org/analyses/no-283-why-turkey-is-not-a-safe-country.pdf>

²⁴ Article 38.

²⁵ http://helsinki.hu/wp-content/uploads/Serbia_as_a_safe_third_country_A_wrong_presumption_HHC.pdf

1.7. MACEDONIA

Macedonia is designated as an SCO by several Member States.²⁶ Under the Asylum Procedures Directive, an application for international protection may be accelerated or conducted at the border or in transit zones if the applicant is from an SCO.²⁷ Therefore Macedonians seeking asylum in those Member States which have designed Macedonia as an SCO can be subject to accelerated assessment and be assessed at a border or in transit zones.

Macedonia is designated as an STC by several Member States.²⁸ An application for asylum may be considered inadmissible by a Member State if, amongst other reasons, *“a country which is not a Member State is considered as [an STC] pursuant to Article 38 of the Directive”*.²⁹ The legal implication of such a finding is that an applicant who had the opportunity to claim asylum in Macedonia may be returned for their application to be determined there.³⁰

Macedonian law includes both the STC and SCO concepts. The legal consequence of an applicant either being from an SCO or coming through an STC to Macedonia is that their application would be considered to be *“obviously unfounded”* and subject to a shorter application procedure.³¹ The shorter procedure will also apply to an individual who has entered Macedonia through or from a Member State.

26. Austria, Belgium, Bulgaria, Czech Republic, France, Germany, Luxembourg and the United Kingdom. Information correct as at 8 October 2015. Available at <http://www.europarl.europa.eu/EPRS/EPRS-Briefing-569008-Safe-countries-of-origin-FINAL.pdf>.

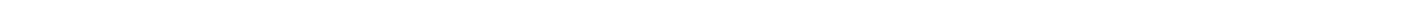
27. Article 31(8)(b) of the Asylum Procedures Directive.

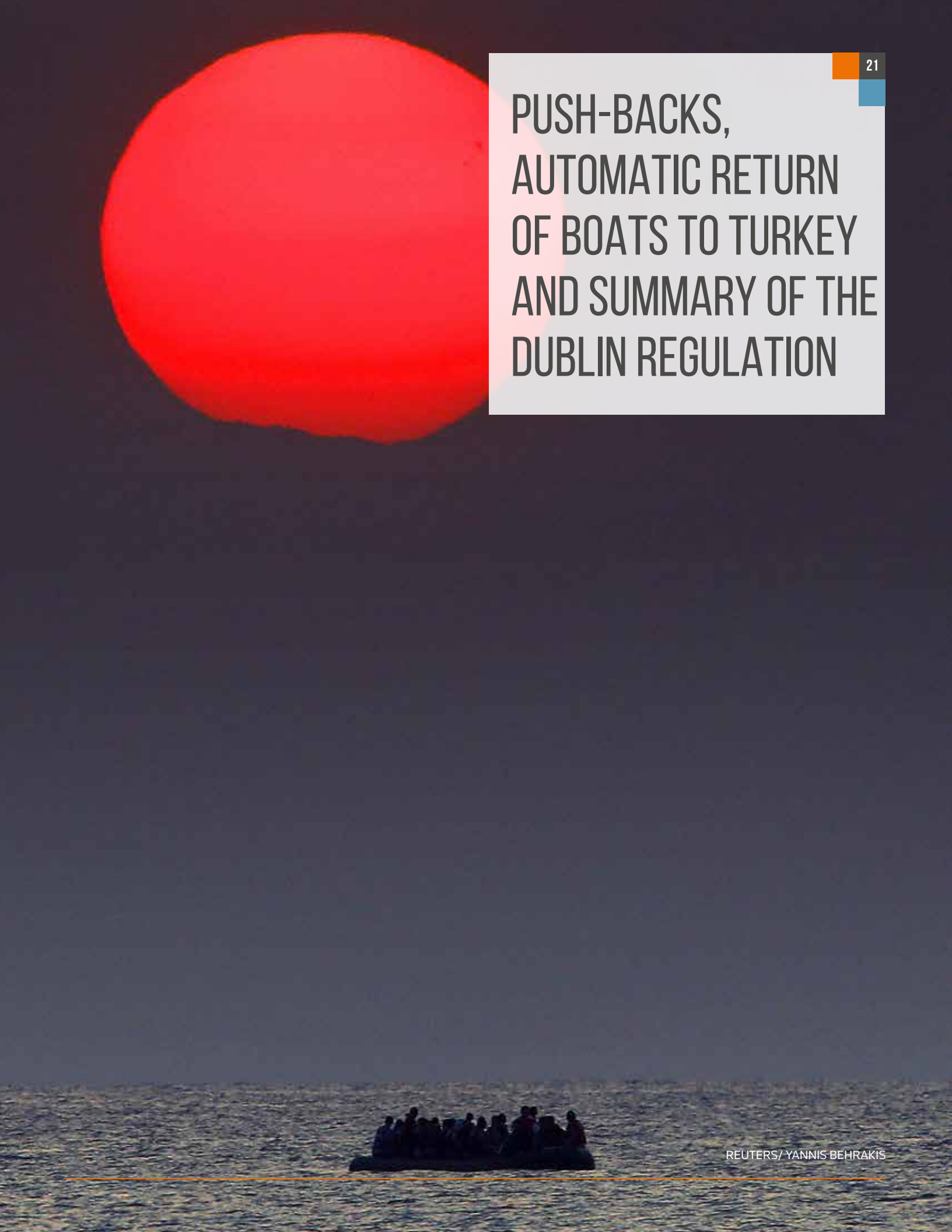
28. Bulgaria, Hungary and Luxembourg. Information correct as at December 2014. Available at [http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/ad-hoc-queries/return/2014.615_emn_ahq_list_of_safe_countries_of_origin_\(wider_diss\).pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/ad-hoc-queries/return/2014.615_emn_ahq_list_of_safe_countries_of_origin_(wider_diss).pdf).

29. Article 33(2)(c) of the Asylum Procedures Directive.

30. E. Roman et al, “Statewatch Analysis: Why Turkey is Not a Safe Country”. Available at <http://www.statewatch.org/analyses/no-283-why-turkey-is-not-a-safe-country.pdf>.

31. Article 35 of the Law on Asylum and Temporary Protection (the “Macedonian Asylum Law”).





PUSH-BACKS, AUTOMATIC RETURN OF BOATS TO TURKEY AND SUMMARY OF THE DUBLIN REGULATION



2. PUSH-BACKS, AUTOMATIC RETURN OF BOATS TO TURKEY AND SUMMARY OF THE DUBLIN REGULATION

- a. With reference to international, EU, and relevant national laws, please advise on the legality of border closures and “push-backs”?
- b. Boats in distress coming from Turkey that are rescued in the Aegean Sea by NATO are now being automatically returned to Turkey. This automatic return is being implemented regardless of in whose territorial waters the boat is rescued, whether Turkey is the nearest safe port, and without any screening of those on board (e.g. for refugee status or risk on return to Turkey). Is this practice compliant with obligations under international and EU law?
- c. Please summarise the Dublin Regulation and advise on the legal implications of countries, such as Germany, disapplying certain of its provisions.

2.1 INTERNATIONAL LAW

a. Border closures and push-backs

No international legal principle explicitly forbids states from closing their borders to refugees. The right to seek asylum³² under international law does not equate to an obligation to open up borders or to grant asylum. However, in order for states to comply with the international legal right of *non-refoulement*, they should allow asylum seekers entry (at least temporarily) for processing. A state which closes its border is potentially violating the *non-refoulement* principle as those returned may be under threat of persecution in the territory they are returned to. A public policy exception exists allowing the closure of borders where a state faces “*very serious security concerns*”, such as a mass influx of refugees or the endangerment of the local population.³³

³² Article 14 of the UDHR. Available here: <http://www.un.org/en/universal-declaration-human-rights/>

³³ Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press, 2007), 242.

b. Return of boats to Turkey

The automatic return of boats to Turkey by NATO is not compliant with international law. All vessels, including rescue vessels, have an obligation to disembark people rescued at sea without delay in a place of safety. Safety constitutes physical safety and protection from human rights violations. Furthermore, state-controlled vessels as organs of the state have a direct obligation under international refugee law³⁴ and international human rights law³⁵ not to engage in *refoulement* and returns without a case-by-case determination.

2.2 EUROPEAN UNION

a. Border closures and pushbacks

No provision of EU law expressly prohibits border closures vis-à-vis non-EU nationals. However, the Schengen Borders Code requires border checks to be carried out in full respect of human dignity and prohibits discrimination on grounds of racial or ethnic origin. Recent ECtHR case law has held that EU asylum law may apply prior to an individual arriving at an EU border as the act of rescue will trigger a state's international responsibility.³⁶ The *Hirsi Jamaa* case further held that a state's refusal to authorise entry via a push-back at sea can amount to collective expulsion.³⁷ Push-backs are therefore unlawful insofar as they constitute collective expulsions where the circumstances and specific situation of individuals concerned are not ascertained and/or where individuals concerned are subject to the threat of inhumane or degrading treatment.³⁸

b. Summary of Dublin Regulation

The Dublin Regulation gives Member States the right to request transfers of asylum seekers back to the Member State where they first entered the EU provided that upon return they would not be exposed to a deficient asylum process or poor living conditions.³⁹ However, Member States can consider asylum claims that are not legally their responsibility under the general criteria in the Dublin Regulation if they so choose.⁴⁰ Therefore, Germany's recent choice not to utilise its right to return Syrian asylum seekers to other EU countries, where they had already been registered, is legal.

³⁴ Article 33 of the Refugee Convention.

³⁵ Article 3 (Prohibition of torture) read with Article 13 (Right to an effective remedy) and Article 4 of Protocol 4 to the ECHR (Prohibition of collective expulsion of aliens). See also *Hirsi Jamaa v Italy*, Grand Chamber Application No. 27765/09.

³⁶ *Hirsi Jamaa v Italy*, Grand Chamber Application No. 27765/09 ("*Hirsi Jamaa*").

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ Greece and Hungary have recently been considered to be deficient in this respect.

⁴⁰ Article 17(1) of the Schengen Borders Code.

2.3 AUSTRIA

Austrian borders were closed in September 2015 and Austria can only be entered legally through border inspection posts.⁴¹ Individuals may be pushed back if they do not cross through a border inspection post.⁴² A push-back becomes unlawful if: (i) the individual has made an application for international protection pursuant to the Austrian Asylum Act on Austrian ground, irrespective of the legality, point or method of entry⁴³ (such an application does not need to be made in writing⁴⁴); or (ii) if it would put the individual in danger of loss of life or exposure to torture.⁴⁵

2.4 SWEDEN

Sweden introduced temporary border controls in November 2015.⁴⁶ Sweden can temporarily introduce border controls where a serious threat to public policy or internal security exists⁴⁷ provided the controls are an exception and respect the principle of proportionality.

Notwithstanding the introduction of border controls, pursuant to the Dublin Regulation, Sweden must determine, on an individual basis, whether it is the Member State responsible for an asylum application. If it is, it cannot refuse the asylum seeker entry to its borders. See 2.2(c) above for a summary of which Member State will be responsible for an asylum application.

2.5 GREECE

The position under Greek law is identical to the position under EU law.⁴⁸ We are not aware of any actions or local laws contrary to this position.

2.6 TURKEY

Turkish law does not explicitly prohibit border closures to asylum seekers. Turkey has implemented the Refugee Convention with a geographical reservation (which means that Turkey only provides “refugee” status to the citizens of the member states of the Council of Europe, Russia and former Soviet Republics). The citizens of other countries who seek asylum in Turkey may be granted a “conditional refugee” status and are allowed to remain in Turkey until they are permanently settled in another country.⁴⁹ Turkey has also ratified the Convention Against Torture⁵⁰ and the ECHR.

41. Ordinance BGBl. II Nr. 62/2016. Available in German only at https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBlA_2016_II_62/BGBlA_2016_II_62.pdf

42. Section 15 para. 3 of the Austrian Foreign Police Act, available in German only at <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20004241>

43. Section 41 of the Austrian Foreign Police Act.

44. Section 12 para. 1 of the Austrian Asylum Act.

45. Section 17 para. 1 of the Austrian Asylum Act.

46. Section 45a para. 1 of the Austrian Foreign Police Act. This would also constitute a breach of Articles 2 and 3 of the ECHR and the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty.

47. See http://europa.eu/rapid/press-release_IP-16-1627_en.htm.

48. Article 23(1) of the Schengen Borders Code.

49. The Schengen Borders Code and the Dublin Regulation are directly applicable.

50. Turkey cooperates with the United Nations High Commissioner for Refugees for the resettlement of refugees in other countries. See 6.1 for more details.

Mass push-backs are therefore unlawful insofar as they constitute collective expulsions where circumstances and the specific situations of individuals concerned are not ascertained and/or where individuals concerned are subject to the threat of inhumane or degrading treatment.

2.7 CROATIA

It is illegal to expel or return third country nationals or stateless persons to a country where such person's life of freedom would be endangered⁵¹ from the time that a person expresses their intention to apply for international protection. The ability to express such intention is directly connected with the ability to enter the territory of Croatia.⁵² Therefore, authorities must allow refugees to enter Croatia (at least temporarily) for processing in order to comply with the principle of *non-refoulement*. Push-backs are also prohibited under Croatian law if a person demonstrates that their life or liberty would be threatened or that they could be subjected to torture, inhuman and degrading treatment.⁵³

2.8 SERBIA

No Serbian law expressly prohibits border closures.

However, Serbian law expressly recognises the principle of *non-refoulement*. To the extent that border closures or push-backs breach this principle, they are illegal under Serbian law. Furthermore, push-backs are unlawful insofar as they undermine the asylum application procedure set out in the Serbian Asylum Act⁵⁴ or, where effected by the Serbian Border Police, cause damage disproportionate to their objective.⁵⁵

51. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>

52. Article 6 of the Croatian Act on International and Temporary Protection (the "AITP"). Available at <http://www.refworld.org/docid/4e8044fd2.html> (translation).

53. Croatian Law Centre, Where is the Law?. <http://www.hpc.hr/news.aspx?newsID=38&pageID=14> (available only in Croatian).

54. Article 6(1) of the AITP.

55. Asylum Act (Sl. glasnik RS 109/07).

SELECTIVE DENIAL OF ENTRY, FILTERING AND PRE-SCREENING IN ASYLUM PROCEDURES





3. SELECTIVE DENIAL OF ENTRY, FILTERING AND PRE-SCREENING IN ASYLUM PROCEDURES

With reference to international and EU principles relating to discrimination, as well as relevant national laws, please advise on the legality of:

- a. Selectively denying border entry to individuals wishing to claim asylum based on ethnicity or nationality?
- b. Ethnic or nationality-based “filtering” or “pre-screening” in asylum procedures (e.g. arbitrary denial of access to asylum procedures based on nationality).

3.1 INTERNATIONAL LAW

Selectively denying border entry to individuals on ethnicity or nationality grounds is likely to be a violation of the ICCPR.⁵⁶

It is likely that subjecting individuals to filtering and screening processes based on their ethnic or national backgrounds is contrary to Article 26 of the ICCPR where it leads to certain groups of people being discriminated against. States can limit the numbers of incoming refugees, but doing so on the basis of nationality or ethnicity is likely to be a breach of international law.

3.2 EUROPEAN UNION

Pursuant to the Asylum Procedures Directive applications for international protection must be made individually. Therefore, groups of individuals cannot be denied border entry based only on nationality or ethnicity or simply because they are a large group.⁵⁷ Instead, each individual must be separately and independently assessed without an ethnic or nationality-based filtering or pre-screening. The Asylum Procedures Directive provides that the examination procedure for an applicant may be conducted at the border or in a transit zone (i.e. without entry to the Member State) where the applicant is from an

⁵⁶ United Nations Human Rights Committee, General Comment 18: Non-Discrimination (10 November 1989), para 12.

⁵⁷ Article 10(3)(a).

SCO and the applicant has not submitted any serious grounds for considering the country not to be an SCO in their particular circumstances.⁵⁹ Applicants may only legally be denied border entry and/or be inadmissible for asylum procedures if they are from an SCO or STC⁵⁹ or benefit from a “first country of asylum”.⁶⁰

3.3 SERBIA

The Serbian Border Protection Law⁶¹ confers powers to protect the state border, prevent and detect criminal offences, protect the health and life of people and the environment and prevent illegal migration. However, refusing entry on grounds of nationality or ethnicity is not permitted. In addition, refusing border entry on the grounds of nationality or race would be contrary to the Serbian constitutional principle of non-discrimination.⁶²

In an asylum context, discrimination on any grounds is prohibited and discrimination on the grounds of race and nationality is expressly prohibited.⁶³ The obligation not to discriminate applies to pre-screening of applications as well as to entry.

3.4 MACEDONIA

The Macedonian Constitution prohibits discrimination on the “*grounds of sex, race, colour of skin, language, religion, national or social origin, property or social status*”⁶⁴ and therefore prima facie prohibits discrimination on the grounds of nationality or ethnicity in asylum procedures. More specifically, all foreigners may state their intention to submit a request for asylum to a police officer, who must allow the individual 72 hours to submit the request to an authorised official i.e. the individual cannot be turned away from the border or be asked to leave Macedonia immediately.⁶⁵

3.5 CROATIA

Individuals arriving at a Croatian border crossing with an intention to claim asylum in Croatia must be allowed entry and residence until their application has been fully and finally assessed.⁶⁶ There is no legal basis to deny entry to individuals and such a denial would potentially violate the principle of *non-refoulement*.

The AITP does not permit any “pre-screening” or “filtering” of applicants based on their nationality or ethnicity during asylum procedures. Therefore it would seem that in Croatia there is no pre-

⁵⁸. Article 31(8)(b) of the Asylum Procedures Directive.

⁵⁹. Within the meaning of Articles 36, 38 or 39 of the Asylum Procedures Directive.

⁶⁰. Within the meaning of Article 35 of the Asylum Procedures Directive.

⁶¹. Official Gazette of the Republic of Serbia. No. 97/08 and 20/2015.

⁶². Article 21 of the Constitution of the Republic of Serbia (Sl. Glasnik RS 83/06), 30 September, 2006.

⁶³. Article 7 of the 2007 Act.

⁶⁴. Article 54. Full text available at www.wipo.int/edocs/lexdocs/laws/en/mk/mk014en.pdf

⁶⁵. Article 16 of the Macedonian Asylum Law.

⁶⁶. Article 53(1) of the AITP.

screening process which could be misused, although there could technically be selective filtering of actual applications which could be undertaken in an illegal manner.

3.6 SLOVENIA

Slovenian border authorities cannot prevent asylum applications based on an SCO⁶⁷ or STC⁶⁸ concept. Anyone wishing to apply for asylum should be allowed to do so, regardless of their nationality or the country from which they arrive. Although not all asylum seekers may be granted entry, their applications can be made and processed at the border.

Asylum seekers may be subject to a form of “pre-screening” during the asylum procedure if they have arrived from an SCO or STC. In such cases an “accelerated procedure” may apply. This accelerated procedure may be invoked based on general information about the applicant’s country of origin⁶⁹ and does not necessarily involve a personal interview with the applicant.⁷⁰

3.7 GREECE

Greek law prohibits discrimination between asylum seekers based on their nationality.⁷¹ As far as we are aware, Greece has not denied refugees border entry or access to asylum procedures based on ethnicity or nationality nor has it unilaterally engaged in “filtering” or “pre-screening” in its asylum procedures.

⁶⁷. Article 66 of the Slovenian International Protection Act. Available in English at <http://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=54b543ab4>

⁶⁸. Article 61 of the Slovenian International Protection Act.

⁶⁹. Article 54 of the Slovenian International Protection Act.

⁷⁰. Article 46 of the Slovenian International Protection Act.

⁷¹. The Asylum Procedures Directive and the Racial Equality Directive, which have been transposed in Greek national law.

SAFE PASSAGE



4. SAFE PASSAGE

What are the legal obligations on Member States with regard to the provision of safe passage into the EU for asylum seekers?

- a. To what extent can it be said that there is an obligation on the EU and Member States to ensure asylum seekers attempting to reach and enter the EU arrive safely?
- b. How do these obligations relate to humanitarian and maritime principles on rescuing those in distress at sea?
- c. What obligations are there under EU law in relation to allowing asylum seekers the right to apply for asylum (as distinguished from the right to international protection more broadly)?
- d. To what extent can it be said that the EU is denying access to international protection by not providing safe and legal routes to the EU for those seeking asylum?

4.1 INTERNATIONAL LAW

There is no legal obligation under international law to offer or ensure legal and safe avenues for individuals seeking international protection in Member States.

All vessels, including private and state vessels, have an obligation under the international law of the sea⁷² to come without delay to the rescue of persons in distress at sea. SAR states⁷³ also have the obligation to disembark people (i.e. accept them) if prompt disembarkation in another state cannot be arranged.⁷⁴ Disembarkation should be in a place of safety, and that, read in light of human rights law, requires the place of safety to also be one where the individuals human rights are protected, i.e. a country fulfilling the SCO or STC requirements.

If exercising effective control, including in the context of a rescue operation, States are required⁷⁵ to provide effective access to an asylum procedure.⁷⁶

⁷² The United Nations Convention of the Law of the Sea, the International Convention on Maritime Search and Rescue ("SAR") and the International Convention for the Safety of Life at Sea.

⁷³ 106 states as of November 2015 (including Turkey and Greece). <https://imo.amsa.gov.au/public/parties/sar79.html>

⁷⁴ IMO Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea. <http://www.imo.org/en/OurWork/Facilitation/Documents/FAL.3%20Circ.194.pdf>

⁷⁵ Article 3 and Protocol 4 of the ECHR.

⁷⁶ See in particular the case of *Hirsi Jamaa v. Italy*, fn 36 above.

A failure to provide safe passage does not as a matter of international law equate to a failure to provide international protection to the relevant individuals.

4.2 EUROPEAN UNION

EU law does not oblige Member States to facilitate the arrival and safety of asylum seekers and only grants asylum seekers rights once they have entered the EU, are at the border or in a transit zone (including a Member State's territorial waters). An asylum seeker arriving after being rescued at sea has the same rights as any other asylum seeker arriving to a Member State, as set out in paragraph 5.2 below.

There are no additional maritime rescue obligations arising from EU law. Member States are subject to the international legal obligations set out at 4.1 above.

EU law does not prescribe a mechanism for entering Europe to make an application for international protection. The right to apply for asylum and the right to access the asylum procedures only arise once an individual is in the EU or at its external borders (which includes territorial waters and transit zones⁷⁷).⁷⁸ In order to attain protection it is essential to make an asylum application in the relevant territory in accordance with the relevant country's laws.

Therefore, it cannot be said that Member States are denying access to international protection by not providing safe and legal routes to the EU for those seeking asylum.

4.3 TURKEY

There is no positive obligation under Turkish law, the Refugee Convention or the ECHR to (i) ensure safe entry and arrival for asylum seekers in Turkey; or (ii) ensure safe transit through Turkey for asylum seekers.

Turkey is a party to the international conventions listed at 4.1 above, which regulate rescue of persons in distress at sea, and is therefore under the maritime rescue obligations described above. The delimitation of territorial waters between Turkey and Greece is disputed and their search and rescue regions overlap. However, cooperation as regards rescues from these areas has not yet been established as required by the SAR Convention.⁷⁹

Turkish law provides that every "*foreigner or stateless person*" has the right to apply for international protection.⁸⁰ International protection in Turkey encompasses the statuses of refugee, conditional refugee and recipient of subsidiary protection.

⁷⁷ Article 3 of the Asylum Procedures Directive.

⁷⁸ European Union Agency for Fundamental Rights, 2014, 'Handbook on European law relating to asylum, borders and immigration', p. 35.

⁷⁹ Statement by the Turkish Ministry of Foreign Affairs. Available in Turkish at <http://www.mfa.gov.tr/baslica-ege-denizi-sorunlari.tr.mfa>

⁸⁰ Article 65(3) of the Turkish Law on Foreigners and International Protection.

In the absence of such obligations arising from domestic law, the Refugee Convention or the ECHR, it cannot be said that Turkey is denying access to international protection by not providing safe and legal routes for those seeking asylum.

4.4 GREECE

We are not aware of any specific Greek law which requires Greece to ensure asylum seekers attempting to reach and enter Greece arrive safely.⁸¹

Greece's obligations under international and EU law with respect to the rescue of individuals at sea are covered at paragraphs 4.1 and 4.2 above. Furthermore, Greek national law requires the competent authorities to take adequate measures in order to ensure that material reception conditions are available to applicants for asylum and this would apply to those rescued at sea and delivered to Greece.⁸² These conditions must provide applicants with a standard of living adequate for their health, capable of ensuring their subsistence and to protect their fundamental human rights.

Greece has implemented the Asylum Procedures Directive into national law and the right to apply for asylum is protected in national law in conformity with that Directive.⁸³ See paragraph 4.2 for the position under EU law.

A failure to provide safe passage for asylum seekers is not in breach of international, EU or Greek law.

⁸¹ Subject to paragraph 5.3 below.

⁸² Article 12(1), Presidential Decree 220/2007.

⁸³ Presidential Decree 113/2013.

LEGAL STATUS OF INDIVIDUALS RESCUED AT SEA





5. LEGAL STATUS OF INDIVIDUALS RESCUED AT SEA

What is the legal status of individuals intercepted in the Aegean Sea by Frontex and/or the Greek Coast Guard and brought to shore? How does this status differ from the status of undocumented individuals (asylum seekers and migrants) arriving by different routes (e.g. arriving by boat without interception; arriving via land or air)?

5.1 INTERNATIONAL LAW

The legal status of individuals intercepted in the Aegean Sea is of undocumented migrants until they apply for asylum. They may also be refugees if they meet the legal requirements.

Individuals intercepted in the Aegean Sea are entitled to the rights that are inherent to all persons arriving to a border including the right to be informed about accessing protection.⁸⁴ They are also protected from *refoulement* under principles of international law. Individuals who arrive directly by boat without being intercepted have identical rights to those who are intercepted. People who arrive by land or air would generally have the same rights as those arriving from the sea, although those travelling by air are likely to be documented i.e. in possession of a passport, and therefore easier to process for the recipient country.

5.2 EUROPEAN UNION

In the first instance, intercepted individuals have the status of irregular or undocumented migrants under EU law.⁸⁵

An individual arriving by boat unintercepted will also be an irregular/undocumented migrant. The rights of individuals arriving by different routes are the same as those

⁸⁴ As established by the ECtHR in *Hirsi Jamaa v. Italy*.

⁸⁵ Euro-Mediterranean Human Rights Network's Policy Brief, June 2014, pp 13-14. Available at <http://www.statewatch.org/news/2014/jul/eu-migrants-at-sea.pdf>

arriving by boat (intercepted or otherwise). The *Hirsi Jamaa* case stated that all persons falling within a State's jurisdiction "*should be afforded an appropriate opportunity and facilities to seek international protection.*"⁸⁶

5.3 GREECE


Individuals intercepted in Greek territorial waters will have the same legal status as those arriving on a boat which has not been intercepted, by land or by air.

However, the applicable law differs where interception is in territorial waters as opposed to on the high seas. Individuals intercepted in Greek territorial waters have the same rights and process as any other individual that arrives on Greek land. For individuals intercepted on the high seas, the applicable law is international law. The ECtHR has held that the exercise of extraterritorial jurisdiction by a State that refused to authorise entry in the context of a push-back operation to Libya amounted to collective expulsion contrary to Articles 3 ECHR and Article 4 of Protocol No. 4 to the ECHR. Ultimately, because of Greece's obligations to safely disembark people (as set out in 4.1 above), intercepted individuals may also be granted the same rights as those arriving by other routes. This would mean that such intercepted individuals would at the very least have the right to apply for international protection, although such an application may subsequently be denied.

⁸⁶ *Hirsi Jamaa v Italy*. The case also made clear that the act of interception establishes a state's jurisdiction over the persons intercepted.

⁸⁷ Article 3(1) of the Dublin Regulation.

⁸⁸ *Hirsi Jamaa v Italy*.

A close-up, profile view of a woman wearing a black headscarf with a white floral pattern. She is looking upwards and to the left with a thoughtful or hopeful expression. The background is dark and out of focus.

REMOTE PROCESSING OF ASYLUM APPLICATIONS



6. REMOTE PROCESSING OF ASYLUM APPLICATIONS

What legal mechanisms are available to provide for the remote processing of asylum applications prior to entry into the EU?

6.1 INTERNATIONAL LAW

There are no international laws regarding remote processing of asylum applications.

However, the UNHCR does offer a resettlement process to help identify, interview and submit refugee cases to participating resettlement countries. Countries are under no international legal obligation to participate in this programme, which allows applications for asylum to, amongst others, Member States, to be effected remotely. Individuals who qualify for resettlement under the UNHCR are those refugees for whom resettlement is the most appropriate solution and who also fall under the UNHCR's Resettlement Submission Categories⁸⁹: (i) the applicant must be determined to be a refugee; and (ii) having assessed all solutions, the UNHCR must have identified resettlement as the most appropriate solution for that specific applicant.

A resettlement country is selected according to several factors such as, amongst others, family links, language abilities, cultural aspects, the country's average processing time and selection criteria. Currently, 28 countries have agreed to become resettlement countries, including France, Germany and the United Kingdom.⁹⁰

6.2 EUROPEAN UNION

There are no EU laws regarding remote processing and it is explicitly stated that the asylum framework does not apply to persons who cannot reach EU territory⁹¹ and that it only applies when an individual reaches an applicable border or transit zone.⁹²

⁸⁹ Available at <http://www.unhcr.org/3d464e842.html>.

⁹⁰ Complete list of resettlement countries is available at <http://www.refworld.org/resettlement.html>.

⁹¹ Article 6 of the Asylum Procedures Directive. Available at <http://eur-lex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:32013L0032&from=en>

⁹² Handbook on European law relating to asylum, borders and immigration (the "FRA 2014 Handbook"), at p. 35 Available at http://fra.europa.eu/sites/default/files/fra_uploads/handbook-law-asylum-migration-borders-2nd-ed_en.pdf

Legal mechanisms for remote processing have been discussed, including the use of short term humanitarian visas⁹³, joint processing at Member States' consulates and mobility partnerships, but none of these have been incorporated into EU law.

6.3 TURKEY

Turkish law requires that the asylum seeker be within or at Turkey's borders for their application to be processed.⁹⁴ There are no provisions regarding remote processing.⁹⁵

Turkey cooperates with the UNHCR for the resettlement of non-European asylum seekers (see 6.1 above), but such an application also needs to be submitted after arrival in Turkey.

6.4 JORDAN

There are no Jordanian laws regarding remote processing. However, the UNHCR has a presence in Jordan and operates a remote resettlement programme of the kind described in paragraph 6.1 above.

6.5 LEBANON

There are no Lebanese laws regarding remote processing. The UNHCR remote resettlement programme (see 6.1 above) is the only mechanism currently in place which allows for the remote processing of asylum applications in Lebanon.

⁹³ European Union Agency for Fundamental Rights: Legal entry channels to the EU for persons in need of international protection: a toolbox, 02/2015, at p. 9. Available at <http://eur-lex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:32013L0032&from=en>

⁹⁴ Pursuant to Article 2 of the Turkish Code, international protection will be extended in cases of individual protection claims of foreigners at borders, border gates or within Turkey.

⁹⁵ Article 65 of the Turkish Code.

RECEPTION CONDITIONS



7. RECEPTION CONDITIONS

What are the laws and regulations governing reception conditions for asylum seekers and those awaiting asylum determinations in Europe?

7.1 INTERNATIONAL LAW

International law does not define the minimum conditions asylum seekers are entitled to. However, international human rights law is relevant in determining the international standards for treatment of asylum seekers between arrival and determination of their application. The UDHR, ICESCR and the ICCPR all address the minimum content of human rights which apply to everyone in all situations (including asylum seekers). Such fundamental rights include, among others, freedom from discrimination, arbitrary arrest or detention, and the right to basic access to food, clothing, shelter, medical and social care.

7.2 EUROPEAN UNION

The Reception Conditions Directive sets down common standards for living conditions of asylum applicants. It applies to all third country nationals as well as to stateless persons who have requested asylum at the border or on the territory of the Member State, and is also extended to their respective accompanying family members. Within 15 days of lodging an asylum application, applicants must be informed of the benefits to which they are entitled and any obligations they must comply with.

Under the Reception Conditions Directive, Member States are obliged to guarantee, amongst other things: (i) certain material reception conditions, in particular accommodation, food and clothing, in kind or in the form of financial allowance, whereby allowances must be such to prevent the applicant from becoming destitute; (ii) family unity; (iii) medical and psychological care; and (iv) access to the educational system for minor children and language courses to enable them to attend ordinary school.⁹⁶

⁹⁶ See Articles 12, 14 and 17 of the Reception Conditions Directive.

Failure to comply with obligations under the Reception Conditions Directive or the Temporary Protection Directive may result either in the breach of EU law giving rise to a claim in damages⁹⁷, and/or a breach of Article 3 of the ECHR.

7.3 GREECE

Greek law requires that “*material reception conditions*” (being housing, food and clothing or the financial means to acquire such⁹⁸) be available to asylum applicants.⁹⁹

Under Greek law, this includes the provision of accommodation in reception centres and a financial allowance based on the Greek welfare framework. Asylum seekers staying at reception centres are to be provided with: (i) meals (other than the consumption of alcohol, which is prohibited) and a proper place for accommodation which is adequate, well-lit, heated and aired; (ii) necessary clothes if they are not able to afford to buy clothes themselves; (iii) the possibility to take care of their personal hygiene and the necessary articles for personal hygiene and cleanliness; and (iv) the possibility to undertake outdoor activities and participate in other recreational activities.¹⁰⁰

The provision of all or some material reception conditions and health care is subject to the condition that applicants do not themselves have or have access to sufficient means to maintain a standard of living adequate for their health and capable of ensuring their subsistence.¹⁰¹

⁹⁷ ECJ, Joined Cases C-6/90 and C-9/90 [1991] ECR I-05357, *Francovich and Bonifaci and Others v. Italian Republic*, 19 November 1991; ECJ, Case C-479/93 [1995] ECR I-03843, *Francovich v. Italian Republic*, 9 November 1995.

⁹⁸ Article 1(p), Presidential Decree 220/2007.

⁹⁹ Article 12(1), Presidential Decree 220/2007. Available at: <http://www.refworld.org/docid/49676abb2.html>.

¹⁰⁰ Article 12, decision N. 7001/2/1454-h “General rules for the operation of the regional initial reception services” (the “Decision”), available at <http://www.refworld.org/pdfid/4f33bace2.pdf> (in English).

¹⁰¹ Article 12(3), Presidential Decree 220/2007.

RELOCATION CRITERIA





8. RELOCATION CRITERIA

Where the EU and/or Member States are developing formulae or criteria for relocation of asylum seekers within the EU, to what extent can it be said they have a legal obligation to consider the preferences of the individual?

8.1 INTERNATIONAL LAW

No legal obligation exists under international law to consider the preferences of the individual when transferring them for processing. However, when making a transfer¹⁰² a state must consider: (i) the risk that the asylum seeker will be denied entry into the receiving state; (ii) the risk the asylum seeker will be *refouled*; and (iii) whether rights under the Refugee Convention and general human rights will be respected. Further, in the case of children, the child's interests are a primary consideration¹⁰³ and it may well be that the child's preference is in their best interests i.e. to be with family.

8.2 EUROPEAN UNION

Under EU law, asylum seekers cannot choose the Member State of relocation.¹⁰⁴ This is an express derogation from the Asylum, Migration and Integration Fund Regulation¹⁰⁵, which includes the transfer of applicants for international protection between Member States in the context of relocation-type programs with the asylum seeker's consent.¹⁰⁶ Therefore, the applicant's consent is required for a relocation, but their consent to the specific Member State of relocation is not.

¹⁰² The right to make such a transfer is retained under Article 32 of the Refugee Convention.

¹⁰³ Under the Convention on the Rights of the Child

¹⁰⁴ Council Decision (EU) 2015/1523 of 14 September 2015 (the "**Relocation Decision**"). The applicant's consent is explicitly excluded.

¹⁰⁵ Regulation (EU) 516/2014 of 16 April 2014.

¹⁰⁶ Article 7(2).

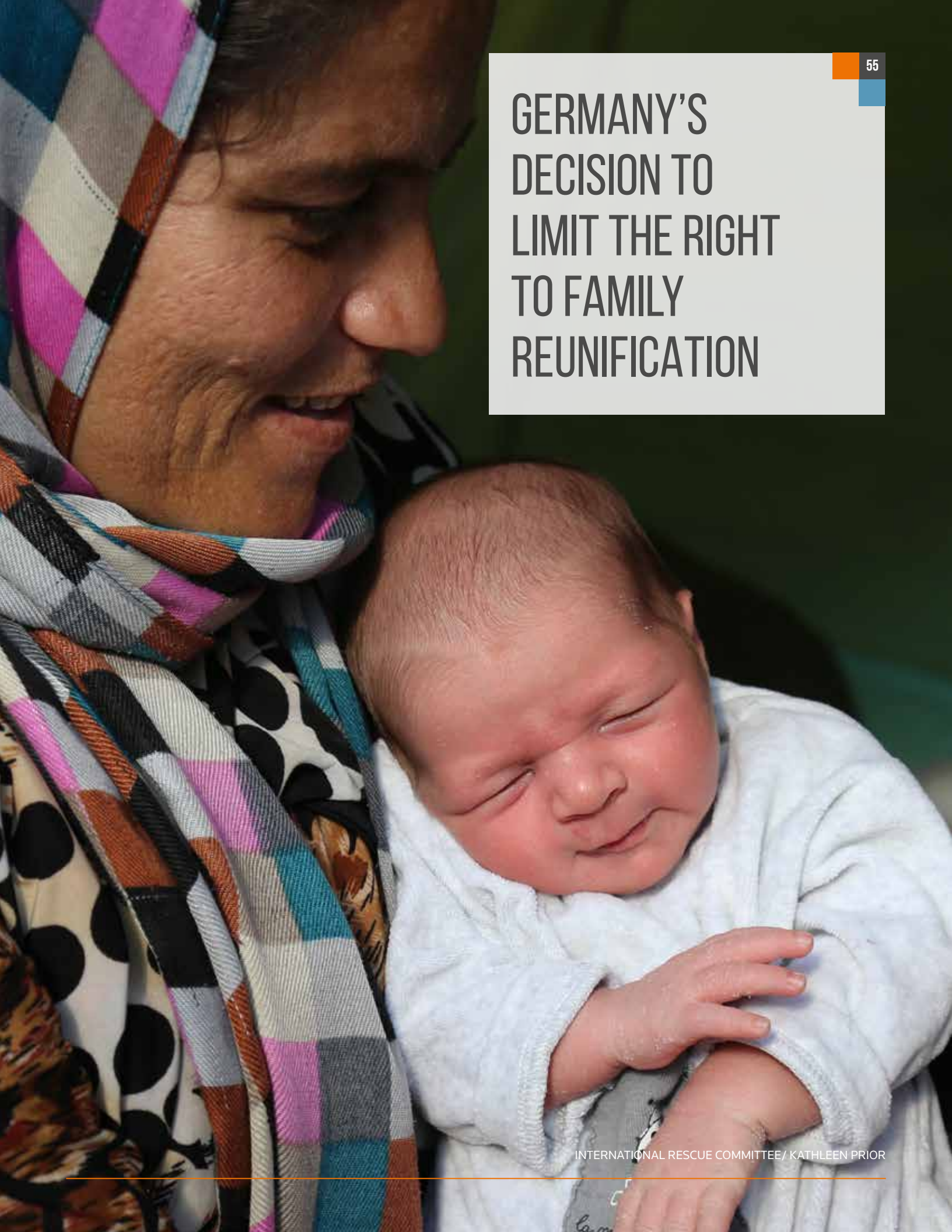
However, Member States should take into account, amongst others, (i) particular vulnerabilities; and (ii) integration prospects (i.e. language skills and specific qualifications), when determining an individual's relocation.¹⁰⁷

Relocation measures where the asylum seeker indicates a preference to be relocated in a specific Member State are partial exceptions from the Dublin Regulation, which does not normally allow individuals to express preferences.¹⁰⁸ Only those individuals who meet certain criteria under the Dublin Regulation (such as those with family members in other Member States) can request to be transferred to a specific Member State.¹⁰⁹

¹⁰⁷ Recital 28 of the Relocation Decision.

¹⁰⁸ They are a derogation from Article 13(1) of the Dublin Regulation, which provides that the first Member State that the asylum seeker enters is responsible for their application.

¹⁰⁹ Article 9 of the Dublin Regulation.

A close-up photograph of a woman with a warm, smiling expression looking down at a newborn baby. The baby is sleeping peacefully, wearing a white long-sleeved garment. The woman is wearing a colorful patterned headscarf and a matching shawl. The background is softly blurred, focusing attention on the mother and child.

GERMANY'S DECISION TO LIMIT THE RIGHT TO FAMILY REUNIFICATION



9. GERMANY'S DECISION TO LIMIT THE RIGHT TO FAMILY REUNIFICATION

Is Germany's decision to limit the right to family reunification legal?

9.1 GERMANY

As a matter of German law, the position is legal.

German law does not grant a third country national the right to family reunification.¹¹⁰ The right to family reunification has been suspended until 17 March 2018¹¹¹ for individuals under subsidiary protection.¹¹² This suspension does not affect the rights of individuals entitled to asylum or refugee status (see paragraph 5.1 for the definition of a refugee).

Further, this suspension does not affect minors.¹¹³

9.2 INTERNATIONAL LAW

The Refugee Convention does not expressly confer a right to family reunification to non-nationals. Germany's suspension of right to family reunification for those benefiting from subsidiary protection is not in breach of international law.

Persuasive arguments justifying family reunification are:

- a. the principle of international law that *"the family is the natural and fundamental group unit of society and is entitled to protection by society and the State"*¹¹⁴, which applies irrespective of nationality and citizenship status;

¹¹⁰ Article 6 of the German Basic Law has been held not to have such an effect. Court decision available at <http://www.servat.unibe.ch/dfr/bv076001.html> (in German only).

¹¹¹ The German Residence Act. Available in English at http://www.gesetze-im-internet.de/englisch_aufenthg/index.html. Note this was amended in February 2016. See <https://www.theguardian.com/world/2015/nov/06/germany-imposes-surprise-curbs-on-syrian-refugees>

¹¹² A person entitled to subsidiary protection is defined as a "foreigner [who] has shown substantial grounds for believing that he would face a real risk of suffering serious harm in his country of origin. Serious harm consists of [...] serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict". Section 4(1) of the German Asylum Procedure Act. English text available at https://www.gesetze-im-internet.de/englisch_asylvg/index.html

¹¹³ Sections 22 and 23 of the German Asylum Procedure Act.

¹¹⁴ Article 16 of the UDHR, which has the force of customary international law.

- b. the UNHCR's guidelines on reunification of refugee families recognise the right to family reunification for refugees. These guidelines do not extend to those without refugee status; and
- c. the Convention of the Rights of the Child which provides that *"States Parties shall respect the rights of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis....in accordance with such obligations, applications by a child or his parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by State Parties in a positive, humane and expeditious manner"*.¹¹⁵ The ECtHR has held that a fair balance is to be struck between the competing interests of the individual (the child), and of the community as a whole; and that in both contexts the State enjoys a margin of discretion.¹¹⁶

Given the above qualifications and the fact that Germany's suspension of the right does not apply to children, Germany's decision is not in breach of international law.

9.3 EUROPEAN UNION

Germany's suspension of the right to family reunification for those benefiting from subsidiary protection is not in breach of EU law.

The right to family and family life is enshrined in European law.¹¹⁷ The CFR recognises everyone's (not just EU citizens') right to family life, which must be read in conjunction with the obligation to have regard for a child's best interests, and to take into account the need for a child to maintain on a regular basis a personal relationship with both of his/her parents.¹¹⁸

The Family Reunification Directive¹¹⁹ grants third country nationals and refugees residing lawfully in the territory of Member States the right to family reunification. However, individuals who are still awaiting recognition of refugee status or are entitled to reside in a Member State on the basis of subsidiary protection are not afforded this right under the Family Reunification Directive, making Germany's suspension compliant with that Directive.

The legality of the distinction between refugees and those under subsidiary protection was upheld in 2006 when the ECJ held that Article 8 of the ECHR does not grant third-country individuals the right to family reunification.¹²⁰

¹¹⁵ At Article 10.

¹¹⁶ *Sen v the Netherlands* (Application no. 31465/96), Judgment of 21 December 2001, at paragraph 31.

¹¹⁷ Articles 7 and 9 of the EU's Charter of Fundamental Rights (the "CFR").

¹¹⁸ Articles 24(2) and 24(3) of the CFR.

¹¹⁹ Available at <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32003L0086&from=EN>

¹²⁰ Case C-540/03 available at:

<http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d2dc30d5f1ecf5e8db9e4327bf83c7fe88208a87.e34KaxiLc3qMb40Rch0SaxuSbxj0?text=&docid=55770&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=179155>

GLOSSARY





GLOSSARY

“1951 Convention” means the 1951 Convention Relating to the Status of Refugees.

“1967 Protocol” means the 1967 Protocol Relating to the Status of Refugees.

“Asylum Procedures Directive” means 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.

“asylum seeker” is someone who has left their country of origin and is seeking asylum in another country but whose application has not yet been concluded.

“Dublin Regulation” means 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.

“ECHR” means the European Convention on Human Rights.

“ECJ” means the European Court of Justice, which is the highest court in the European Union in matters of European Union law.

“ECtHR” means the European Court of Human Rights, which is an international court set up by the member states of the Council of Europe who have ratified the ECHR.

“ICCPR” means the International Covenant on Civil and Political Rights.

“ICESCR” means the International Covenant on Economic, Social and Cultural Rights.

“international protection” means refugee status and subsidiary protection status under Article 2(a) of the Qualification Directive.

“Member States” means the member states of the European Union.

“non-refoulment” is a central principle in international refugee law under Article 33 of the 1951 Convention which prohibits a country from expelling or returning refugees to a territory where their life or freedom is threatened on account of their race, sex, language, religion, nationality, membership of a particular social group or political opinion.

“person eligible for subsidiary protection” means a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to their country of origin, or in the case of a stateless person, to their country of former habitual residence, would face a real risk of suffering serious harm (as defined in Article 15 of the Qualification Directive) and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country (under Article 2(f) of the Qualification Directive).

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

“Racial Equality Directive” means Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

“reception conditions” refers to the conditions under which asylum seekers and those awaiting determinations are placed from the time they make their claims either in-country or at the border until either a transfer is effected to the State deemed to be responsible for the examination of their claims or a final decision is taken as regards the substance of their claims under the UNHCR Recommendation.

“Reception Conditions Directive” means Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection.

“refugee” is someone who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of their nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of their former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it under Article 1 of the 1951 Convention.

“Refugee Convention” means the 1951 Convention, as amended by the 1967 Protocol.

“safe country of origin” or **“SCO”** is a country which a particular asylum seeker has nationality of or, if that applicant is a stateless person, where they were formerly habitually resident, and they have not submitted any serious grounds for considering the country not to be a safe country of origin in their particular circumstances under Article 36 of the Asylum Procedures Directive.

“safe third country” or **“STC”** is a concept under the Asylum Procedures Directive, whereby a Member State may determine that a third country satisfies those criteria outlined in Article 38 of the Asylum Procedures Directive to consider it a STC for the purposes of providing international protection to a particular asylum seeker. Some sources define this term as a country considered capable of providing protection to non-citizens.¹²¹

“Schengen Borders Code” means Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders.

“subsidiary protection status” means the recognition by a Member State of a third country national or a stateless person as a person eligible for subsidiary protection under Article 2(g) of the Qualification Directive.

“Temporary Protection Directive” means Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.

“UDHR” means the Universal Declaration of Human Rights.

“UNHCR” means the United Nations High Commissioner for Refugees.

“UNHCR Recommendation” means UNHCR Reception Standards for Asylum Seekers in the European Union.

¹²¹ European Parliamentary Research Service, Briefing, EU Legislation in Process (8 October 2015). Available at <http://www.europarl.europa.eu/EPRS/EPRS-Briefing-569008-Safe-countries-of-origin-FINAL.pdf>

