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BURDEN-SHARING GAMES FOR ASYLUM SEEKERS
BETWEEN TURKEY AND THE EUROPEAN UNION

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Turkey and the European Union*

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Abstract

The marginal amount of legislative activity in the asylum topic suggests that the impact of the EU accession process on Turkish asylum law has been insignificant compared that in other fields of law, despite early gusto. Remarkably, this negative shift in Turkish asylum policy coincides with the adoption of the secondary legislation by the EU throughout the transitional period as envisaged by the Amsterdam Treaty, particularly the Asylum Procedures Directive. The records of interaction between the Union's asylum acquis and the Turkish Government's responses indicate that the problem, at least to a certain extent, arises on account of the Union's asylum acquis. The fact that the Union imposes a burden-shifting tool on an acceding State, as a process of becoming a part of the burden-sharing system within the EU, inevitably raises concerns among Turkish authorities. Therefore, a solution could be found in bringing the proposed legal framework closer to the burden-sharing relationship that exists among the EU Member States.

Keywords

Asylum, Burden-sharing, Externalization, Refugees, Fortress Europe

Introduction

Burden-sharing of refugees is among the most intricate topics of contemporary asylum law since the main international instrument in this field, namely the Convention Relating to the Status of Refugees,¹ lacks any burden-sharing system to support the States that contribute more to the international protection regime than others². Despite the gradual decrease in the number of asylum seekers in the last two decades³, the rising security concerns of the States after the terrorist attacks of 9/11 and the train bombings in Madrid gave momentum to the debates in this area. Industrialized countries responded to the change of circumstances by introducing more restrictive asylum laws, putting them in a state of limbo concerning their international law and human rights law obligations. UNHCR reports in its “The State of the World's Refugees 2006” book that the people who were forcibly displaced after the new chain of events post-2001 faced “closed borders, extremely hostile and insecure conditions in exile and/or accelerated or involuntary returns due to ‘anti-terror’ measures in asylum states.”⁴ Such changes in the political and legal environment both at universal and European level, inevitably affected Turkey, which is a major transit country for migrants and asylum seekers at the external borders of the European Union⁵. As the number of illegal migrants annually apprehended in its territory has varied from 50,000 to 100,000 since the year 2000⁶, Turkey is under continuous pressure from the EU to develop its asylum law framework. Moreover, this is among the membership requirements of the Union since the asylum and migration topic is part of the Union's legal framework. In this respect, Turkey is being compelled to change its transit country role and take over more responsibility for refugees, something currently, to a great extent, delegated to the United Nations High Commissioner For Refugees.⁷ The Turkish Government initially responded positively to these demands and started to prepare for the transition by incorporating a rather ambitiously drafted section in the National Program for the Adoption of the EU *acquis*. Nevertheless, soon after this Program was published in 2003, Turkey revised its plans on asylum while continuing with democratization reforms in other fields⁸. The marginal amount of legislative activity in this area suggests that the impact of the

¹ Convention Relating to the Status of Refugees, adopted 28 July 1951, U.N. Doc. A/CONF.2/1087(1951), 189 U.N.T.S. 150(96/196/JHA. To be referred as “the 1951 Refugee Convention” herein below.

² James C. Hathaway, *“Preface: Can International Refugee Law be made Relevant Again?”*, *Reconceiving International Refugee Law*, 1997, Martinus Nijhoff Publishers, p. xxi.

³ The global population of refugees of concern to UNHCR has declined from nearly 18 million in 1992 to just over 9 million in 2004. See UNHCR, *The State of the World's Refugees 2006 - Human displacement in the new millennium*, 19 April 2006, p. 10. Available at <http://www.unhcr.org/4444afc50.html> [visited on 01.12.2009].

⁴ *Ibid.*, p. 11.

⁵ To be referred as the “EU” herein below.

⁶ Ibrahim Kaya, *Undocumented Migration: Counting the Uncountable*, Data and Trends across Europe, December 2008, *Clandestino*, p. 26. See Table No. 6 with reference to the People Movements Bureau. Turkey remains a very important transit and destination country for irregular migration; According to Turkey 2009 Progress Report by the European Commission “[i]n 2008, 65,737 illegal immigrants were apprehended by Turkish law enforcement agencies, followed by another 15,701 in the first six months of 2009. This figure shows a slight increase in comparison with 2007 (when the total was 64,290). The number of smugglers apprehended also increased, from 1,242 in 2007 to 1,305 in 2008...With 11,248 new asylum seekers in 2008 the number nearly doubled in comparison to 2007(5,831 new asylum seekers)...” See European Commission, *Commission Staff Working Document: Turkey 2009 Progress Report*, 14 October 2009, SEC(2009)1334, p. 74. Available at: <http://www.unhcr.org/refworld/docid/4adc28402.html> [visited on 18 November 2009].

⁷ To be referred as the “UNHCR” herein below.

⁸ For a more detailed analysis of the impact of the European Union accession process on the Turkish democratization reforms, see Serap Yazıcı, Ergun Özbudun, *Democratization Reforms in Turkey (1993 – 2004)*, TESEV Publications, İstanbul, 2004; Serap Yazıcı, *“The Impact of the EU on the Liberalisation and Democratisation Process in Turkey, Turkey and the EU Enlargement Processes of Incorporation”*, eds. Richard T. Griffiths and Durmuş Özdemir, İstanbul Bilgi University Press, İstanbul, December, 2004.

EU accession process on Turkish asylum law has been insignificant compared that in other fields of law, despite early gusto.⁹ Remarkably, this negative shift in Turkish asylum policy coincides with the adoption of the secondary legislation by the EU throughout the transitional period as envisaged by the Amsterdam Treaty, particularly the Asylum Procedures Directive¹⁰. To this date, although asylum and migration remained on the agenda of Turkish authorities, it has not been possible to introduce extensive legal reforms that go beyond political programs. Therefore, this study aims at exploring the grounds for hesitation of the Turkish Government to the extent that they are linked to its relationship with the EU.

In this regard, this study comprises two sections: The first section is devoted to the external dimension of the EU's migration *acquis* that focuses on developments in EU law, particularly after the adoption of the Amsterdam Treaty. In this context, the first chapter provides an overview of the general tendencies of the EU's asylum and migration *acquis* with a burden-sharing and shifting perspective. This chapter is followed by another concentrating on EU readmission agreements, which form a core component of its burden-shifting instruments.

The second section is divided into two chapters, the first of which describes the evolution of the Turkey-EU relationship with a view to undertaking asylum and migration obligations. Finally, in the last chapter the causes of stalling cooperation in the migration field are explored, leading to a conclusion which suggests a course of action on legal grounds in order to find a common basis for a compromise.

I. The legal environment of burden-sharing and -shifting in the EU

1. Dynamics of the EU's asylum *acquis*

The EU represents the industrialized countries showing a strong tendency to deter refugees from seeking asylum in their territories in the last decade. The legal developments within the asylum *acquis* of the Union demonstrate two clear tendencies in this respect. The first is to limit asylum seekers' access to asylum procedures and their possibility of succeeding in asylum claims within the Member States and thus shifting the burden of those asylum seekers towards the transit countries.¹¹

The second tendency is to share the burden of those asylum seekers who have managed to have access to the asylum procedures, in an equal fashion, among the Member States.¹² As the EU Member States are bound with the 1951 Refugee Convention, in the spirit of *pacta sunt servanda*, it is not possible for them to avoid this responsibility entirely.

⁹ The European Commission which reported only limited progress in the field of migration and asylum in its "Turkey 2009 Progress Report" particularly underlined that no major legislative developments took place in this area. Op. Cit., p. 73.

¹⁰ The 2005 Turkish Action Plan on Asylum and Migration made such shift officially visible as discussed in further detail in the section concerning the evolution of the Turkey-EU relations.

¹¹ Sandra Lavenex, in her assessments concerning the newly emerging 'safe third country' rules and readmission agreements, pointed to the threat of negative redistribution of the 'burden' of asylum seekers, refugees and illegal migrants from traditional refugee receiving countries to the transit countries at the beginning of the transitional period in 1999 envisaged by the Treaty of Amsterdam. See Sandra Lavenex, *Safe Third Countries: Extending the EU Asylum and Immigration Policies to Central and Eastern Europe*, 1999, Central European University Press, p. 175; Sandra Lavenex, *"Shifting Up and Out: The Foreign Policy of European Immigration Control"*, West European Politics, Vol. 29, No. 2, March 2006, Routledge, pp. 329 – 350; Eiko R. Thielemann, *"Why Asylum Policy Harmonization Undermines Refugee Burden-Sharing"*, European Journal of Migration and Law, Vol. 6, 2004, pp. 47-65.

¹² See for instance Christina Boswell, *"Burden-Sharing in the European Union: Lessons from the German and UK Experience"*, Journal of Refugee Studies, Vol. 16, No. 3, 2003, pp. 316-335.

These two tendencies have led to an intensive harmonization process within EU law, which has accelerated after the adoption of the Amsterdam Treaty. This Treaty transferred the asylum and migration topics from the ‘third pillar’ to the so-called ‘first pillar’ and set forth a 5-year transition period during which all fundamental asylum laws were to be harmonized. As the Member States were not prepared to give up all sovereign powers in such a strategic area, the powers vested in the Community institutions throughout this transition stage were not typical powers of the Community framework. A hybrid decision-making structure was adopted for this period, which was conducive to an environment where Member States could prioritize their national interests while drafting the fundamental rules of the European asylum system. This national interest oriented structure generated excessively restrictive asylum rules combined with the wave of restrictive policies particularly targeting aliens after the terrorist attacks of September 11, 2001 in the United States.

With regard to the tendency of deterring asylum seekers in the Member States, the rules adopted by the Community can be grouped into two categories: The first category of rules aim at preventing the entry of asylum seekers into the territory of the Member States.

These measures are usually intended to be justified by preventing illegal migration, however in reality, they result in the prevention of asylum due to their indiscriminate application. Protected entry procedures¹³, tight visa regulations¹⁴, jointly organized interception and other border control measures on the high seas¹⁵ as well as air carrier sanctions¹⁶ imposed on airline companies, which fail to check the validity of the required documentation of aliens at the departure points of third countries before aliens arrive in the EU territory¹⁷, are measures that shall be considered within this category. As a result of these measures, for asylum seekers, travelling by sea appears to be the only feasible option today for reaching Schengen borders. Due to the intensified interception measures at sea with the introduction of the FRONTEX agency and increasing cooperation between the EU Member States and the transit countries, asylum seekers take more risks by travelling to the European coasts in unsafe vessels. The death toll constantly rises as many boats sink on their way to EU territories, while the instruments of the law of the sea such as the UNCLOS¹⁸, SOLAS¹⁹ and SAR²⁰ Conventions as well as the asylum law framework fail to respond to such deaths and casualties.

¹³ Protected entry procedure is defined as “... arrangements allowing an individual to approach the authorities of a potential host country outside its territory with a view to claiming recognition of refugee status or another international protection; and be granted an entry permit in case of a positive response to that claim.” See Sonia Sirtori, Patricia Coelho, *Defending Refugees' Access to Protection in Europe*, European Council on Refugees and Exiles, December 2007, p. 8. According to this Report a number of EU Member States including Bulgaria, France, The Netherlands, Spain and the UK resort to Protected entry procedures on a formal basis and some other like Belgium, Germany, Ireland, Italy, Luxemburg and Portugal apply it in an informal fashion. (see p. 50.); For a detailed analysis of protected entry procedures see Gregor Noll, Jessica Fagerlund, Fabrice Liebaut, *Study on the Feasibility of Processing Asylum Claims outside the EU against the background of the Common European Asylum System and the goal of a common asylum procedure*, 2002, The Danish Centre for Human Rights.

¹⁴ Council Regulation 1932/2006 of 21 December 2006 [OJ L 405/23].

¹⁵ Council Regulation 2007/2004 of 26 October 2004 [OJ L 349/1]; Regulation (EC) No 863/2007 of July 2007 [OJ L 199/30]; Council Decision of 26 April 2005 [OJ L 114/13]. See also Decision No. 574/2007/EC of the European Parliament and of the Council of 23 May 2007 [OJ L 144/22].

¹⁶ Council Directive 2004/82/EC of 29 April 2004 [OJ L 261/24].

¹⁷ Council Directive (EC) 2001/51 of 28 June 2001 [OJ L 187/45]; Council Directive (EC) 2004/82 of 29 April 2004 [OJ L 261/24]; Council Directive (EC) 2003/110 of 25 November 2003 [OJ L 321/26].

¹⁸ United Nations Convention on the Law of the Sea (UNCLOS), 10 December 1982, 1833 U.N.T.S. 3.

¹⁹ International Convention for the Safety of Life at Sea (SOLAS), 1974, 1184 U.N.T.S. 278.

²⁰ International Convention on Maritime Search and Rescue (SAR), 1979, 1405 U.N.T.S. 97.

The second category comprises the measures that reduce the possibility of succeeding in the asylum procedures. The “first country of asylum”²¹ and “safe third country”²² rules, which generally result in the applicant’s case being considered manifestly unfounded without an examination on the merits and the applicant being returned to a third country or being subjected to accelerated procedures or border procedures without the safeguards of standard asylum procedures. This dramatically reduces the possibility of being awarded a refugee status in the EU Member States.

On the other hand, unlike the burden-shifting policies towards the countries outside the EU, Member States have put considerable effort into sharing the burden of refugees *inter se*, a responsibility that can not be shifted to the countries outside the EU territory due to their international law obligations under the 1951 Refugee Convention and human rights instruments such as the European Convention on Human Rights, UN Covenant on Civil and Political Rights²³ and the Convention Against Torture.²⁴

Human rights instruments played an important role in limiting the Union’s authority for introducing further restrictions transgressing the prohibition on *refoulement*. Therefore, it is no coincidence that the Qualification Directive²⁵ of the EU appeared as the first supranational instrument, regulating ‘subsidiary protection status’, - a status originating predominantly in human rights instruments – along with refugee status. From the perspective of burden-sharing, the Union has adopted the Dublin Convention, which was subsequently replaced by the so called Dublin II Regulation that sets forth criteria for determining the Member State responsible for examining the claims of an asylum seeker.²⁶ The EURODAC Regulation²⁷ which established the refugee fingerprint database is a notable support mechanism for sharing evidence concerning asylum seekers.

Finally, there are a series of financial burden-sharing instruments established by the EU and designed for supporting Member States in their asylum policies including the European Refugee Fund²⁸, External Borders Fund²⁹ and European Return Fund.³⁰ Despite such institutional burden-sharing mechanisms, it remains the case that the countries at the external borders of the EU such as Spain, Cyprus, Greece, Italy and Malta are faced with a greater burden than other Member States and they are putting pressure on the EU Institutions to adopt more efficient burden-sharing mechanisms. In line with this tendency, the Commission published a communication on 17 June 2008 entitled, “A

²¹ Council Directive 2005/85/EC of 1 December 2005 OJ L 326/13, Art. 26.

²² *Ibid.*, Art. 27 and Art. 36.

²³ UN Covenant on Civil and Political Rights, UNGA Res. 2200A (XXI) of 16 December 1966.

²⁴ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UNGA Res. 39/46, 10 December 1984.

²⁵ Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted, [OJ L 304/12], 30.09.2004.

²⁶ Chapter 7 of Title 2 of the Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at their Common Borders, 19 June 1990, UNHCR Refworld, <http://www.unhcr.org/refworld/docid/3ae6b38a20.html> [visited on 7 March 2009] already contained similar burden sharing arrangements by allocation of responsibility between the States parties. The Dublin Convention which entered into force on 1 September 1997 however, replaced the Schengen provisions on asylum.

²⁷ Council Regulation 2725/2000/EC of 11 December 2000 concerning the establishment of EURODAC for the comparison of fingerprints for the effective application of the Dublin Convention on the State responsible for examining applications for asylum lodged in one of the European Union Member States, [OJ L 316] of 15 December 2000.

²⁸ Decision No 573/2007/EC of the European Parliament and of the Council of 23 May 2007, [OJ L 144/1].

²⁹ Decision No 574/2007/EC of the European Parliament and of the Council of 23 May 2007, [OJ L 144/22].

³⁰ Decision No 575/2007/EC of the European Parliament and of the Council of 23 May 2007, [OJ L 144/45].

Common Immigration Policy for Europe: Principles, Actions and Tools”³¹, which involves more developed burden-sharing and shifting mechanisms. In line with such Communication, a Regulation of the European Parliament and of the Council establishing a European Asylum Support Office³² has been proposed, which purports to establish an agency in charge of organizing support activities that act as an incentive to practical cooperation between the Member States.

Although in principle the EU Member States have a burden-sharing tendency only between themselves, it is exceptionally noticeable that the burden-sharing instruments of the EU cover a small group of distinguished non-member States. Unlike other third countries, Switzerland, Norway, Iceland and Liechtenstein are these countries covered by most of the burden-sharing instruments of the Union stated above. For instance, Norway and Iceland have been full operational members of the Schengen and Dublin II Regulations and the EUODAC Regulation³³. Switzerland has been added to these two countries recently³⁴. In addition to Switzerland, Liechtenstein is expected to accede to the Dublin/EUODAC agreements soon.³⁵

2. EU readmission agreements as an asylum policy instrument

In order to position Turkey within the aforementioned dynamics of European asylum and migration *acquis*, a closer look at the foreign and security policy aspects of the said legal framework is necessary. In this respect, it is of prime importance to note the connection between international cooperation and the implementation of the EU asylum *acquis*.

‘First country of asylum’ and ‘safe third country’ rules have no foundation in international law, as international customary law only imposes the obligation on States to take back their own citizens,³⁶

³¹ COM (2008) 359 available at http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DosId=197142 [visited on 15 December 2009].

³² Proposal for a Regulation of the European Parliament and of the Council establishing a European Asylum Support Office {SEC(2009) 153} {SEC(2009) 154} /* COM/2009/0066 final - COD 2009/0027 */

³³ Council Decision 2006/167/EC of 21 February 2006 on the conclusion of a Protocol to the Agreement between the European Community and the Republic of Iceland and the Kingdom of Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Iceland or Norway [OJ L 57 of 28.2.2006].

³⁴ Council Decision 2008/147/EC of 28 January 2008 on the conclusion on behalf of the European Community of the Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland [OJ L 53 of 27.2.2008]; Switzerland held referenda on taking part to the Dublin and EUODAC Regulations in June and September 2005.

³⁵ See Council Decision of 24 October 2008 on the conclusion of a Protocol between the European Community, the Swiss Confederation and the Principality of Liechtenstein to the Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland [OJ L 161 of 24.06.2009]. After signature of the agreements in 2008, the Liechtenstein Parliament approved the treaty texts for Liechtenstein’s participation in the agreements in June 2008. Parliament adopted the necessary implementing legislation in September 2008. (See Office for Foreign Affairs, Principality of Liechtenstein, Liechtenstein - Facts and Figures, p.5 available at http://www.liechtenstein.li/en/grundlagenpapier_finanzplatz_2007e-2.pdf [visited on 15 December 2009]. Liechtenstein’s accession to the Schengen system however, has recently been blocked by the Swedish Parliament due to tax evasion issues. See SR International, Liechtenstein’s Schengen-Accession Stopped, 19 May 2009, available at <http://www.sr.se/cgi-bin/International/nyhetssidor/amnessida.asp?programID=2054&Nyheter=0&grupp=3574&artikel=2845515> [visited on 15 December 2009].

³⁶ Although the Western European governments persistently claim that international law obliges States to take back their own citizens, some States manifestly refuse to comply with this obligation. Therefore, the European Community also had to conclude readmission agreements including provisions on the admission of their own nationals. Gregor Noll, Rejected

not the citizens of third countries.³⁷ Some scholars argue that readmission of foreign nationals could be regarded as a responsibility linked to the “principle of neighborliness” and the responsibility of a state to other states, deriving from its territory. This would indicate that the ideas of good neighborhood and European solidarity imply that each state bears the responsibility for aliens who have crossed its territory on their way to a neighboring state.³⁸ It is difficult however, to support this argument in the case of refugees, as European solidarity should work the other way around when protection seekers are concerned. In this respect, it would be more appropriate to speak of solidarity for providing a safe haven for protection seekers. This requires a fair-sharing of the burden as indicated in a number of instances by the UNHCR’s Executive Committee, the most authoritative voice in the interpretation of the 1951 Refugee Convention.³⁹

On the other hand, Member States of the EU introduced such ‘first country of asylum’ and ‘safe third country’ rules in their domestic laws, which were subsequently harmonized by the Asylum Procedures Directive, without consulting the countries which might potentially bear its burden as a result of the burden-shifting effects of the practices in question. A Member State cannot however, effectively implement such mechanisms without having convinced the third countries concerned to admit the asylum seekers. Hence, each of the provisions in the Asylum Procedures Directive regarding the “first country of asylum”⁴⁰, “safe third country”⁴¹ and “super safe third country”⁴² rules contain an admission requirement by a third country as a condition for implementation. Accordingly, in the event that a third country refuses to admit the asylum seeker concerned, the Member State in question must bear the responsibility of the protection seeker and let him/her have access to the ordinary asylum procedure.

In this legal environment, the external dimension of protection becomes one of the pillars of the mechanism, which is designed to shift the responsibility of protection seekers to third countries. Readmission agreements have appeared as a solution to make such rules operable by creating a mechanism capable of forcing transit countries concerned to readmit asylum seekers as well as migrants.⁴³

The term “readmission agreement” has been authoritatively defined by Gregor Noll as “*an agreement whereby both parties undertake to admit their own citizens illegally residing on each*

(Contd.) _____

Asylum Seekers: The Problem of Return, New Issues in Refugee Research: UNHCR Working Paper No. 4, May 1999, p. 16.

³⁷ See Lavenex, “Safe Third Countries”, p. 78.

³⁸ Keil Hailbronner, “*Readmission Agreements and the Obligation of States under Public International Law to Readmit their own and Foreign Nationals*”, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, No. 57, p. 31. as quoted in Trauner, Kruse, “*EC Visa Facilitation and Readmission Agreements: Implementing a New EU Security Approach in the Neighbourhood*”, CEPS Working Document No. 290/April 2008, p. 9.

³⁹ See EXCOM Conclusion No 11 (XXIX) – 1978; EXCOM Conclusion No. 15 (XXX) – 1979; EXCOM Conclusion No 19 (XXXI) – 1980; EXCOM Conclusion No 22 (XXXII) – 1981; EXCOM Conclusion No 61 (XLI) – 1990; EXCOM Conclusion No 67 (XLII) – 1991; EXCOM Conclusion No 68 (XLIII) – 1992; EXCOM Conclusion No 71 (XLIV) – 1993; EXCOM Conclusion No 74 (XLV) – 1994; EXCOM Conclusion No 77 (XLVI) – 1995; EXCOM Conclusion No 79 (XLVII) – 1996; EXCOM Conclusion No 80 (XLVII) – 1996; EXCOM Conclusion No 81 (XLVIII) – 1997; EXCOM Conclusion No 85 (XLIX) – 1998; EXCOM Conclusion No 87 (L) – 1999; EXCOM Conclusion No 89 (LI) – 2000; EXCOM Conclusion No 90 (LII) – 2001; EXCOM Conclusion No 93 (LIII) – 2002; EXCOM Conclusion No 95 (LIV) – 2003; EXCOM Conclusion No 97 (LIV) – 2003; EXCOM Conclusion No 99 (LV) – 2004; EXCOM Conclusion No 100 (LV) – 2004; EXCOM Conclusion No 102 (LVI) – 2005; EXCOM Conclusion No 104 (LVI) – 2005; EXCOM Conclusion No 107 (LVIII) – 2007.

⁴⁰ See Asylum Procedures Directive, Article 26.

⁴¹ *Ibid.*, Article 27(4).

⁴² *Ibid.*, Article 36(6).

⁴³ Morten Kjaerum, “*Refugee Protection Between State Interests and Human Rights: Where is Europe Heading?*”, *Human Rights Quarterly*, Vol. 24, p. 518.

*others' territory and/or third country citizens who illegally entered each others' territory transiting through their own territories".*⁴⁴

The European Community is involved in such agreements in two different ways:

First, the Community has inserted readmission clauses into the association and cooperation agreements it signed with non-member states. Before the Treaty of Amsterdam entered into force, the Community did not have the competence to conclude binding agreements with non-members States on behalf of the Member States. However, the 'safe third country', 'first country of asylum' and 'safe country of origin' practices as appeared in the London resolutions in 1992 necessitated a harmonized action on the readmission policy. Therefore, in December 1994 the Council made a recommendation for a specimen bilateral readmission agreement between a Member State and a third country.⁴⁵ This was followed by other recommendations such as the Recommendation on the Guiding Principles to be Followed in Drawing up Protocols on the Implementation of Readmission Agreements in July 1995⁴⁶ and Council Conclusions Concerning Readmission Clauses to be Inserted in Future Mixed Agreements in March 1996.⁴⁷ In practice, since 1995, the Community has been persistent on inserting clauses into the cooperation and association agreements involving an obligation for non-member States to readmit their own citizens when approached by an EU Member State and further, to negotiate bilateral readmission agreements with Member States on the details of readmission of their own citizens and/or readmission of citizens of third countries.⁴⁸ By the end of 1999, 130 readmission agreements were in force between 15 EU Member States, plus Iceland and Norway, and 58 third countries.⁴⁹

Secondly, after being granted competence by the Amsterdam Treaty, the Community itself has entered into readmission agreements in its own name. In April 2002, the Justice and Home Affairs Council identified the following five selection criteria to determine which States to sign Community readmission agreements with:

- Migration pressure exerted by flows from or via third country;
- Countries with which accession negotiations were continuing were excluded;
- Geographical position in relation to the Union;
- Added value of a Community agreement compared to the agreements signed by individual Member States;
- Geographical balance shall be maintained between various regions of origin and transit of illegal migration flows.⁵⁰

Accordingly, so far, the Community has entered into readmission agreements with Hong Kong,⁵¹ Sri Lanka,⁵² Macao,⁵³ Albania,⁵⁴ Bosnia Herzegovina,⁵⁵ Macedonia,⁵⁶ Moldova,⁵⁷ Montenegro,⁵⁸ the

⁴⁴ See *supra* Noll, "Rejected Asylum Seekers", p. 16.

⁴⁵ Council Recommendation Concerning a specimen Bilateral Admission Agreement between a Member State of the EU and a Third Country of 1 December 1994, [OJ C 274], p. 20.

⁴⁶ Council Recommendation of 24 July 1995 on the Guiding Principles to be Followed in Drawing up Protocols on the Implementation of Readmission Agreements, 1996, [OJ C 274/25].

⁴⁷ Council Conclusions of 4 March 1996 Concerning Readmission Clauses to be inserted in Future Mixed Agreements docs No. 4272/96 ASIM 6 and 5457/96 ASIM 37.

⁴⁸ Steve Peers, Readmission Agreements and EC External Migration Law, Statewatch Analysis No. 17, available at <http://www.statewatch.org/news/2003/may/readmission.pdf> [visited on 13.09.2006].

⁴⁹ Council Doc. 11486/2/99 of 24 November 1999 on the Inventory of Readmission Agreements.

⁵⁰ Council Doc. 7999/02 of 15 April 2002 on the Criteria for the Identification of Third Countries With Which New Readmission Agreements Need to be Negotiated.

Russian Federation,⁵⁹ Serbia,⁶⁰ Sri Lanka,⁶¹ and Ukraine.⁶² There are also ongoing negotiations with Algeria, China, Morocco, Pakistan and Turkey.

As Gregor Noll has observed, readmission agreements generally have a reciprocal structure hence; they establish rights and obligations for both parties.⁶³ As opposed to this, an asymmetrical reciprocity between the European Community, Member States and non-member States is also visible in these legal instruments, since non-member States would not normally be expected to expel illegal migrants to the European Community or to the Member States. Therefore, the European Community has had to provide benefits to these countries other than the benefits, which a simple readmission agreement would normally offer. As a result, it has been observed that readmission agreements have been concluded with non-member countries in larger contexts.⁶⁴ In this regard, third countries have agreed

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⁵¹ Agreement between the Government of Hong Kong Special Administrative Region of the People's Republic of China and the European Community on the Readmission of Persons Residing without Authorization, 27 November 2002, [OJ C 31 E/163].

⁵² Agreement Between the Democratic Socialist Republic of Sri Lanka and the European Community on the Readmission of Persons Residing without Authorization, 21 March 2003, SEC (2003) 255.

⁵³ Agreement Between the European Community and the Macao Special Administrative Region of the People's Republic of China on the Readmission of Persons Residing without Authorization 30 April 2004 [OJ 2004 L143/97].

⁵⁴ Agreement between the Republic of Albania and the European Community on the Readmission of Persons Residing without Authorization COM (2004) 92, 12 February 2004.

⁵⁵ Council Decision of 18 February 2008 2008/211/EC on the principles, priorities and conditions contained in the European Partnership with Bosnia Herzegovina and repealing decision 2006/55/EC [OJ L 80], 19.3.2008.

⁵⁶ Council Decision of 18 February 2008 2008/212/EC on the principles, priorities and conditions contained in the Accession Partnership with the former Yugoslav Republic of Macedonia and repealing Decision 2006/57/EC [OJ L 80], 19.3.2008.

⁵⁷ Council Decision of 22 November 2007 on the conclusion of the Agreement between the European Community and the Republic of Moldova on the readmission of persons residing without authorization. [OJ L 334/148], 19.12.2007.

⁵⁸ Council Decision of 22 January 2007 2007/49/EC on the principles, priorities and conditions contained in the European Partnership with Montenegro: Although making reference to establishing asylum law framework there is no reference to an undertaking for negotiating a community readmission agreement [OJ L 20], 27.1.2007.

⁵⁹ Council Decision of 19 April 2007 on the conclusion of the Agreement between the European Community and the Russian Federation on readmission [OJ L 129/38], 17.5.2007.

⁶⁰ Council Decision of 18 February 2008 2008/213/EC on the principles, priorities and conditions contained in the European Partnership with Serbia including Kosovo as defined by United Nations Security Council Resolution 1244 of 10 June 1999 and repealing Decision 2006/56/EC [OJ L 80], 19.3.2008.

⁶¹ Agreement Between the Democratic Socialist Republic of Sri Lanka and the European Community on the Readmission of Persons Residing without Authorization, 21 March 2003, SEC (2003) 255, [OJ L 124], 17.5.2005.

⁶² Council Decision of 29 November 2007 concerning the conclusion of the Agreement between the European Community and Ukraine on readmission of persons [OJ L 332/46], 18.12.2007.

⁶³ See *supra* Noll, Rejected Asylum Seekers: The Problem of Return, p. 16.

⁶⁴ The Commission's following statements in the 'Communication COM(2002) 703 final of 3.12.2002 on Integrating Migration Issues in the European Union's Relations with Third Countries, p. 25' reveals the Commissions' parallel understanding on this matter: *"to negotiate a readmission agreement, which is seen as being in the sole interest of the Community, should not be underestimated and no quick results should be expected. They can only succeed if they are part of a broader co-operation agenda, which takes duly into account the problems encountered by partner countries to effectively address migration issues. This is the reason why the Commission considers that the issue of "leverage" – i.e. providing incentives to obtain the co-operation of third countries in the negotiation and conclusion of readmission agreements with the European Community – should be envisaged on a country by country basis."*, available at <http://www.statewatch.org/news/2002/dec/MIGR.DOC> [visited on 13.09.2006]. As the Commission noted in its Communication No COM(2002)703 (3.12.2002, p. 26) however, it is not always easy to convince the transit countries for concluding readmission agreements. Therefore, a growing tendency of compulsion rather than encouragement in the Community's strategy towards third countries can be observed in some documents. For instance, the Seville European Council of June 2002 adopted a conclusion which provided that each future association and cooperation agreement should include a clause on joint management of migration flows and compulsory readmission in the event of illegal

to undertake readmission obligations in return for certain benefits granted by the Union, which they value higher than the expected burden of asylum seekers and migrants in question. From a benefit perspective these agreements can be grouped under four main categories:

- **Agreements concluded in the context of development cooperation**

The Community readmission agreements concluded with African, Caribbean and Pacific countries and Sri Lanka bear a visible development cooperation perspective.⁶⁵ The EU has imposed readmission obligations as a condition for granting development aid. For instance, Article 13(c) of the Cotonou Agreement between the EU and African, Caribbean and Pacific States provides:

“Each of the ACP States shall accept the return of and readmission of any of its nationals who are illegally present on the territory of a Member State of the EU, at that Member State’s request and without further formalities.”⁶⁶

This is regarded as a basis for supplementary bilateral readmission agreements between EU Member States and selected ACP countries.⁶⁷ At this point, it is important to note that the ACP countries were not considered eligible for visa facilitation agreements, as they were motivated to assume readmission obligations through development aid programs.

- **Agreements concluded in the context of economic cooperation**

A Community readmission agreement was concluded with Macao in 2004.⁶⁸ The Union has strong economic interests in Macao as it is its third largest trading partner.⁶⁹ Therefore, the Commission considers Macao as “an important business partner that has many common values and institutional structures with the EU in the economic, regulatory, social and cultural spheres”.⁷⁰ This relationship is, to a great extent, based on a Trade and Cooperation Agreement concluded between the EU and Macao on 14 December 1992.⁷¹

The incentives and the interests in play for the conclusion of the Community readmission agreement with Hong Kong⁷² were similar to the case of Macao.

- **Neighborhood association with the Mediterranean and the new eastern neighbors**

(Contd.) _____

migration. It was further expressed that inadequate cooperation by a third State could hamper further development of relations with the Union, following a systematic assessment of relations with that country. In the event of unjustified lack of cooperation the Union might adopt measures or positions while honoring the Union’s contractual commitments but not jeopardizing the objectives of development cooperation. (See Presidency Conclusions 13462/02 of Seville European Council of 21-22 June 2002, para. 35-36.)

⁶⁵ Council Decision of 27 March 1995 concerning the conclusion of the Cooperation Agreement between the European Community and the Democratic Socialist Republic of Sri Lanka on Partnership and Development; Agreement Between the Democratic Socialist Republic of Sri Lanka and the European Community on the Readmission of Persons Residing without Authorisation, 21 March 2003, SEC (2003) 255, [OJ L 124], 17.5.2005.

⁶⁶ Cotonou Agreement between the EU and African, Caribbean and Pacific States, 2000, [OJ L 317].

⁶⁷ Commission of the European Communities, Communication from the Commission to the Council and the European Parliament. The Global Approach to Migration one year on: Towards a comprehensive European Migration Policy, COM (2006) 735 final, Brussels.

⁶⁸ Agreement Between the European Community and the Macao Special Administrative Region of the People’s Republic of China on the Readmission of Persons Residing without Authorization 30 April 2004 [OJ 2004 L143/97].

⁶⁹ On 12 November 1999, the Commission adopted a Communication to the Council and the European Parliament entitled “The EU and Macao: Beyond 2000” COM/99/0484 final.

⁷⁰ Communication from the Commission to the Council and the European Parliament - The European Union, Hong Kong and Macao: possibilities for cooperation 2007-2013 COM/2006/0648 final.

⁷¹ 31 December 1992, [OJ L 404], p. 27.

⁷² Agreement between the Government of Hong Kong Special Administrative Region of the People’s Republic of China and the European Community on the Readmission of Persons Residing without Authorization, 27 November 2002, [OJ C 31 E/163].

The format of the relationship in the neighborhood association with Mediterranean and new eastern neighbors has a similar character to the aforementioned development cooperation agreements, the only difference being that the relationship is at a more advanced level in the neighborhood policy, which includes intensive institutional cooperation. In this context, the readmission obligations are also imposed in return of financial benefits and development aid. The European Neighborhood Policy Strategy Paper, which the Commission prepared in 2004, provides: “*Action Plans should also reflect the Union’s interest in concluding readmission agreements with the partner countries.*”⁷³

The European Neighborhood policy covers Southern Mediterranean countries as well as some countries at the Eastern borders of the Union. In this context, Community readmission agreements have recently been concluded with Ukraine,⁷⁴ the Russian Federation,⁷⁵ and Moldova.⁷⁶

- **Agreements concluded in the context of accession association as a part of the framework of enlargement negotiations with third countries.**

In the case of Central and Eastern European States, which recently became full members, the Union had endorsed road maps encouraging them to conclude bilateral readmission agreements with Member States and other transit countries. On the other hand, beginning with Turkey, the Union took a different approach and imposed Community readmission agreements in addition to the bilateral readmission agreements in the context of enlargement. The States of Western Balkans, which were given a membership perspective beginning with the year 2000,⁷⁷ also joined Turkey in facing an obligation to negotiate a Community readmission agreement. The readmission requirements for Albania,⁷⁸ Bosnia Herzegovina,⁷⁹ Serbia⁸⁰ and the Former Yugoslav Republic of Macedonia,⁸¹ appeared in the partnership documents endorsed by the Council as short-term priorities. However, the Council Decision 2007/49/EC concerning partnership with Montenegro did not impose a clear obligation to negotiate a Community or other readmission agreement but only addressed the necessity

⁷³ European Neighborhood Policy Strategy Paper, COM(2004) 373 final, 12.5.2004, p. 17.

⁷⁴ Council Decision of 29 November 2007 concerning the conclusion of the Agreement between the European Community and Ukraine on readmission of persons [OJ L 332/46], 18.12.2007.

⁷⁵ Council Decision of 19 April 2007 on the conclusion of the Agreement between the European Community and the Russian Federation on readmission [OJ L 129/38], 17.5.2007.

⁷⁶ Council Decision of 22 November 2007 on the conclusion of the Agreement between the European Community and the Republic of Moldova on the readmission of persons residing without authorization. [OJ L 334/148], 19.12.2007.

⁷⁷ The Feira European Council in June 2000 recognized that all the countries of the Western Balkans are potential candidates for membership of the EU. Zagreb Declaration of November 2000 between the EU and the countries participating in the stabilization and association process.. This was affirmed in the Thessalonica European Council of June 2003.

⁷⁸ Council Decision of 18 February 2008 2008/210/EC on the principles, priorities and conditions contained in the European Partnership with Albania and repealing decision 2006/54/EC [OJ L 80], 19.3.2008.

⁷⁹ Council Decision of 18 February 2008 2008/211/EC on the principles, priorities and conditions contained in the European Partnership with Bosnia Herzegovina and repealing decision 2006/55/EC [OJ L 80], 19.3.2008.

⁸⁰ Council Decision of 18 February 2008 2008/213/EC on the principles, priorities and conditions contained in the European Partnership with Serbia including Kosovo as defined by United Nations Security Council Resolution 1244 of 10 June 1999 and repealing Decision 2006/56/EC [OJ L 80], 19.3.2008.

⁸¹ Council Decision of 18 February 2008 2008/212/EC on the principles, priorities and conditions contained in the Accession Partnership with the former Yugoslav Republic of Macedonia and repealing Decision 2006/57/EC [OJ L 80], 19.3.2008.

to develop the asylum law framework in more general terms.⁸² Finally, nevertheless all of these countries concluded Community readmission agreements.⁸³

II. The *sui generis* tale of an acceding State

Evolution of the Turkey-EU relations with a view to undertaking migration obligations

Turkish asylum law, as it stands, is to a great extent regulated by a single by-law adopted in 1994⁸⁴ for the purpose of implementing Turkey's obligations under the 1951 Refugee Convention. This instrument has established an asylum system that is based on the geographical limitation under the Convention. Accordingly, the term 'refugee' refers to European⁸⁵ refugees while the term 'asylum seeker' addresses non-Europeans who fit the refugee definition in the 1951 Refugee Convention. In international literature, an asylum seeker would become a refugee after recognition, whereas this is not the case under the Turkish law. Hence, being recognized as an 'asylum seeker' only enables an alien to remain in Turkey until he or she is recognized by UNHCR as a refugee and subsequently resettled to a third country. Applicants for the 'asylum seeker' status are interviewed by both the Ministry of Interior and UNHCR officers. Upon application, they are granted *ex officio* six months' residence permit, which is automatically renewable for another six months. At the end of this second period, extension of the residence permit is under the discretion of the Ministry of Interior. Therefore, the Turkish asylum system does not offer a refugee status for non-European asylum seekers but, by merely providing a temporary status, delegates the responsibility thereof to the UNHCR.

Having faced problems concerning deportation cases with the European Court of Human Rights⁸⁶, the Turkish Ministry of Interior adopted an internal asylum directive⁸⁷ in 2006, which introduced

⁸² Council Decision of 22 January 2007, 2007/49/EC on the principles, priorities and conditions contained in the European Partnership with Montenegro: Although making reference to establishing asylum law framework there is no reference to an undertaking for negotiating a community readmission agreement [OJ L 20], 27.1.2007.

⁸³ Council Decision of 3 March 2005 on the signing of the Agreement between the European Community and the Republic of Albania on the readmission of persons residing without authorization [OJ L 124/21], 17.5.2005; Council Decision of 8 November 2007 on the conclusion of the Agreement between the European Community and the Republic of Serbia on the readmission of persons residing without authorization [OJ L 334/45], 19.12.2007; Council Decision of 8 November 2007 on the conclusion of the Agreement between the European Community and the Republic of Montenegro on the readmission of persons residing without authorization [OJ L 334/25], 19.12.2007; Council Decision of 8 November 2007 on the conclusion of the Agreement between the European Community and Bosnia and Herzegovina on the readmission of persons residing without authorization [OJ L 334/65], 19.12.2007. Council Decision of 8 November 2007 on the conclusion of the Agreement between the European Community and the former Yugoslav Republic of Macedonia on the readmission of persons residing without authorization [OJ L 334/1], 19.12.2007.

⁸⁴ By-Law No. 94/6169 of 30 November 1994 on the Procedures and Principles Related to Population Movements and Aliens Arriving in Turkey Either as Individuals or in Groups Wishing to Seek Asylum Either From Turkey or Requesting Residence Permits in Order to Seek Asylum from Another Country, R.G. No. 22127, 30.11.1994. The By-Law was further subject to two amendments: See Council of Ministers Decree No. 98/12243 Concerning the Amendment of the By-Law on the Procedures and Principles Related to Population Movements and Aliens Arriving in Turkey Either as Individuals or in Groups Wishing to Seek Asylum either from Turkey or Requesting Residence Permits in order to Seek Asylum from Another Country, R.G. No. 23582, 13.01.1999; By-Law by the Council of Ministers Decree No. 2006/9938 of 16.01.2006, R.G. No. 26062, 27.01.2006.

⁸⁵ The Turkish Government perceives Europe as the member States of the Council of Europe: See Ministry of Foreign Affairs of Turkey, Circular No. BMGY III 2542-3799 of 13 August 1996.

⁸⁶ See for instance, *Jabari v. Turkey*, ECtHR, Judgement of 11 July 2000, Application No. 40035/98; *Mamatkulov and Abdurasulovic v. Turkey*, ECtHR, Judgement of 6 February 2003, Application Nos. 46827/99 and 46951/99; *D. and Others v. Turkey*, ECtHR, Judgement of 22 June 2006, Application No. 24245/03.

⁸⁷ General Directorate of Security of the Ministry of Interior of Turkey, Directive No. 57 of 22 June 2006, Document No. B.05.1.EGM.0.13.03.02./16147.

certain asylum mechanisms of the EU asylum *acquis* such as accelerated asylum procedures, subsidiary protection status, in addition to a list of humanitarian grounds for granting residence permit including but not limited to health, education, family unification purposes or application to a court. The mechanisms in the Directive however, have a remarkably narrower and restrictive scope compared to the relevant EU *acquis*. For instance, the subsidiary protection status created under the Turkish directive does not cover persons fleeing from indiscriminate violence in situations of international or internal armed conflict. Accordingly, Turkish authorities may only grant subsidiary protection status if there are substantial grounds for believing that, after being deported, the applicant will face a real risk in the context of European Convention on Human Rights. Unlike the Qualification Directive of the EU, the subsidiary protection status does not entail rights comparable to that of refugee status but it merely prevents deportation.

Furthermore, because a directive is an administrative instrument that concerns the internal organization of a public authority under the Turkish law, it is not accessible by the public, as it is not published in the Official Journal. Turkish judicial practice has shown that even the Council of State is encountering problems with accessing the Directive concerned.⁸⁸ In the light of the above, the Turkish asylum law framework demonstrates a visible need for a comprehensive legislation in order to provide an effective asylum system with procedural guarantees and specific institutional structure but without any geographical limitation.

Considering the substantial deepening of the Community *acquis* in this area, asylum and migration have undoubtedly become a challenging area of the EU accession for Turkey. The road map for Turkey's harmonization of asylum legislation was initially drawn by the Accession Partnership document, which was first adopted in 2001⁸⁹ and subsequently revised in 2003⁹⁰ and 2008.⁹¹ This document sets forth the following objectives on migration and asylum policy concerning Turkey's accession to the EU:

- In the short-term: Struggle against illegal migration will be further strengthened and a readmission agreement will be negotiated with the Commission,
- In the medium-term: The EU *Acquis* and practices on migration (permission for entrance and re-entrance into the territory and deportation) will be adopted and put into force for the purposes of preventing illegal migration. Alignment in the field of asylum will be ensured, activities striving to lift the geographical limitation of the 1951 Refugee Convention will commence, also the system for evaluating and deciding on the asylum claims will be strengthened and accommodation centers and social assistance will be provided for asylum seekers and refugees.

Shortly after the second revision of the Accession Partnership Document, the Turkish Government published the National Program for the Adoption of the EU *Acquis*, which was published in the Official Gazette on 24 July 2003.⁹² This document provided a detailed list of undertakings of the Turkish Government on asylum and migration issues, including a comprehensive legislative reform. In this respect, the Turkish Government had planned the adoption of the Law on Aliens by 1 January

⁸⁸ In December 2009, the 10th Chamber of the Turkish Council of State requested a copy of the Implementation Directive No. 57 in connection with a case pending before the Court, where the applicant challenged the validity of Articles 12 and 13 of the Directive. The Ministry of Interior however, failed to provide a copy of the Directive so that the Chamber had to render a second decision requiring the Ministry to provide a copy of the Directive. See Alimojiang Abdurehaman v. Turkish Ministry of Interior, Turkish Council of State, Decision of 7.12.2009, E. 2009/8048.

⁸⁹ Council Decision 2001/235/EC of 8 March 2001 on the principles, priorities, intermediate objectives and conditions contained in the Accession Partnership with the Republic of Turkey, [OJ L 85/13], 24.03.2001.

⁹⁰ Council Decision 2003/398/EC of 19 May 2003 on the Principles, Priorities, Intermediate Objectives and Conditions in the Accession Partnership with the Republic of Turkey, [OJ L145], 12.06.2003.

⁹¹ Council Decision 2008/157/EC of 18 February 2008 on the principles, priorities and conditions contained in the Accession Partnership with the Republic of Turkey [OJ L51], 26.02.2008.

⁹² Turkey's National Program for the Adoption of the *Acquis*, R.G. No. 25178 bis., 24.07.2003.

2005 and the Law on Asylum during 2005 and to lift the geographical limitation under the 1951 Refugee Convention.

By 2003, both the conditions and the anticipated content of the Law on Asylum showed that the Turkish contingent was not yet prepared for the asylum harmonization. Hence, the Program indicated that the Law on Asylum, which would be adopted before the end of 2005 should include provisions corresponding to the implementation of the Dublin Treaty and the Dublin II Regulation, EURODAC and the Council Decision of the European Refugee Fund.⁹³ It was not however, plausible to adopt rules corresponding to those instruments in a domestic legislation, since they could only be applied with mutual consent. For instance, establishing the criteria for determining the State responsible for asylum applications would only be meaningful if the State was part of the Dublin regime. This was also the case for the EURODAC Regulation. Furthermore, the European Refugee Fund was established in order to assist financial burden-sharing of the Member States through funding specific asylum related activities of the Member States. Therefore, adopting rules concerning the European Refugee Fund in 2005 under Turkish domestic law would not work either since Turkey did not qualify as a beneficiary of the Fund. In fact, the Decision establishing the European Refugee Fund clearly states in item (11) of the preamble that: *"In the light of the scope and the purpose of the Fund, it should not, in any event, support actions with respect to areas and centres for holding persons in third countries."*⁹⁴

On the other hand, Turkey's Action Plan on Asylum and Migration that was adopted in 2005⁹⁵ shows that the Turkish contingent had come to realize the dynamics of the European asylum framework relating to its effects on the neighboring countries including Turkey. The Plan revised certain important objectives set forth in the 2003 National Program. For instance, the deadlines for adoption of the Law on Asylum and the Law on Aliens have been postponed to 2012.⁹⁶ It was indicated that the fate of these two codes was strongly linked to the negotiations on burden-sharing between the European Commission and the Turkish Government. This point was criticized by Amnesty International, which published a media briefing on the Action Plan.⁹⁷ The Plan further indicated that a proposal for lifting the geographical limitation was expected to be submitted to the Turkish Grand National Assembly in 2012 in line with the completion of Turkey's negotiations for accession to the EU.⁹⁸ It is noticeable that the unilateral objectives concerning the Dublin II Regulation, the EURODAC and the European Refugee Fund were replaced with new goals; such as the establishment of an asylum and migration specialization unit, a training academy, a country of origin information system, reception and accommodation centers for asylum seekers, initiation of accelerated procedures for asylum decisions, standards on applying for administrative justice against asylum decisions, on non-*refoulement*, on family unification procedures, on subsidiary protection, and establishing an integration system for refugees,⁹⁹ etc..

More recently however, Turkey adopted another national program for the adoption of the EU *acquis*, which was published in the Turkish Official Journal on 31 December 2008. The updated

⁹³ *Ibid.*, table 24.1.1.

⁹⁴ See Decision No 573/2007/EC.

⁹⁵ See Turkey's 2005 Action Plan on Asylum and Migration.

⁹⁶ *Ibid.* see annexed table titled 'Ministries, Institutions, and Agencies Responsible for Implementing the National Action Plan.

⁹⁷ Amnesty International Turkey Branch, *İltica ve Göç Ulusal Eylem Planı: Eksik Olan İnsani Duyarlılık*, 19 May 2005, <http://www.amnesty-turkiye.org/sindex.php3?sindex=vifois2405200501> [visited on 25 August, 2005].

⁹⁸ *Ibid.*, para. 4.13.

⁹⁹ For a detailed analysis of the current situation in Turkey see Lami Bertan Tokuzlu, *"Integration of Aliens Under the Turkish Law"*, Integration Policies: The View from Southern and Eastern Mediterranean Countries, Articles submitted in the CARIM Consortium Seminar Tunis 12-15 December 2005, Robert Schuman Centre, European University Institute, available at <http://www.carim.org> [visited on 20 September, 2006].

Program maintains the scepticism and conditional approach of the 2005 Action Plan on Asylum and Migration. In fact, it shows that the problem has become acute among the parties. While generally maintaining the conditional position of the Government in the 2005 Action Plan, the latest National Program indicates that legislation regarding asylum and aliens will be adopted before the end of 2010. The Program however, makes reference to the conditions in the 2005 Action Plan and indicates that the new laws will be adopted maintaining the geographical limitation under the 1951 Refugee Convention. Furthermore, the Program contains no reference to the adoption of the Community readmission agreement, although Turkey recently agreed to resume formal negotiations on the Community readmission agreement blocked since December 2006.¹⁰⁰ These two facts lead to the conclusion that Turkey will maintain its current position unless the EU takes further steps on burden-sharing. Therefore, Turkey's future plans for improving its asylum system still betray visible hesitation in proceeding with an overall change in the asylum law framework.

2. The Grounds of hesitation for developing an effective asylum system

Grounds for the hesitation can be found in the EU asylum *acquis* itself. It is notable that, on the one hand, the Union appears to be a strong supporter of Turkey's efforts for developing its asylum laws and, on the other hand, it constitutes the biggest obstacle for Turkey in achieving this end. This conclusion is reached by an analysis of the EU's existing asylum *acquis* and the position of Turkey as a transit country.

The current Turkish asylum law is designed to give Turkey a transit role for asylum seekers rather than allowing them to stay permanently. Theoretically, it is possible for European asylum seekers to obtain refugee status and stay in Turkey however, this has not been granted even to Chechnians¹⁰¹ or Bosnians who remain in Turkey with humanitarian residence permits granted under the general provisions of the Law on Residence and Travel of Aliens. The number of asylum seekers availing themselves of the asylum procedure in Turkey per year was approximately 5,000 until 2004.¹⁰² However, the number of applications has dramatically increased lately. The UNHCR Branch Office in Turkey has become the second largest operation of the organization in the World, with approximately 13.000 new claims in 2008.¹⁰³ The number of smugglers captured between 1998 and 2006 reflects the significance of Turkey as a route for illegal migrants and asylum seekers.¹⁰⁴ Within this period, Turkey apprehended 5961 smugglers of 32 different nationalities.¹⁰⁵

¹⁰⁰ European Commission, Commission Staff Working Document: Turkey 2009 Progress Report, p. 74.

¹⁰¹ For the status of Chechens in Turkey, see Mehmet Terzioğlu, "*Göçmen Ülkesi Olarak Türkiye: Hukuksal Yapı ve Uygulamalar*", 8-11 December 2005 International Migration Symposium Communiqué, July 2006, Zeytinburnu Municipality, p. 170.

¹⁰² Ahmet İçduygu, "*Demographic Mobility and Turkey: Migration Experiences and Government Responses*", Mediterranean Quarterly, Fall 2004, p. 89.

¹⁰³ 2008 Global Trends: Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless Persons, 16 June 2009, UNHCR, p. 16. Available at <http://www.unhcr.org/4a375c426.html> [visited on 9 December, 2009]

¹⁰⁴ For a comprehensive analysis of the changing migration patterns in Turkey see Didem Danış, Cherie Taraghi, Jean-François Pérouse, "*Integration in Limbo: Iraqi, Aghan, Maghrebi and Iranian Migrants in Istanbul*", Land of Diverse Migrations: Challenges of Emigration and Immigration in Turkey, Ahmet İçduygu, Kemal Kirişçi (eds.), İstanbul Bilgi University Press, 2009, pp. 443-626.

¹⁰⁵ See Terzioğlu, p. 171. For further information on the demographic mobility through Turkey see İçduygu, "*Demographic Mobility*", p. 91; Kaya, p. 26, Table No. 6 with reference to the People Movements Bureau: Claude-Valentin Marie identifies Turkey as a hub for immigration flows in Europe and quotes an Interior Ministry report indicating 360.000 foreigners apprehended between 1998 and 2003 in Turkey; Claude-Valentin Marie, Preventing Illegal Immigration: Juggling economic imperatives, political risks and individual rights, Council of Europe Publishing, January 2004, pp. 21 – 22; Thomas Hammarberg, Report by the Commissioner for Human Rights of the Council of Europe on Human Rights of Asylum Seekers and Refugees in Turkey (CommDH(2009)31), 1 October 2009, p. 6.

Turkey is a State party to the European Convention on Human Rights,¹⁰⁶ the Convention Against Torture¹⁰⁷ and the International Covenant on Civil and Political Rights¹⁰⁸ and has accepted the supervisory and/or judicial competences of the respective monitoring bodies. Thus, Turkey is arguably among the democratic transit countries that the EU is currently handling. Given such human rights standards, Turkey still does not qualify and function as a safe third country according to the criteria set forth in the Asylum Procedures Directive of the EU.¹⁰⁹ There are two grounds supporting this, that are immediately noticeable: First, Turkey maintains its geographical limitation under the 1951 Refugee Convention. Therefore, for the vast majority of asylum seekers there is no possibility of receiving protection according to the 1951 Refugee Convention. Secondly, Turkey is not party to readmission agreements with the Member States, except Greece.¹¹⁰ The agreement with Greece, however, does not work effectively in practice, as will be examined in further detail below. Therefore, Turkey has no general obligation to readmit third country citizens who transit through its territory towards the EU Member States, apart from Greece. Consequently, in the case of Turkey, the EU cannot effectively implement the burden-shifting tools that it has unilaterally developed. It is not possible to return asylum seekers to Turkey without a substantial assessment of their asylum claims. These factors put Turkey in the position of an ideal potential safe third country for the EU.

The road map drawn for Turkey in the Accession Partnership document implies Turkey's special position as an acceding member of the EU in asylum matters. Turkey is required to lift the geographical limitation and to negotiate a Community readmission agreement with the Commission. There is no doubt that compliance with these two requirements will bring Turkey within the definitional domain of a safe third country. In this respect, it is notable that Turkey has been the first candidate country, which was required to negotiate a Community readmission agreement throughout the accession process.¹¹¹ As noted above, the Council had decided not to impose Community readmission agreements to the previous line of acceding States.¹¹² The conclusion of a Community readmission agreement with Turkey was however, endorsed only a few months after that decision, by the Seville European Council in June 2002. In November 2002, the Council formally authorized the Commission to start negotiations on a Community readmission agreement with Turkey. The draft text was officially transmitted to the Turkish Government in March 2003.¹¹³ The negotiations which opened in May 2005¹¹⁴ have not yet been finalized.

¹⁰⁶ See Law No. 6366 of 10 March 1954, R.G. No. 8662, 19.03.1954. Declaration the competence of the Commission to receive individual complaints (Council of Ministers Decree No. 87/11439 of 22 January 1987, R.G. No. 19438, 21.04.1987) and declaration recognizing the competence of the Court (Council of Ministers Decree No. 89/14861 of 12 December 1989, R.G. 20384, 26.12.1989.)

¹⁰⁷ Council of Ministers Decree No. 88/13023 of 17 July 1988, R.G. No. 19895, 10.08.1988. Declaration recognizing the competence of the Committee Against Torture according to Article 21 CAT is available at <http://www.ohchr.org/english/countries/ratification/9.htm#reservations> [visited on 29 September, 2006]

¹⁰⁸ Council of Ministers Decree No. 2003/5451 of 7 July 2003, R.G. No. 25175, 21.07.2003. Turkey recognized the competence of the Human Rights Committee by ratifying the Optional Protocol (Council of Ministers Decree No. 2006/10692 of 29.06.2006, R.G. No. 26250, 05.08.2006.)

¹⁰⁹ Morten Kjaerum, "Article 14", Alfredsson, G., Eide, A., (eds), *The Universal Declaration of Human Rights: A Common Standard of Achievement*, The Hague 1999, Martinus Nijhoff Publishers, p. 291.

¹¹⁰ Protocol on Readmission of Illegal Migrants, Council of Ministers Decree 2002/3914 of 12 March 2002, R.G. No. 24735, 24.04.2002.

¹¹¹ For a detailed analysis of the strategic considerations of the Justice and Home Affairs Council see Nils Coleman, *European Readmission Policy: Third Country Interests and Refugee Rights*, 2007, PH. D. Thesis submitted to the European University Institute, Florence, pp. 167-169.

¹¹² Council Doc. 7999/02 of 15 April 2002 on the Criteria for the Identification of Third Countries With Which New Readmission Agreements Need to Be Negotiated.

¹¹³ Martin Schieffer, "Community Readmission Agreements with Third Countries: Objectives, Substance and Current State of Negotiations", *European Journal of Migration and Law*, Vol. 5, 2003, p. 346-347.

¹¹⁴ European Commission, COM(2005)561 final, Turkey 2005 Progress Report, 9 November 2005, p. 111.

As noted above, the Central and Eastern European Countries, which have recently become full members of the Union, were only encouraged to sign bilateral readmission agreements with the Member States and *inter se* in return for visa facilitations towards their own citizens. This gave those acceding States the possibility to choose the States with which they would establish this relationship. Whereas, in the case of a Community readmission agreement that Turkey faces, all Member States could return asylum seekers to the transit country. Considering the fact that Turkey is a more prominent transit country than the former, the impact of this Community readmission agreement on Turkey's asylum burden might be dramatic.

In this legal environment, negotiations on the Community readmission agreement were suspended and progress of the Turkish asylum framework was blocked by the following concerns: First, the visa facilitation option, which the Commission has been resorting to for other countries has turned out not to be a useful persuasion tool for the Commission when Turkey is concerned, because of Article 41 of the Additional Protocol to the Association Agreement between the Community and Turkey.¹¹⁵ The European Court of Justice rendered a judgment on 19 February 2009, in line with the long standing position of Turkey, indicating that, the *“Additional Protocol is to be interpreted as meaning that it precludes the introduction, as from the entry into force of that protocol, of a requirement that Turkish nationals such as the appellants in the main proceedings must have a visa to enter the territory of a Member State in order to provide services there on behalf of an undertaking established in Turkey, since, on that date, such a visa was not required.”*¹¹⁶ Therefore, visa facilitation is, in fact, not an incentive for Turkey on legal grounds and can be perceived as a step back from the existing rights of Turkish citizens *vis-à-vis* the EU.

Secondly, throughout the accession process Turkey is being treated as an outsider in terms of asylum issues, meaning that the legal framework with the Union lacks the necessary structural mechanisms for burden-sharing. Therefore, Turkey is concerned about becoming a destination country for asylum seekers who are refused access to the asylum procedure in the EU Member States. Considering the sensitivity of the matter in the agenda of the Member States, this may well work against Turkey's full membership in the long run since having shifted the burden of asylum seekers to Turkey, Member States may be discouraged from allowing her to become a part of a legal framework that will require re-sharing it.

Thirdly, there are good grounds for concern in the weak structural framework of the readmission agreement that is proposed to Turkey. A closer look at the readmission agreement between Turkey and Greece does give some insight into the potential problems that may be carried into the relationship between the EU and Turkey if a standard readmission agreement is concluded with the Community.

The European Council on Refugees and Exiles' 2003 Country Report for Greece indicates that, “out of the 2,500 occasions that Greece invoked the agreement, Turkey refused 2,486 cases, arguing that there was no evidence that asylum seekers had travelled through Turkey”.¹¹⁷ On the other hand, it

¹¹⁵ [OJ L 293], 29.12.1972. Article 41 of the Additional Protocol provides: “1. The Contracting Parties shall refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services. 2. The Council of Association shall, in accordance with the principles set out in Articles 13 and 14 of the Agreement of Association, determine the timetable and rules for the progressive abolition by the Contracting Parties, between themselves, of restrictions on freedom of establishment and on freedom to provide services. The Council of Association shall, when determining such timetable and rules for the various classes of activity, take into account corresponding measures already adopted by the Community in these fields and also the special economic and social circumstances of Turkey. Priority shall be given to activities making a particular contribution to the development of production and trade.”

¹¹⁶ *Mehmet Soysal, Ibrahim Savatli v Germany* [Case C-228/06] European Court of Justice, Judgment of 19.2.2009, [OJ C 90/2], 18.4.2009.

¹¹⁷ European Council on Refugees and Exiles (ECRE) Country Report for Greece 2003, p. xvi, <http://www.ecre.org/> [visited on 2 September 2005]. According to the information note of the Turkish Ministry of Interior dated 2 September 2005 since the conclusion of the Protocol the Greek Government claimed the readmission of 18199 persons 2816 of

has been repeatedly reported by the Turkish authorities that Greece prefers not to use the readmission procedure in the Protocol but sends asylum seekers informally to Turkey either by pushing the boats of illegal migrants apprehended at the borders towards Turkish waters, or by releasing them in order to let them escape towards Turkey. An information note of the Turkish Ministry of Interior dated 2 September 2005 addresses three incidents of illegal migrants being sent to Turkey in such fashion.¹¹⁸ One of those instances was the case of a sinking boat captured close to Kuşadası on 13 July 2004 from which 56 Somalian, 2 Moroccan and 6 Mauritanian nationals were rescued. When they approached the scene, Turkish authorities noticed that there were two Greek coast-guard boats beside the captured boat. Upon the request of the Turkish Ministry of Interior, the Somalian and Mauritanian nationals in question were interviewed by UNHCR officials. According to the information provided by the Turkish authorities, they stated in interview that they had paid 1400 – 2000 USD to the smugglers who brought them to Greek waters from Libya where they were apprehended by the Greek authorities, transferred to another boat, towed towards Turkish waters and released. This incident was recorded by the FLIR video camera of the Turkish coast-guard helicopter. Another similar incident reported by the Turkish Ministry of Interior took place on 11 July 2005 when 29 Mauritanian, 4 Somalian and 1 Algerian nationals in a boat close to Izmir were arrested by Turkish authorities. They had crossed to Turkish waters with a boat carrying a Turkish flag, which was known to have been confiscated by the Greek authorities in 2002 when it was used for smuggling purposes. In their interview, the migrants told the officials that they had departed from Libya and crossed the Greek waters illegally; where they were apprehended and detained for three days. Later on, they were put in the boat and taken to the Turkish waters. The Turkish authorities indicate that many other similar incidents are taking place in the area.¹¹⁹ The dispute is notably linked to the boundary dispute on the delimitation of the Aegean Sea between Turkey and Greece. Greece asserts that its islands on the Aegean Sea are entitled to their own continental shelf relying on the two prominent conventions on the Law of the Sea¹²⁰ which Turkey is not a party to. Accordingly, the delimitation line is proposed to be drawn between the easternmost Greek islands and the Turkish coast. Turkey, on the other hand, claims that a fair agreement based on equitable principles is necessary in this semi-enclosed sea, as it is a typical example of special circumstances.¹²¹ Therefore, Turkey gives priority to performing search and rescue operations in this area, in order to strengthen its position under the Law of the Sea.¹²²

The dispute on the readmission agreement has been high up in the agenda of the European Commission as well. The 2004 Regular Report on Turkey's progress towards accession prepared by the European Commission indicates that in July 2004, Turkish and Greek authorities had held the first meeting of the Co-ordination Committee established under the Readmission Protocol and discussed the implementation of this document. The Parties agreed to take measures to implement the protocol more effectively and to convene further meetings at expert level.¹²³ Given the aforementioned recent incidences however, it appears that the problem remains to be solved by the parties.

(Contd.) _____

which were accepted by the Turkish side. The number of illegal migrants delivered to the Turkish authorities however, are 1023. On the other hand, the Turkish authorities have made 859 readmission claims from the Greek side 19 of which, were accepted. (Readmission Bureau of the Population Movements Branch under the Head of the Aliens, Border and Asylum Unit, Information Note: Greece – Turkey Readmission Protocol, 02 September 2005).

¹¹⁸ The information note concerned was prepared by the General Directorate of Security of Ministry of Interior upon the author's request on 2 September 2005.

¹¹⁹ See Soner Gürel, "*Mülteci Operasyonu*", *Hürriyet*, 20 September 2006.

¹²⁰ The 1958 Geneva Convention on the High Seas (U.N.T.S. vol. 450, p. 11, p. 82) and the UNCLOS.

¹²¹ See Dolunay Özbek, "*Islands and Maritime Boundary Delimitation in the Semi-enclosed Sea of the Aegean*", Problems of Regional Seas 2001: Proceedings of the International Symposium on the Problems of Regional Seas, Bayram Öztürk, Nesrin Algan (eds.), 12-14 May 2001, Istanbul, pp.158-160.

¹²² Detailed information on the activities of the Search and Rescue Coordination Center established under the Undersecretary of Maritime Affairs is available at <http://www.denizcilik.gov.tr/dugm/aakkm.asp> [visited on 15 December 2009].

¹²³ European Commission, 2004 Progress Report COM (2004) 656 final on Turkey's Progress Towards Accession, 6.10.2004 SEC(2004), p. 120.

The system apparently fails due to two deficiencies: Firstly, there is no comprehensive database such as the EURODAC, where parties can exchange trustworthy records concerning asylum seekers. Most of the time, providing evidence that migrants had passed through the country before entering EU territory and hence establishing the travel route is a major problem in the readmission of migrants.¹²⁴ Secondly, the financial burden-sharing system set by the Agreement is rather weak. Article 9(3) of the Protocol indicates that each requesting State is obliged to bear all expenses of the third country national until he/she arrives at his/her country of origin. Therefore, not only does this proviso lack an institutional mechanism for burden-sharing but also using an informal channel for returning asylum seekers becomes more profitable for the requesting State. In this respect, the lack of a comprehensive financial burden-sharing arrangement such as the European Refugee Fund appears to hinder the process.

Conclusion

Settlement of the burden-sharing dispute between Turkey and the Union is crucial as it not only has direct impact on the interpretation of protection standards available to asylum seekers but also discourages Turkish authorities to take further steps in promoting the Turkish asylum system.

Statistical data shows that the States overburdened by the burden shifting practices of the Union tend to water down the protection standards of the 1951 Refugee Convention. Normative upgrading alone is not sufficient to ensure that the protection regime is effective.¹²⁵ In this regard, Gregor Noll has observed significant deterioration in the possibility of having access to fair refugee status determination procedures in Europe after the 'safe third country' practices were initiated and the burden was shifted towards the Central and Eastern European Countries. In his view, the countries at the eastern border of the EU such as the Czech Republic, Hungary and Poland sought to limit their burden through more restrictive recognition practices when faced with rising numbers of asylum applications as a result of the 'safe third country' rule. For instance, in the year 2000, the Czech Republic only recognized 1.9 percent of all applications while in Germany the recognition rate was 10.8 percent. The recognition rate was 2 percent for Poland and 2.2 percent for Hungary at the time.¹²⁶

Having faced similar burden shifting policies of the Union, Turkey has already begun to prepare for a potential increase in its refugee burden by adopting some of the criticized features of the European Asylum system such as the accelerated procedure. Since 2001 she has also been following a policy of concluding readmission agreements primarily with the source countries and progressively with transit countries and countries of destination which may shift a potential increase in the burden of Turkey towards the transit countries. She has concluded readmission agreements with Greece¹²⁷, Ukraine¹²⁸, Syria¹²⁹, Kirghizstan¹³⁰ and Romania¹³¹ so far. Ongoing negotiations with the Russian Federation, Uzbekistan, Belarus, Hungary, Macedonia, Ukraine, Lebanon, Egypt, Libya and Iran are underway.

¹²⁴ For an opinion supporting this view see *supra* Trauner and Kruse, p. 20.

¹²⁵ See Rosemary Byrne, "*Harmonization and Burden Redistribution in the two Europes*", *Journal of Refugee Studies*, Vol. 16, No. 3, 2003, pp. 346-347.

¹²⁶ Gregor Noll, "*Protection in a Spirit of Solidarity?*", *New Asylum Countries?: Migration Control and Refugee Protection in an Enlarged European Union*, Rosemary Byrne, Gregor Noll and Jens Vedsted-Hansen (eds.), the Netherlands 2002, Kluwer Law International, pp. 322-323; also see Lavenex, "Safe Third Countries", p. 175; In a more recent study, Eric Neumayer also found substantial variation in origin-specific recognition rates between Western European States. (Eric Neumayer "*Asylum Recognition Rates in Western Europe: Their Determinants, Variation, and Lack of Convergence*", *Journal of Conflict Resolution*, Vol. 49, No. 1, February 2005, Sage Publications, 62-63).

¹²⁷ Council of Ministers Decree 2002/3914 of 12 March 2002, R.G. No. 24735, 24.03.2002.

¹²⁸ See Council of Ministers Decree 2005/9535 of 17 October 2005, R.G. No. 25996, 17.11.2005.

¹²⁹ See Council of Ministers Decree 2007/11896 of 19 March 2007, R.G. No. 26491, 12.04.2007.

¹³⁰ See Council of Ministers Decree 2009/15471 of 29 September 2009, R.G. No. 27416, 18.10.2009.

¹³¹ See Council of Ministers Decree 2009/15564 of 30 October 2009, R.G. No. 27416, 24.11.2009.

Readmission agreements were proposed to Pakistan, Bangladesh, India, People's Republic of China, Tunisia, Mongolia, Israel, Georgia, Ethiopia, Sudan, Algeria, Morocco, Nigeria and Kazakhstan.¹³²

It is a foreseeable reality that the tendency for watering down the protection standards will be reduced in the event that a fair burden-sharing system is established between the Union and Turkey. The current state of affairs however, is notably different. As explained in the second chapter of the first section above, the Union utilizes readmission agreements as an instrument to deal with the burden of asylum seekers *vis-à-vis* third countries. The European Commission pursues a standardized approach in negotiating readmission agreements and proposes a more or less similar structure.¹³³ The first draft of the texts that the Commission negotiates with its partners does not vary widely. Nevertheless, during negotiations, adjustments can be made according to the respective countries' objections and demands. Moreover, in practice, such readmission agreements are often linked to visa facilitation agreements in order to stabilize the asymmetrical reciprocity of such agreements.

The records of interaction between the Union's asylum *acquis* and the Turkish Government's responses indicate that the problem, at least to a certain extent, arises on account of the Union's asylum *acquis*. Therefore, solutions through legal engineering should be employed for the dispute in question.

The main problem is the asymmetrical nature of the Community readmission agreements. Such agreements do not have the burden-sharing perspective that the Union has among the Member States. The fact that the Union imposes a burden-shifting tool on an acceding State, as a process of becoming a part of the burden-sharing system within the EU, inevitably raises concerns among Turkish authorities. Therefore, a solution could be found in bringing the proposed legal framework closer to the burden-sharing relationship that exists among the EU Member States.

Since the readmission agreements establish permanent readmission obligations between the parties, burden-sharing instruments thereof, should not offer weak or one-off financial or technical solutions. The structural provisions of standard EC readmission agreements however, offer considerably insufficient instruments for solving potential problems. Similar to the readmission agreement between Greece and Turkey, the agreement establishes a readmission joint committee, which consists of the Commission acting on behalf of the European Community and representatives of the third country. The joint committee is responsible for the implementation of the agreement.

Unlike these insufficient instruments, the Union itself has relatively better operating burden-sharing mechanisms which are open to non-Member States since Switzerland, Norway, Iceland and Liechtenstein were allowed to take part in them through international agreements. There is no legal justification for depriving an acceding State of a burden-sharing opportunity that is provided to non-Member States. In this respect, the possibility of involving Turkey in the burden-sharing tools of the Union, to the extent that it is possible, is worth serious consideration. Turkey should be allowed to benefit from the burden-sharing instruments of the Union such as the Dublin Regulation, the Schengen System and the EURODAC Regulation.

For those EU burden-sharing instruments such as the European Refugee Fund, that are deemed unfit for involving non-EU Member States, a strict conditional basis for burden-sharing should be incorporated in the readmission agreement. For instance, the financial burden-sharing system in the readmission agreement must be supported by a clear provision indicating that failure to fulfill the financial burden-sharing obligations thereunder should be considered as a "material breach" of the agreement as provided in Article 60 of the 1969 Vienna Convention on the Law of Treaties¹³⁴ so that the other party may invoke the breach as a ground for terminating the agreement or suspending its operation.

¹³² See Turkey's 2005 Action Plan on Asylum and Migration, para. 3.2.7.

¹³³ See Schieffer, p. 353. Also see Council Recommendation of 30 November 1994 Concerning a Specimen Bilateral Readmission Agreement Between a Member State and a Third Country [OJ C 274], 19.09.1996.

¹³⁴ U.N.T.S., vol. 1155, p. 331.

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