TURKEY'S ASYLUM DILEMMA AND PROCESS OF EU HARMONIZATION

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Approval of the Graduate School of Sciences

_____

Prof.Dr. Sencer Ayata
Director

I certify that this thesis satisfies all the requirements as a thesis for the degree of Master of Science.

_____

Prof.Dr. Meliha Altunisik
Head of Department

This is to certify that we have read this thesis and that in our opinion it is fully adequate, in scope and quality, as a thesis for the degree of Master of Science.

_____

Prof.Dr. Y. Atila Eralp
Supervisor

Examining Committee Members

Prof.Dr. Y. Atila Eralp	(METU, IR)	_____
Assoc. Prof.Dr. Mehmet Okyayuz	(METU, ADMIN)	_____
Assistant Prof.Dr, Galip Yalman	(METU, ADMIN)	_____

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Name, Last name: Su Esra

Signature :

ABSTRACT

TURKEY'S ASYLUM DILEMMA AND PROCESS OF EU HARMONIZATION

Su, Esra

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Supervisor: Prof. Dr. Y. Atilla Eralp

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Turkey has been one of the few countries that signed the 1951 Convention relating to the Status of Refugees with the provision of maintaining geographical limitation to that of offering protection only to European nationals. This is, however, expected to change as Turkey heads towards EU membership. Since 1999, Turkey has been declared as a candidate country to the European Union (EU), in the Helsinki Summit. It is expected to adopt EU Asylum Acquis into its legislation and to lift the geographical limitation of the 1951 Geneva Convention.

This study aims to analyze EU's Common Asylum Policy in order to present a comprehensive overview to EU Asylum Acquis and practices that are expected to be adopted by Turkey during the pre-accession process. The aim of this thesis is to analyze deficiencies of European Common Asylum Policy and its potential positive and negative effects on Turkey's asylum policy.

Keywords: EU, Harmonization on Asylum, Common European Asylum Policy, Turkey's Asylum Policy

ÖZ

TÜRKIYE'NİN SIĞINMA POLİTİKASI ÇIKMAZI VE AVRUPA BİRLİĞİ UYUM SÜRECİ

Su, Esra

Yüksek Lisans, Avrupa Çalışmaları Yüksek Lisans Programı
Tez yöneticisi: Prof.Dr. Y. Atilla Eralp

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Türkiye, Mültecilerin Statüsüne yönelik 1951 Cenevre Sözleşmesine taraf olan, ve bu Sözleşmede sunulan 'coğrafi çekince' seçeneğini kabul eden ve günümüzde bu kısıtlamayı hala saklı tutan az sayıdaki devletlerden biridir. Ancak, Avrupa Birligine uyum surecinde Turkiye'nin siginma politikasini degistirmesi beklenmektedir. Türkiye 1999 Helsinki Zirvesi'nde Avrupa Birliğine aday ülke ilan edilmiş ve bu çerçevede Avrupa Birliği Sığınma Müktesabatını uyumlaştırmayı ve 1951 Sözleşmesi'nden gelen coğrafik kısıtlamasını kaldırmayı taahüt etmiştir.

Bu tez calışması Avrupa Birliği'ne üyelik sürecinde Turkiye'nin uyumlaştırması beklenen Avrupa Birliği Sıgınma Müktesabatı ve uygulamalarına genel bir bakış sunmak amacıyla Avrupa Birliği Ortak Sığınma Politikasını analiz etmektedir. Bu tez calışması Avrupa Birliği Ortak Sığınma Politikasını analiz ederek Avrupa Birligi Ortak Sığınma Politikası'nın Türkiye'nin mevcut sığınma politikasına olası negatif ve pozitif etkilerini incelemeyi amaçlamaktadır.

Anahtar Kelimeler: AB, İltica Harmonizasyonu (Uyumlaştırılması), Ortak Avrupa Sığınma Politikası, Türkiye'nin Sığınma Politikasi

TO MY FAMILY …… ;))

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LIST OF ABBREVIATIONS

UNHR	**:** United Nations High Commissioner for Refugees
HCR	**:** High Commissioner for Refugees
EU	**:** European Union
UN	**:** United Nations
IRO	**:** Intergovernmental Refugee Organization
UNRRA	**:** United Nations Relief and Rehabilitation Agency
IGCR	**:** Inter-governmental Committee on Refugees
OAU	**:** Organization of African Unity
EEC	**:** European Economic Community
JHA	**:** Justice and Home Affairs
NAP	**:** National Action Plan
MOI	**:** Ministry of Interior
IOM	**:** International Organization on Migration
NPAA	**:** National Plan for the adoption of EU Acquis
ExCOM	**:** Executive Committee
CEAS	**:** Common European Asylum System
CAP	**:** Common Asylum Policy
CEAP	**:** Common European Asylum Policy
ECRE	**:** European Consultation on Refugees and Exile

INTRODUCTION

Migration is a complex phenomenon, which next to natural population growth, constitutes the major contributing factor to a state's demographic and economic development. Migration occurs all over the world, but mostly from 'third world' or 'developing countries' to 'rich countries' in the north. In international law, 'migration' refers to voluntary and involuntary movement, while 'flight' means involuntary or forced movement, including the trespassing of state borders. Whatever caused refugees to flee, they have some characteristics in common: '... they are uprooted, they are homeless, and they lack protection from their country of origin and most lack legal status. The refugee is an involuntary migrant who cross an international border and is a victim of politics, war and violation of human rights.' Migration comprises flight including any form of movement for whatever cause. In short every refugee is a migrant, but not every migrant is a refugee.

Migration is as old as mankind. Although the phenomenon of people forced to leave their home already existed, 'the first true recognized refugee' in the modern state system were Huguenots, French Protestants fleeing France in 1685.[1] Refugee movement has been a phenomenon of international society for a long time. Before the 20th century there was no international protection for refugees as we know it today. Since then we have definitions instruments and agencies established for the protection of refugees. This topic has nevertheless been a modern issue of national contention and an international concern in 20th century.

Refugees from religious persecution flourished throughout Europe in the sixteenth and seventeenth centuries; Protestants, Catholics, and Jews were expelled by some regimes and were protected by others regarding their beliefs, ideologies, and economic necessity. By the late seventeenth, persecution on account of beliefs was replaced by political upheaval and revolution, during

[1] Barnett, L. (2002), Global Governance and the Evolution of the International Refugee Regime, *International Journal of Refugee Law*, Vol. 14, p.2.

which individuals were persecuted for their political opinions and their political oppositions. During the late nineteenth and the early twentieth centuries, both the causes and the dimensions of the refugee problem began to change radically. During the first mid of 20th century refugee movements were mainly caused by the dissolution of the old empires, the expansion of nation-states, and First World War.[2] As a consequence of Russian Revolution in 1917, 1 million uprooted people fled Russia to Western European Countries. In the aftermath of World War I, Europe itself was to become a center of migration with an estimated total of 9,5 million displaced person and refugees in 1926.

These mass influxes threatened the security of European States, and created tension between European States in terms of burden sharing mechanisms. Refugee movements significantly affected the domestic politics and local economies of host countries, and they aggravated bilateral relations between sending and receiving states. This revealed the need of a common humanitarian and international response to increasing refugee influxes in Europe. Organized international efforts for refugees began in 1921, when the League of Nations was established under the auspices of the first High Commissioner for Refugees, Fridjof Nansen. Over the next twenty years, the scope and functions of assistance programs gradually expanded. The approach to solving the 'refugee problem' during the interwar period was to grant collective refugee status to certain groups of people on the basis of their national origin, rather than their individual motives to leave. Although the asylum countries during the interwar period did not respond protection needs of refugees, it legitimized the status of refugees and guaranteed their 'non-refoulment' to a country where they would likely face persecution. During and after World War II, two international refugee organizations-the United Nations Relief and Rehabilitation Agency and the International Refugee Organization, further developed the international framework for refugee protection. In December 1949, the UN General Assembly established the Office of the United Nations High Commissioner for Refugees (UNHCR) for an initial period of three years from 1 January 1951. The Statute of UNHCR provided a definition of a refugee covered by earlier Conventions and entitled the High Commissioner to provide protection and assistance to refugees under the competence of the Office. Although the Statute provided a

[2] Loescher, G. (1996), The Origins of the International Refugee Regime in *Beyond Charity, International Cooperation and the Global Refugee Crisis: A Twentieth Century Fund Book*, Oxford University Press, p.2.

comprehensive definition of a refugee and the competences of the High Commissioner it was not a legally binding document that States had to apply. The first legally binding document for the protection of refugees was the 1951 Convention relating to the Status of Refugees, through which the term refugee was legally defined and accepted. The 1951 Geneva Convention defined a refugee as;

> any person who…as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

The Geneva Convention implied a time limitation covering only those coming due to events provoked before 1 January 1951 and gave the option to the States to limit the term refugee to those coming from Europe or to extend the definition to world largely. The time limitation depicted in the Convention has been eliminated by the Protocol of 1967 but the States retained the right to maintain optional geographical limitation. Turkey was one of the few countries that opted geographical limitation of the Geneva Convention.

Although the 1951 Convention had a significant role for the development of the international refugee protection regime, it has often been accused of falling short of providing efficient solution to the current refugee problem as it leaves aside protection needs of people whose life and freedom were being threatened by armed conflict. From this point of view, the refugee definition of the 1951 Geneva Convention is often dismissed as not sufficiently relevant to refugee flows stemming from today's conflicts, generalized violence and public disorder such as in the case of Iraq, Afghanistan and Somalia. In this respect, international regional instruments were introduced to provide a more comprehensive definition of refugee covering people who flee from civil disturbances, violence and war. The Organization of African Unity (OAU) and the Cartagena Declaration were the two regional instruments expanding the refugee

definition of the 1951 Convention. However, neither of these definitions are not yet accepted internationally.

The thesis will start with presenting a historical overview of international refugee protection particularly within Europe, starting from the emergence of the refugee protection regime during the inter-war period and the signatory by Member States of the 1951 Geneva Convention relating to the Status of Refugees. The first Chapter will point out circumstances at the end of 40s, outlining the conditions for enacting the Geneva Convention. This will enable the reader to make a comparative analysis of the realities of today's refugee influxes compared to the circumstances under which the Geneva Convention was adopted. This Chapter will aim to shed light on asylum policies of the European States prior to the establishment of the European Economic Community in 1957. However, the original rational attitude of European States evolved drastically towards the end of 20th and the States started to implement more restrictive immigration and asylum measures in view of keeping asylum seekers outside the border of the EU. This evolution of refugee protection regime within the EU will be the main subject of the second chapter.

Chapter II will study the motives for and the milestones towards the formation of a Common European Asylum Policy within Europe. At first, the circumstances that led European States to develop a common position on asylum and migration will be analyzed. The milestones in the establishment of Common European Asylum System will be covered, giving specific reference to Schengen and Dublin Conventions or London Resolutions and to the mid 90s' developments towards a Common Asylum System within the Union, like the Maastricht, Amsterdam Treaties, Tampere Conclusions and Hague Programme. The Chapter will give an emphasis to lately introduced Council Directives in view of providing the level of accomplishment of the European Union Common Asylum System and presenting the measures introduced by the EU in order to step back from assessing asylum claims coming into its border.

Harmonization of asylum policies at the EU level has arisen from an increasing number of asylum seekers coming to European countries in the end of 1980s. In particular, the collapse of the Berlin Wall in 1989 resulted in a sudden influx of people from Eastern Europe when frontier barriers were largely removed. In the post- Cold War era, the continuous ethnic and political conflicts all over the

world created an increase in the number of refugees and asylum seekers. These developments significantly affected the number of asylum seekers that reached European Countries. A considerable increase in the number of asylum applications was witnessed in Western Europe between the early 1980s and 199Os, reaching a peak of some 700 000 in 1992. This escalation in asylum inflows (much of it from Eastern Europe after 1989) has coupled with the mass displacement of population caused by the outbreak of conflict in the former Yugoslavia. The inflows from former Yugoslavian States put pressure at a time of worsening economic recession and political uncertainty in Western Europe, while societal pressures caused governments to restrict immigration into their territories. [3] It also cannot be denied that Eastern European citizens were attracted to the prospect of having more prosperous future in the Western Europe which may have increased the number of asylum applications beyond the intention of the 1951 Convention. Globalization and the development in transportation also played a facilitating role in crossing national borders. The low transportation costs in recent decades motivated and facilitated the flows of asylum seekers and immigrants into Western Europe during this period. The increased asylum applications and migration flows put the international refugee protection system in the Western Europe under serious pressure. The politicians in Western Europe began to express increasing concern over the perceived threat of mass uncontrolled migration from Eastern Europe and the former Soviet Union, as well as from poorer countries to the South. The increase in immigration into Western Europe changed the perception of asylum seekers in the West; asylum seekers have been considered as a threat to national security and stability. In addition, the increase in the number of asylum seekers was unequally experienced in each Member States. For instance, in the German Federal Republic the increase was 37,000 requests in 1982, 99,700 in 1986, in the Netherlands, 800 requests in 1982, 5,9000 in 1986, in Belgium 2,900 requests in 1982, 7,700 in 1986, in France 22,500 requests in 1982, 26,290 in 1986. [4] Thus, responding to increasing levels of immigration and unequal distribution of asylum applications, European countries have focused on strengthening their external borders and improving other immigration-control mechanisms at their disposal. These challenges brought asylum and immigration

[3] Collinson, S. (1995), V*isa requirements, carrier sanctions, 'safe third countries' and 'readmission': the development of an asylum 'buffer zone' in Europe*, Royal Geographical Society, p.5.
[4] Vevstad,V.(1998), *Refugee Protection: A European Challenge*, Tano Aschehoug., p.253.

issues to high-level politics throughout the Western States with the expression of the need of common coping mechanism at European level. [5]

The necessity of a common approach to the issues such as border control, immigration and asylum policy became evident when free movement of people became one of the four elements of the Single Market enacted in 1986. Member States agreed on establishing a common asylum and immigration policy in view that control shared external borders was a prerequisite for the establishment of freedom of movement within the EU since admission of a foreigners by a European country would affect the other states in a Europe without internal borders. Within this view, strengthening cooperation on immigration and asylum matters has become to the agenda of the EU States in the early 20th century. The Dublin Convention was adopted in 1990 as a mechanism for determining the responsible Member State for examining an application for asylum lodged in one of the contracting States. The Dublin Convention was an essential step to the creation of Common Asylum System; the Convention aimed to avoid ''asylum shopping situation'', where an asylum seeker claims asylum in a number of states for a favourable result, and to avoid ''refugee in orbit'' situation, which was the referral of an asylum seeker from one state to another where no state willing to take responsibility for examining his/her claim. The Dublin Convention put the burden of assessing asylum applications on the border countries and granted the states the right to deny assessment of an asylum application based on 'manifestly unfounded claims', 'safe third country' and 'safe country of origin' principles. These principles allowed Member States to use admissibility procedures where applications may be quickly rejected on unfounded grounds. Signing of Readmission Agreements was the practical implementation of 'safe third-country', 'safe country of origin' and 'manifestly unfounded claim' principles. In order to control entry, almost all EU States have signed Readmission Agreements, binding the contracting parties to readmit their own national or third-country national who entered into the EU in an illegal way. This thesis argues that these principles are an impediment to a fair assessment of individual applications. By introducing these principles, the Member States have shifted their burden to third countries, and sent asylum seekers to countries

[5] Kale, B. (2005), *The Impact of Europeanization on Domestic Policy Structures: Asylum and Refugee Policies in Turkey's Accession Process to the EU*, Thesis for the Degree of Doctor of Philosophy, p.116.

without the examination of individual claims. These principles are contradictory to the principles espoused in the 1951 Geneva Convention.

In 1992, the Maastricht Treaty defined 'asylum and immigration policy' as an area of common interest in the area of Justice and Home Affairs (JHA). Asylum issue would from this point be addressed through intergovernmental cooperation as a 'third pillar' of the EU. The following introduction of the Amsterdam Treaty on May 1, 1999 marked a new stage for the formation of the Common European Asylum System. This Treaty transferred asylum policy from the third pillar of intergovernmental co-operation - where unanimity of Member States is required in decisions to EU institutions which would play a larger role on the field of asylum within five years. The intention to establish a Common European Asylum System was worded for the first time in the Conclusions adopted by the Council and the Commission of the European Union at the Council meeting in Tampere in 1999. The Tampere Conclusions required in the 'short term' establishment of clear and workable determination of the State responsible for the examination of an asylum application, common standards for a fair and efficient asylum procedure, common minimum conditions of reception of asylum seekers, and the approximation of rules on the recognition and content of the refugee status'. These priorities have been adopted through four Council Directives 'Directive on minimum protection for refugees; Directive on minimum standards of accommodation, healthcare on reception of refugees; Council Directive laying down minimum standards for the reception of asylum seekers; Directive on common definition for "refugee"; Council Directive laying down 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, Asylum procedures Directive guaranteeing minimum level of protection for refugees. These Directives will be analyzed in a comprehensive manner in Chapter II given that they constitute the main EU legislations regulating rights and stay of asylum seekers and refugee in the EU States. These Directives have also importance in order to understand the EU asylum acquis that is to be adopted into Turkish legislation and the common standards that asylum seekers and refugees will enjoy upon the adoption of the EU acquis. On the other hand, these legislations will help the reader to make an analysis between the current asylum situation in Turkey and the improvements expected in the rights of refugees and asylum seekers with the adoption of the Four Directives.

Candidate Countries to the EU are expected to adopt EU acquis into their legislation as a prerequisite of full membership. In this respect, as a candidate country to the EU, Turkey will have to adopt EU asylum acquis into its national legislation in order to fulfill requirements of full membership prospects. This will be discussed in the third Chapter. Adoption of EU asylum acquis seems to be one of the most problematic areas in Turkey-EU relations during the membership area. Turkey has regulated its asylum and immigration policy with laws applicable to foreigners and did not introduce a national legislation governing the status of asylum seekers and refugees until the adoption of 1994 Regulation. In the early years of Turkish Republic, there were no legislations regulating situation of asylum seekers and refugees in the country. The State policy was to create a pure nation state, acquiring those of Turkish descents who were perceived to integrate easily into society. National laws applicable to foreigners were also valid for asylum seekers and refugees without any particular regulations in terms of their special situation in the country. These national legislations included the Settlement Law, the Passport Law, the Citizenship Law, the Law Related to the Residence and Travels of Foreign Subjects, and the Law on the Work Permit of Foreigners. However, with unexpected refugee influxes from neighbouring countries, such as, Iran and Iraq these laws fell short of meeting current needs of refugees and asylum seekers. The main refugee floods to Turkey occurred following the Iranian revolution in 1980s, Iran-Iraq war of 1980-1988 and Iraqi invasion of Kuwait in 1990. These unexpected influxes from non-European countries created great concerns in Turkey with regard to asylum seekers' illegal entry and stay in the Turkish territories. In addition to these, mass influxes of Kurdish population raised security concerns in the Turkish Republic. These concerns necessitated the introduction of a national legislation to cope with mass influx situations and led asylum seeker issue to become a national security issue in Turkey. These concerns have been overcome with the adoption of the 1994 Regulation.

The developments in Turkey's asylum policy from the establishment of Turkish Republic until 1999 will be the main subject of Chapter III. The Chapter will provide the position of the Turkish Republic regarding asylum seekers in a historical order. The Chapter aims to shed light the reasons of restrictive asylum policy of Turkey and its valid concerns in maintaining geographical limitation referring to past mass influxes experienced in the country. This Chapter will

provide a critical perspective to the analysis of the 1994 Regulation giving reference to critics of international actors and refugee related organizations.

The primary purpose of this Chapter will be addressing the dilemma of Turkey's asylum policy. Turkey's asylum policy is problematic as the refugee definition brought by the 1994 Regulation limits refugees to only European nationals whereas internationally accepted refugee definition of the 1951 Geneva Convention did not refer to any geographical limitation. So far, Turkey had 44 European refugees whereas there were 15 562 non-European applications in progress (6 622 Iraqis, 5 449 Iranians, 1 260 Somalis, 1 279 Afghans among others). At present, the Turkish government extends international protection for non-European nationals to only %0,2 of all asylum applications. In this respect, Turkey effectively excludes non-European nationals from international protection and assistance despite non-European asylum seekers constitute the majority of asylum applications in the country. Although Turkey has no legal obligation to lift its geographical limitation with regards to international refugee legislation, from a humanitarian perspective, it does not meet the needs of current asylum population in the country. From this point of view, Chapter III will present a brief analysis of the social situation of non-European asylum seekers and refugees in Turkey in view of Turkey's asylum dilemma on the daily life of refugees and asylum seekers.

Turkey, as any other candidate countries to the European Union, is expected to align its national legislation within the EU acquis. In this regard, Turkey will have to transpose the EU asylum acquis into its national legislation throughout the pre-accession process. By doing that, Turkey will experience both negative and positive effects of the harmonization of the EU asylum acquis, which will be illustrated in Chapter III. Turkey has been declared as a candidate State to the European Union in Helsinki Summit in 199. Turkey-EU pre-accession preparations have been pursued through Accession Partnership Documents, which were the main guidelines for Turkey to be followed for the fulfillment of principles, priorities, intermediate objectives and conditions decided by the European Council. In response to the Accession Partnership Documents Turkey has adopted two National Programmes for the Adoption of the Acquis (NPPA) in 2001 and 2003. In line with the Accession Partnership Documents, Turkey undertook to fulfill some short and medium term objectives in a set timeframe. The most important objective set in the NPAA was with regard to the lifting of

geographical limitation. Turkey stated in the National Programme that it would consider about lifting the geographical reservation of the 1951 United Nations Convention Relating to the Status of Refugees in a manner that would not encourage large scale refugee inflows from the East, when the necessary legislative and infra-structural measures are introduced, and in the light of the attitudes of the EU Member States on the issue of burden-sharing. In addition to that, Turkey undertook to adopt a number of EU legislations under the 'Draft Turkish Law on Asylum'. These legislations included Dublin Convention and the four aforementioned Council Directives.

The last Chapter will study harmonization process of Turkey's asylum policy within the EU asylum acquis in reference to the Accession Partnership Documents, National Programme for the Adoption of the Acquis, and the Turkish National Action Plan for the Adoption of the EU Acquis. The Chapter will provide asylum related objectives set by the European Council as a prerequisite of Turkey's full membership. The Chapter will also provide Turkey's commitment to these objectives in the light of its National Action Plan and the level of accomplishment of the set objectives.

The thesis study will conclude on a critical analysis of the EU's Common Asylum Policy and its possible effects on Turkey's asylum policy from positive and negative points of view.

CHAPTER 1

HISTORICAL OVERVIEW TO INTERNATIONAL REFUGEE PROTECTION: HOW 'REFUGEES' BECAME AN AFFAIR OF INTERNATIONAL PROTECTION?

'Migration is a complex phenomenon which, next to natural population growth, constitutes the major contributing factor to a state's demographic and economic development.'[6] Migration is defined as an action of migrants moving from one geographic point to another geographic point; it might take place in two different concepts; internal and international migration. International migration, or in other terms trans-border migration, refers to movements of people from one country to another. In international law, migration means voluntary movement while flight means involuntary or forced movement. Within the framework of this study, I'll try to address involuntary international migration, which specifically refers to the concept of refugees and asylum-seekers. Movement of refugees differs from migration in term of its pull factors. Refugees differ from migrants with regard to their common characteristics '... they are uprooted, they are homeless, and they lack national protection and status'. The refugee is an involuntary migrant who cross an international border and is a victim of politics, war and violation of human rights.'[7] Migration comprises flight including any form of movement for whatever cause. In short every refugee is a migrant, but not every migrant is a refugee. [8] The following scheme would provide a better clarification to the terms refugee and immigrant.

[6] Demuth A. (2000), *Some Conceptual Thoughts on Migration, Theoretical and Methodological Issues in Migration Research*, Biko Agozino, Ashgate Publishing Ltd, pg 1.
[7] *Ibid., pg 4.*
[8] *Ibid., pg4.*

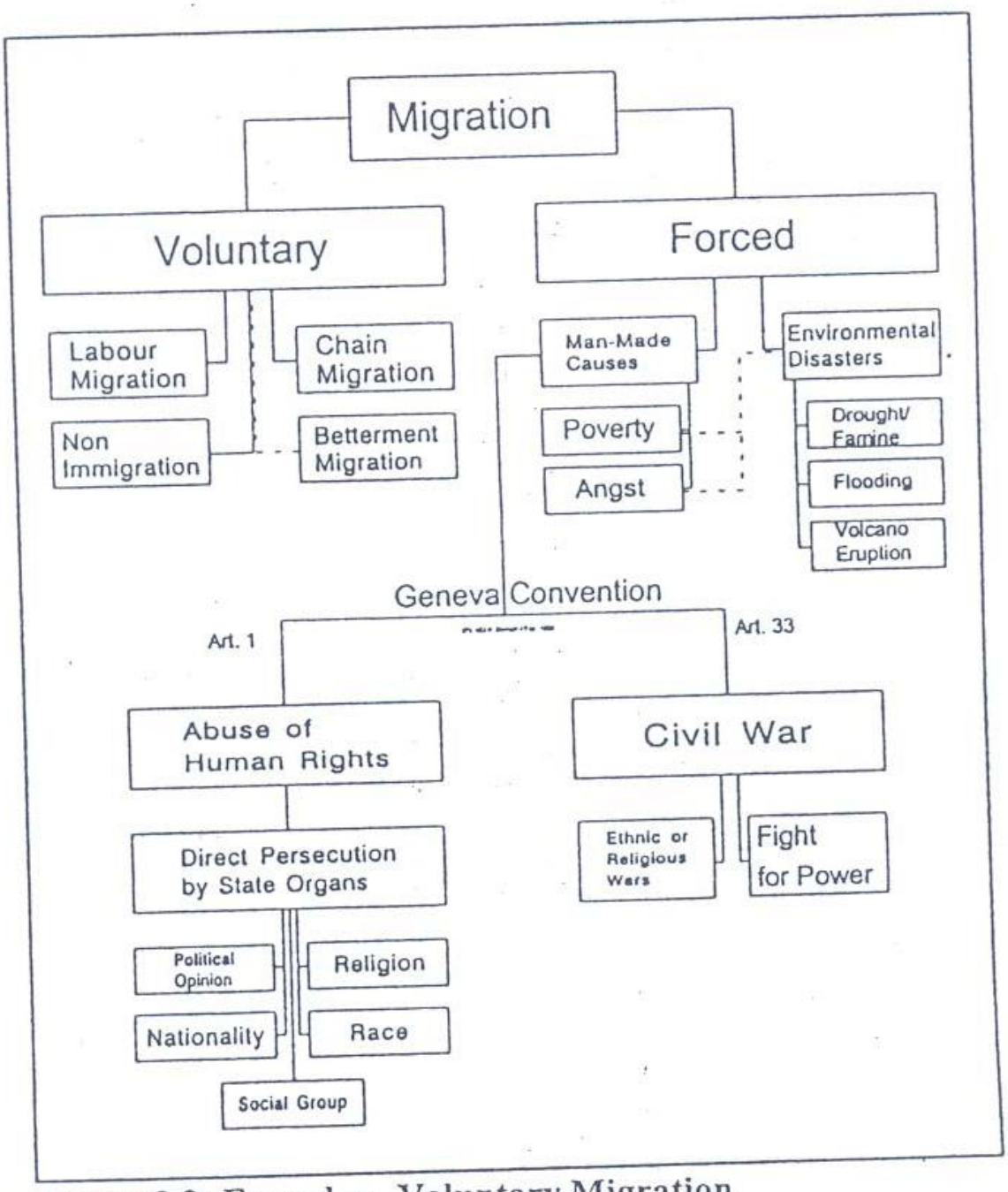

Figure 2.2: Forced vs. Voluntary Migration

Refugees have been a phenomenon in the history since sixteenth century when Huguenots religious minorities fled from Low Countries to France to escape repression.[9] This was particularly followed by mobilization of Jews in the nineteenth century. From the 1840s, they had been migrating from Russia and Eastern Europe to North America and Western Europe. From the 1880s, changes in economic pace increased repression on Jews who were holding artistic and trading positions in the countries, which accordingly put them at the target of anti Semitist policies. Between 1881 and until the outbreak of World War in 1914, 2,5 million Jews moved westwards. Therefore, in 1905, British Parliament passed Alien Act in order to distinguish between a migrant and those fleeing from persecution which latter be defined as refugee. [10] This was the very first attempt to differentiate a migrant from a 'refugee' which by time became an matter of high politics. The forced movements resulting from repression took its roots from the sixteenth century and remained as a permanent phenomenon in international framework.

This Chapter aims to provide a background to international refugee problem addressing causes of refugee influxes and evolvement of refugee protection in international context. This chapter seeks to address roots of refugee problem at first place and then to analyze standpoint of international actors to the refugee problem. This analysis will be covering the period of the aftermath of the World War I - II, the 1951 Geneva Convention and the adoption of International Regional Instruments. In this Chapter, I will try to point out that refugee protection has been an everlasting phenomenon during the history and a problem to be tackled at worldwide level. The Chapter further aims to elaborate how the refugee problem has been taken into the agenda of European States in the early twentieth century and which level of protection the European States provided to refugees. The Chapter aims to find out whether the attempts of European States have been sufficient to put an end to refugee problem in the twentieth century, and to seek to find out the reason behind the failure of European States in solving the refugee problem at world wide context. In overall, the Chapter aims to address the following questions; how and when refugees emerged as a problem in European States' agenda, why States were

[9] Marflet, P. (2006), *Refugees in a Global Era*, Palgrave MacMillan, p.102
[10] Marflet, P. (2006), *Refugees in a Global Era*, Palgrave MacMillan, p.122-123.

concerned about involuntary movement of refugees, what were the practices introduced by the European States in order to resolve the refugee problem, how successful were the European States' policies, how and when refugee problem has been tackled at global level, how a refugee was defined in global context, what were the common characteristics of refugees, what were their protection needs, was the definition of refugee sufficient to meet the protection needs of refugees, why international regional instruments were introduced following the introduction of international refugee definition.

1. Refugee Protection in the aftermath of First World War and the Inter War Period : The very first attempts of European States in solving refugee problem

Refugees and asylum seekers have been a phenomenon throughout the history; wars, hunger, poverty, and oppression forced people to seek a safe haven in order to sustain their life in freedom and dignity. Despite of having a long term existence in the history, refugees have become a concern to States and a problem in international relations in the early twentieth century. Prior to twentieth century, there was neither a common definition of refugee nor a common understanding of refugee protection at international level.

The chaotic environment in the aftermath of the First World War, the collapse of the Russian imperial regime in 1917, the disintegration of the Austrian and Ottoman Empires and the ensuing civil war, uprooted millions across Europe and Western Asia. [11] As a consequence of Russian Revolution in 1917, 1 million people fled Russia between 1917 and 1921, which might be considered as the first mass exodus of 20th century. In addition to Russian influxes, collapse of multinational states created large number of devastated people in need of a safe place who sought protection in Western European Countries.

In the aftermath of World War I, Europe itself was to become the "centre of migrations"[12] as a result of these population influxes. With an estimated total of 9.5 million in 1926, the refugee crisis of the post- World War I years marked a

[11] Jaeger, G. (2001), On the history of the International Protection of Refugees, *International Review of the Red Cross,* Vol. 83, No. 843, p.727.
[12] Kushner, T. and Knox, K., (2001), *Refugees in An Age of Genocide: Global, National and Local Perspectives during the Twentieth Century*, London: Frank Cass, p. 9.

scale unprecedented in European experience.[13] This unexpected and extraordinary situation created tension between European States in terms of burden sharing mechanism and revealed the need of a common humanitarian response and international efforts. In this context, the need of an international refugee regime was expressed by the States which eventually took form with the creation of the League of Nations under the auspices of Fridjof Nansen, the 'High Commissioner for Refugees', in 1921. **The League of Nations** has significant importance for being a concrete step of European States for the establishment of an international refugee regime. The States collectively undertook the responsibility to provide refuges with protection and to seek solution to their problems. The League of Nations mainly aimed to provide a solution to Russian refugees. [14] The League established no generalized definition of the 'refugee' concept; instead certain listed national groups, for instance Russians, Armenians, and Assyrians were declared eligible for assistance. A Russian refugee was defined as 'a person of Russian origin who does not enjoy or who no longer enjoys the protection of government of the Union of Socialist Soviet Republics and who has not acquired another nationality.' [15] Following an agreement in the League of Nations, Russian refugees were issued Nansen passports covering up the qualifications of a citizen ID and a travel certificate, which were later extended to Armenians in 1924 and in 1928 to Turks, Assyrians, Assyro-Chaldeans and Kurds. [16] However, this kind of mechanism, without a common definition of refugee, but only granting refugee status to a number of nationals was far from solving the refugee problem in the international context. [17] The League of Nations failed to extend its mandate and protection to the deepening refugee crisis of Europe created by the disruption of the global and the advent of the Fascist regimes. In the 1930s, Europe experienced flight of refugees from the Spanish War, and Jewish refugees from Nazi persecution in Germany.

In response to escalating refugee crisis in Europe, States adopted the Convention relating to the International Status of Refugees, on 28 October

[13] Zolberg, Aristide R.; Suhrke, A.; Aguayo, S., (1989), *Escape from Violence: Conflict and the Refugee Crisis in the Developing World*, New York: Oxford University Press, p.18-20.
[14] Barnett, L. (2002), *op.cit*., p.242.
[15] Goodwin-Gill,G. (2007), and J. McAdam, *The Refugee in International Law,* 3rd Ed., Oxford University Press, New York, p.16.
[16] Joly, D. (1992), *op.cit.,* p.6.
[17] Loesher, G. (1994), The International Refugee Regime: Stretched to the Limit?, *Journal of International Affairs*, No.2, New York, p.354.

1933, which for the first time granted an international status for refugees. The State Parties undertook for the first time real obligations on behalf of Russians, Armenians and *assimilated refugees*.[18] This Convention granted them 'enjoyment of civil rights' and other benefits including ''administrative measures (the issuance of "Nansen certificates"), non-refoulement, legal questions, labour conditions, industrial accidents, welfare and relief, education, fiscal regime and exemption from reciprocity, and provided for the "creation of committees for refugees". [19] The Convention of 1933 was a milestone in the protection of refugees and served as a model for the 1951 Convention. Its Article 3 reads:

> Each of the Contracting Parties undertakes not to remove or keep from its territory by application of police measures, such as expulsions or non-admittance at the frontier (*refoulement*), refugees who have been authorized to reside there regularly, unless the said measures are dictated by reasons of national security or public order. It undertakes in any case not to refuse entry to refugees at the frontier of their countries of origin. It reserves the right to apply such internal measures as it may deem necessary to refugees who, having been expelled for reasons of national security or public order, are unable to leave its territory because they have not received, at their request or through the intervention of institutions dealing with them, the necessary authorizations and visas permitting them to proceed to another country. [20]

This Article was the very first step of the principle of non-refoulment which remarks the most significant safeguard for refugees and asylum seekers, protecting them against deportation to a country where their life and security is likely to be threatened.

Nevertheless, the Jewish refugee problem was not among the main area of importance during the 1930s. Despite the attempts of the High Commissioner James McDonald, Jewish problem remained as an unresolved issue given that the States were unwilling to admit refugees into their borders. In addition to that, with the Great Depression of 1931, the States became more reluctant to undertake an additional financial burden by admitting foreigners into their territories since they were not able to financially support their own citizens. In

[18] League of Nations, *Treaty Series*, Vol. CLIX, No. 3663. Assimilated refugees were Assyrians, Assyro-Chaldeans, Syrians, Kurds and a small number of Turks
[19] Jaeger, G. (2001), *op.cit.,* p.729.
[20] Ibid.

this respect, Jewish people were highly affected with Great Depression remaining in their home country and being subject to persecution.[21]

In 1938, American president Roosevelt called a conference at Evian to deal with Jewish problem. In this meeting, the **Intergovernmental Committee on Refugees** was established with primary purpose of 'facilitating involuntary return from Germany and Austria of "persons who have not already left their country of origin (Germany, including Austria), but who must emigrate on account of their political opinions, religious beliefs or racial origin, and persons as defined above who have already left their country of origin and who have not yet established themselves permanently elsewhere..." [22]

In 1943, at Bermuda Conference, the work of this committee was expanded to include 'all persons, wherever they may be, who, as a result of events in Europe, have had to leave, or may have to leave, their country of residence because of the danger to their lives or liberties on account of their race, religion, or political beliefs.' [23] The Intergovernmental Committee on Refugees ended its activities on 30 June 1947 and was replaced by the International Refugee Organization. [24]

The approach during the interwar era was in forms of granting collective refugee status to groups of people on the basis of their national origin, rather than to recognize refugees individually on the basis of their personal motives for flight. The League approached refugee problems on a group basis -identifying nationalities that could be at risk should returned to their country of origin. Although the League of Nations has responded to refugee problem for a period of time between the years of 1921 and 1946, it was far from providing a permanent solution perceiving the refugee problem as a temporary issue but not a permanent phenomenon. Furthermore, the League's credibility and effectiveness declined with the withdrawal of Japan, Italy and Germany from the membership and with the League's failure to resolve Manchurian and Ethiopian conflict during 1930. [25] In addition, the non-universal structure of this

[21] Barnett, L. (2002), p.243.
[22] 1938 Convention concerning the Status of Refugees coming from Germany: 191 LNTS No. 4461. The Convention was expanded the following year to Austrian refugees, see Additional Protocol, 14 September 1939: 198 LNTS No. 4634.
[23] Goodwin-Gill and J. McAdam (2007), *opt cit*, p.18.
[24] Musalo, K., Moore, J., and Boswell, R.A. (2002) *Refugee Law and Policy, A Comparative and International Approach,* Carolina Academic Press*,* North Carolina, p.18
[25] Loescher, G. (1994), *opt.cit.,* p.354

organization, without the membership of the US and USSR, was an impediment for considering refugee problem as a worldwide issue within the framework of the League of Nations. [26]

Gil Loescher states that the major impediment in solving the refugee matter in an international context was the lack of consistent and coherent international commitment in refugee problem. The author relates the unwillingness of states to their fiscal constraints, high unemployment levels, and their reluctance in receiving dissidents and minority groups into their territory in view of protecting their national interests.[27]

Although the interwar period was not successful in responding refugees' needs it brought significant steps in terms of admission and protection of refugees. The inter war period set up legitimate status of refugees and guaranteed their non-refoulment, in other terms, protected them against their forced repatriation to an area where they would suffer from persecution. The inter war period starting from the aftermath of the World War I until the II World War was significant for refugee protection since it established the core of international regime and introduced basic principles of refugee protection.

1.2 Refugee Protection in the era of the Second World War : Attempts of European States in the era of the establishment of European Economic Community

The League of Nations was established in the aftermath of World War I to provide protection on collective basis to certain nationalities and therefore failed to extend its protection to the newly emerged refugee crisis following the World War II. When the war ended in 1945 there were 30 million uprooted people, including twelve million of German ethnic expelled from USSR, who were unwilling or unable to return back to their country of nationality. [28] The ineffectiveness of the interwar refugee policy to provide a solution to Holocaust and other refugee crisis generated the need of new strategies to cope with the current escalating refugee problem. Therefore, on 9 November 1943, even before the end of the Second World War and the establishment of the United

[26] Bernett, L (2002), *opt.cit.,* p.242.
[27] Loescher, G. (1994), *op.cit.,* p.354.
[28] Barnett, L. (2002), *op.cit.,* p.243.

Nations itself in June 1945, the Allies set up the **United Nations Relief and Rehabilitation Agency (UNRRA)**. The UNRRA was beyond a refugee agency responsible for assisting in relief and rehabilitation of devastated areas not only for refugees but also for all displaced people. The fact that many of uprooted people were willing to return their home country by the end of the war and that asylum countries were calling for their quick repatriation, UNRRA' mandate was largely focused on repatriation in the post war area. In this respect, in Yalta and Potsdam Conferences, in 1945, an agreement was reached for quick repatriation of Soviet citizens to Soviet Union; from May to September 1945, UNRRA assisted with the repatriation of seven million people. [29] Although there were Eastern citizens not willing to be repatriated to their home countries, which were ruled by communist regime, some of them were repatriated regardless their willing; this approach was criticized by Western countries especially by the USA. Therefore, forced repatriation had arisen a new debate by 1946 whether UNRRA's mandate should be extended beyond repatriation. Eastern Bloc Countries were in view that assistance should only be granted to those repatriated to their home countries whereas US led Western countries believed that every person should have the freedom to choose its country of residence. Eventually, the USA having the leadership role in UNRRA and providing this organization with %70 of total assistance refused to extend the mandate of UNRRA beyond 1947 and expressed the need of a new formation with a new orientation despite the opposition of Eastern Blocs. [30]

In 1947, **the International Refugee Organization** was created to replace and to extend the mandate of UNRRA. IRO was the first organization to deal with all aspects of refugee related issues including repatriation, identification, registration, classification, care and assistance, legal and political protection, transport, resettlement and re-establishment.[31] IRO has brought a wider definition of refugee, which later established the basis of refugee definition in the 1951 Convention. In the IRO Constitution a "refugee" was defined as 'a person who has left, or who is outside of, his country of nationality or of former habitual residence, and who, whether or not had retained his nationality, belongs to one of the following categories: Victims of the Nazi or Fascist regimes or similar regimes; Spanish Republicans and other victims of the Falangist regime in

[29] UNHCR (2000), *The States of World's Refugees: Fifty years of Humanitarian Action,* Oxford: Oxford University Press. p.2.
[30] UNHCR (2000), *op. cit*, p.4.
[31]Musalo, K., Moore, J., and Boswell, R.A, (2002), *opt.cit.,* p.20

Spain; persons who were considered refugees before the outbreak of the second world war, for reasons of race, religion, nationality or political opinion.'' As clear from the definition, there was no pre-condition of belonging to a nationality in order to enjoy the protection of the IRO Constitution. In addition, the IRO Constitution defined ''those unable or unwilling to avail themselves of the protection of the government of their country of nationality or former residence'' as ''refugees.''[32] With this definition, the mandate of UNRRA was extended to Eastern European political dissidents and Jews in Germany and Austria. [33]

A 'Displaced person' was defined as ''a person who, as a result of the actions of the authoritative regimes has been deported from, or has been obliged to leave his country of nationality or former habitual residence. It also included the ''persons who are compelled to undertake forced labour or who are deported for racial, religious and political reasons.''[34] During its operation IRO assisted with the repatriation of 70 000 people which is relatively small compared to 1 million of resettlement to other countries. [35]

Although the two post war organizations, the IRO and the UNRRA were similar in scope they were different as regards the durable solutions provided for refugees; although at the time of UNRRA the main focus was on repatriation, with the establishment of IRO resettlement was prioritized instead of repatriation. It was stated in the IRO's Constitution that the main aim was '' to encourage and assist in every way possible their [displaced persons'] early return to their countries of origin''[36] The Constitution gave emphasis to the UN Resolution of 12th February 1946 regarding the problems of refugees, which stated that ''no refugees or displaced persons shall be compelled to return to their country of origin.''[37] The IRO also recognizes that people might have 'valid objections' to return to their country of origin including the fear or persecution based on reasonable grounds such as their race, religion, nationality, or political objections or opinions.[38] The basis of 'non-refoulment' principle was pronounced in the IRO Constitution; the

[32] IRO Constitution (1946), Annex 1, Art. 1 (c).
[33] UN (1946), *General Assembly Resolution,* A/RES/62, 12.02.1946.
[34] IRO (1946), *Constitution*, Part I, Section B.
[35] UNHCR (2000), *op.cit.,* p.17.
[36]International Refugee Organization (IRO) (1946), *International Refugee Organization Constitution*, 18 UNTS 3, Annex 1, Art.1 (b).
[37] UN (1946), *General Assembly Resolution*, A/RES/17, 12.02.1946.
[38] IRO (1946), Annex 1, Part 1, Section C, 1 (a) (ii).

non-refoulment principle is the main safeguard of international refugee protection as will be re-emphasized in the 1951 Geneva Convention.

During its operation, UNRRA assisted 7 million people to repatriate their country while IRO repatriated 70 000 people and resettled more than one million refugees in Canada, Israel, Australia and the USA. [39] By 1951, IRO was no longer competent to solve refugee problem with 400.000 displaced people remaining in Europe.[40] Furthermore, the policy shift from repatriation to resettlement impelled criticism from Eastern blocks. States supporting repatriation perceived resettlement as a means of acquiring labour by the West and a threat to world peace since it required acquisition of people from diverse nationality into their territories. In respect to the concerns for acquiring refugees into States as a source of labour, the Constitution included a clause for the distinction between a refugee and economic immigrant. Article 1 (e) highlights this distinction as such: "it should be the concern of whom it is clear that they are unwilling to return to their countries because they prefer idleness to facing the hardships of helping in the reconstruction of their countries, or by persons who intend to settle in other countries for purely economic reasons, thus qualifying as emigrants."[41]

The IRO Constitution clearly defined under which circumstances a refugee or displaced person shall be protected. According to Article 1 (c) of the Constitution: "no international assistance should be given to traitors, quisling and war criminals, and nothing should be done to prevent in any way their surrender and punishment"[42] The Constitution also affirmed that "It should be the concern of the Organization to ensure that its assistance is not exploited in order to encourage subversive or hostile activities directed against the Government of any United Nations."[43] These Articles aimed at excluding traitors, and war criminals from benefiting from international protection of the IRO and achieving impartiality on the organization for providing assistance to refugees and displaced persons in need of protection. The same criteria for excluding one

[39] Barnett, L. (2002), *opt.cit.,* p.245.
[40] UNHCR (2000), *op.cit.*, p.5.
[41] IRO Constitution (1946), Art.1 (e).
[42] IRO (1946), Annex 1, General Principles, Art.1 (c), see also; UN (1946), *Economics and Social Council Resolution*, No. 8(1), 16.2.1946.
[43] IRO (1946), Art.1 (d).

from refugee protection was pronounced in the 1951 Geneva Convention, which now constitutes the legal basis of international refugee protection.

In addition to the concerns with regards to national security, resettlement of large number of people put an additional financial burden to the organization, which was funded by eighteen of fifty-four governments. [44] The US led Western countries; the USSR was not a member, were no longer eager to contribute unlimited support to the refugee problem due to security concerns and especially for financial reasons. [45] In response to these critics, the United States[46] argued the need of a new temporary agency with narrower definition aiming at de-emphasizing resettlement and preventing refugees to be liable to international community. [47]

Notwithstanding its efforts to provide durable solutions to the refugee problem with the resettlement practices and defining who deserve protection and who did not in the Constitution, IRO failed to respond newly emerged refugee problems in Europe, which was mainly affected by the Berlin blockade of 1948–49, the explosion of the first Soviet atomic bomb, the formation of two separate German states, the creation of the North Atlantic Treaty Organization, and the start of the Korean War in 1950. These developments in the world politics generated new influxes and demonstrated that refugee issue was not a temporary post-war phenomenon and should be resolved through a permanent and global approach [48]

1.3 Refugee Protection from 1950 to 1980s: The 1951 Geneva Convention and other regional instruments in relating to refugees: Refugee problem at global context

Until the dissolution of IRO in 1952 there was no established system, institution and legislation to tackle with refugee problem in a global manner. As mentioned above, the operations of UNRRA and IRO remained to be limited to European

[44] Musalo, K., Moore, J., and Boswell, R.A, (2002), *opt.cit.,*20.
[45] Goodwin-Gill,G and McAdam, J. (2007), *opt.cit.* p.20.
[46] The USA contributed %39 of administrative expenses and 45% for operational expenses (except for large scale re-settlement) of the IRO. For details of contributions by Member States see UN, *Constitution of the International Refugee Organization*, 15 December 1946. United Nations Treaty Series, Vol.18, p.3.
[47] Musalo, K., Moore, J., Boswell, R. A., (2002), *opt.cit.* p.20
[48] UNHCR (2000), *op.cit.,* p.7

refugees and failed to reach to a consensus between the two blocs of the Cold War in a global context. The US as the main financial supporter of international refugee organizations was in view of establishing a new organization which would operate at worldwide level.

In December 1949, the UN General Assembly established the Office of the United Nations High Commissioner for Refugees (UNHCR) for an initial period of three years from 1 January 1951. UNHCR was to be a subsidiary organ of the General Assembly under Article 22 of the UN Charter.[49] The USSR as a supporter of repatriation rather than resettlement was against the formation of UNHCR and therefore did not become a party to the 1951 Convention with the perception that the Convention was to protect people in association with fascist and anti democratic regimes. [50] Yet, reflecting the realities of the Cold War era the UNHCR Statute highlightened the non-political character of the work of High Commissioner. According to the Statute the work of UNHCR has to be entirely non-political, humanitarian, and social and it has to relate to groups and categories of refugees. [51]

Universal Declaration of Human Rights affirmed in Article 14 that ''everyone has the right to seek and enjoy in other countries asylum from persecution. This right may not be invoked in case of persecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.''[52] Thus, right to seek asylum has become a basic human rights guaranteed under the Universal Declaration of Human Rights. Despite of its non binding character, member states of the UN were bound to respect and apply provisions of the UDHR. Inclusion of the right to asylum to the Universal Declaration of Human Rights has been a fundamental step for the development of an international regime for the protection of refugees. This notion was further institutionalized by the Statute of the UNHCR.

The Statute of UNHCR covers refugee definition brought by various earlier treaties and arrangements. Chapter II of the Statute includes into refugee

[49] *ibid.*
[50] Barnett,L. (2002), *opt.cit.*, p.9.
[51] UN (1950), *Statute of the Office of the United Nations High Commissioner for Refugees,* General Assembly Resolution, 428 (V), 14.12.1950.
[52] UN (1948), *Universal Declaration of Human Rights*, A/811, 10.12.1984, Art. 14 adopted by the United Nations General Assembly, 1012.1928.

definition ''any person who has been considered a refugee under the arrangements of 12 May 1926 and of 30 June 1928 or under the Convention of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization.''[53] The Statute also states that the competence of the High Commissioner shall extend to "any person who is outside the country of his nationality, or if he has no nationality, the country of his former habitual residence, because he has or had well-founded fear of persecution by reasons of his race, religion, nationality or political opinion and is unable or, because of such fear, is unwilling to avail himself of the protection of the government of the country of nationality, or, if he has no nationality, to return to the country of his former habitual residence''.[54]

The Statute entitles the High Commissioner to provide protection and assistance to refugees falling under the competence of the Office. Thus, basic human rights of refugee such as, right to life, liberty and the security were guaranteed under the UN system. Although the Statute provided with a comprehensive definition of refugee and the competences of the High Commissioner it was not a legally binding document that States were bound to apply. The first legally binding document for the protection of refugees was the 1951 Convention relating to the Status of Refugees, through which the term refugee was legally defined and accepted. The 1951 Convention relating to the Status of Refugees was the outcome of the Conference on the Status of Refugees and Stateless Persons held in Geneva on 2-25 July 1951 upon the call of the General Assembly Resolution 429 (V) of 14th December 1950 for a conference of Plenipotentiaries in Geneva. Twenty-six states were represented by delegates authorized to participate in the Conference. As mentioned earlier, within these twenty-six countries neither Soviet Union nor any of the Eastern bloc countries were present; Cuba and Iran participated as observers. [55]

The 1951 Convention relating to the Status of Refugees differs from previous instruments in various aspects. Firstly, the 1951 Convention aimes to establish an international definition of refugee focusing on the causes of the flight rather than focusing on the origin of specific groups. However, until now, previous

[53] UN (1950), *op.cit*., Chapter II, Article 6 A (i)
[54] UN (1950), *Statute of the UNHCR*, Chapter II, Article 6 B.
[55] For the full list of these twenty-six states see also UN (1951), *Convention Relating to the Status of Refugees,* Text: 189 UNTS 250.

conventions only dealt with a specific group of persons and therefore were far from covering all people in need of protection. After the promulgation of the Convention, refugees were defined on individual basis by general concept of 'fear', which was emphasized with the notion of 'well-founded fear of persecution.' Secondly, the number of participating states and the divergence of the participating parties not covering only European countries but states from all continents made the Convention more acceptable to the Governments and consolidated its international status. In this regard, while all earlier Conventions referred to only European refugees, the 1951 Convention covers people coming from any part of the world. [56] Thirdly, the scope of rights in the 1951 Convention exceeds those granted in the earlier Conventions. The 1951 Convention consolidates the rights contained in human rights treaties and furthermore defines the rights of refugees and their implementation standards referring to the Charter of the UN and the Universal Declaration of Human Rights. In this respect, "the UN has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms.''[57] The rights accorded to refugees in the 1951 Convention covers every aspects of life including prohibition for illegal entries, the right to acquire property, the right to enjoy housing, and accommodation, which were not stipulated in earlier Conventions; the Geneva Convention grants refugees 'the same treatment as to foreigners not enjoying special favours'. Although the previous Convention on Russians and Germans only granted to refugees the relief and social security provisions equal to the most favored treatment granted to foreigners, the Convention of 1951 equalizes the status of refugees to those of nationals of the country of refugee. The Convention further guarantees that all rights accorded to refugees shall be applied to anyone who seek refuge and has a fear of persecution in the country of origin without any discrimination with regard to race, religion, nationality. Any one who has refuge in a territory should be accorded the rights stipulated in the 1951 Convention. [58]

The 1951 Convention stresses its commitment to preceding legal documents and "to extend the scope and the protection accorded by such instruments by means

[56] Robinson, N., (1953), *Convention Relating to the Status of Refugees, in History, Contents and Interpretation,* Institute of Jewish Affairs, New York, p.6-8.
[57] UN (1951), *Convention Relating to the Status of Refugees*, Text: 189 UNTS 150, Preamble.
[58] Robinson, N. (1953), *op.cit.*p.6-8.

of a new agreement." [59] In this respect, the 1951 Convention has become an internationally binding instrument combining together the preceding documents and practices developed within the League of Nations and the United Nations mechanisms. The 1951 Convention still remains to be the sole legally binding international instrument for the protection of refugees providing a definition of a refugee that remained valid up to day.

The term refugee was defined in Article 1 of the Convention, which was recommended by the General Assembly on 14th December 1950 and contained in the Annex to Resolution 429 (V).[60] The universal definition of 'refugee' safeguarded under international law is explained in Article 1 of the 1951 Convention as

> any person who…as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[61]

The 1951 Convention does not allow any other interpretation of the term refugee and any reservation that might be introduced.[62] While defining a refugee, the Convention also lists categories of persons who do not reserve international protection. Clause F of Article 1 clarifies under which circumstances a person shall be excluded from international protection. According to Article 1(F), persons who have committed "a crime against peace, a war crime, or a crime against humanity", or "a serious non-political crime outside the country of refuge prior to the admission to that country", or "persons who have been guilty of acts contrary to the purposes and principles of the United Nations" shall be excluded from the protection of the Convention. [63] In addition to that, Article 1 (C) sets out the circumstances under which international protection may cease, as such, if a person "has voluntarily re-availed himself of the protection of the country of his nationality; or having lost his nationality, he has voluntarily

[59] UN (1951), *Convention Relating to the Status of Refugees*, Text: 189 UNTS 150, Preamble.
[60] UN (1950), *Economic and Social Council Resolution*, Annex 429 (V), 319 B II (XI).
[61] UN (1951), *Convention Relating to the Status of Refugees*, Art.1.
[62] UN (1951), *Convention Relating to the Status of Refugees.*
[63] UN (1951), *Convention Relating to the Status of Refugees,* Art.1.para F.

reacquired it; or he has acquired a new nationality, and enjoys the protection of the country of his new nationality; or he has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or he can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality''[64]

The 1951 Convention depicted a time limitation for the definition of refugee by reference to 'events occurring before 1 January 1951'. The purpose of the inclusion of time limitation was to constraint responsibility of the states with existing refugees and not to extend to potential refugee problems in the future. The date of 1 January 1951 was chosen because it coincided with the creation of UNHCR.[65]

The Convention under Article 1(B) provided a clarification to the words 'events occurring before 1 January 1951' proposing two meanings either;

(a) events occurring in Europe before 1 January 1951; or
(b) events occurring in Europe or elsewhere before 1 January 1951

In respect of these two proposals, the term refugee implies a time limitation covering only those coming due to events provoked before 1 January 1951 and gives the option to the States to limit the term refugee to those coming from Europe or to extend the definition to world largely. In other words, each state at the time of signature, ratification, or adhesion, was supposed to make a declaration concerning which of the two alternatives it would choose. The States were given the right to declare 'geographical limitation' with regards to their obligations deriving from the Convention to refugees fleeing from events occurring in Europe. Turkey is one of the countries using its right arising from the Convention to grant refugee status only to persons coming from European countries.

[64] UN (1951), *Convention Relating to the Status of Refugees,* Art.1. para.C.
[65] A.Grahl-Madsen (1966), *The Status of Refugees in International Law*, Kluwer Law International, p.171.

Table2. States adopted the geographical limitation as of 1 November 2007[66]

STATES	Acceptance date of the 1951 Convention	Acceptance date of the 1967 Protocol
CONGO	15 Oct 1962 d	10 Jul 1970 a
MADAGASCAR (C)	18 Dec 1967 a	
MONACO (C)	18 May 1954 a	
TURKEY	30 Mar 1962 r	31 Jul 1968 a

Notes:

- Ratification (r), Accession (a), Succession (s)
  (C) denotes States Parties to the 1951 Convention only

At the time of adoption of the 1951 Convention, the States were in view of solving refugee problem in a short period of time and therefore introduced two 'limitations' to the definition of refugee; one on time "ratione tempore'' and the second on geography "ratione loci''. However, by the time past number of refugees increased considerably and necessity to remove temporal limitation became evident in order to extend protection to individuals persecuted after 1 January 1951 in/or outside of Europe, thereof, the time limitation foreseen in the 1951 Convention was eliminated by the accession of the 1967 Protocol. This elimination of temporal limitation was an achievement for the universalisation of the 1951 Convention. [67] In the meantime, Contracting States retained the right to reserve their option to limit refugee definition to those coming from Europe. Article 1(3) of the Protocol states that

> The present Protocol shall be applied by the States Parties hereto without any geographic limitation, save that existing declarations made by States already Parties to the Convention in accordance with article 1 B (1) (a) of the Convention, shall, unless extended under article 1 B (2) thereof, apply also under the present Protocol.[68]

In other words, the states were not obliged to abolish geographical limitation even if it was the intention of the Protocol. The Protocol expanded refugee

[66] UNHCR*, State Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol.* Available at: http://www.unhcr.org.
[67] Ibid.

[68] UN (1967), *Protocol Relating to the Status of Refugees*, Art.3.

protection from regional to a global regime despite of leaving the States the option to maintain geographical limitation. In other words, this Protocol contributed to the transformation of a regional European refugee regime into a global one. Even after the adoption of the Protocol, Turkey was one of the few countries that maintained optional 'geographical limitation' disregarding many refugees coming outside of Europe.

Although there was an optional geographical limitation attached to the Convention, the Statute of 1950 did not contain any time or geographical limitation. At present, both the 1951 Convention and the Statute of 1950 have universal character, with the adhesion of 132 States to the Convention and /or to the Protocol of 1967. [69] There were some differences in the context and interpretation of the UNHCR Statute and the Convention. Although the 1951 Convention set out obligations of States with regards to refugees the Statute established the core of the UNHCR' mandate. The difference in respect to their definition of 'refugee' was the reference to the 'membership of a particular social group' as a ground of persecution in the 1951 Geneva Convention. According to the 1951 Convention determination of refugee status rests with the contracting states whereas the interpretation of the statutes rests with the UNHCR. In the countries not party to the 1951 Convention UNHCR takes responsibility of refugee status determination process. Article 8 of the Statute set out how UNHCR shall provide protection to refugees under its competences i.e. supervising the government in the application of the convention for the protection of refugees.[70] Further Article 2 of the Statute calls the governments 'to cooperate with the UNHCR in the performance of his functions concerning refugees falling under the competence of this office.'[71] In the same respect, Article 35 of the Convention obliges contracting States to co-operate with the office of the UNHCR in the exercise of its functions and in facilitating its duty of supervising the application of the provisions of the Convention. [72] These provisions clearly indicate the importance of UNHCR' involvement in the interpretation of the Convention. Although it was on the states' responsibility to provide international protection for refugees, UNHCR had supervisory role that

[69] UNHCR, Documentation Center, Geneva, October 1996.
[70] For details see Article 8 of the Statute of the Office of the United Nations of High Commissioner for Refugees. A/RES/428.
[71] For details see Article 2 of the Statute of the Office of the United Nations of High Commissioner for Refugees. A/RES/428
[72] UN (1951), *Convention Relating to the Status of Refugees,* Ar.35.

should be performed upon the cooperation of states with the High Commissioner. [73]

The refugee definition of the 1951 Convention emphasized on the necessity of 'well-founded fear of persecution' and inability to enjoy state protection for being eligible for international protection. Within this definition 'well-founded fear' of persecution has a vital importance and controversial nature. While a person has a subjective fear it might not have objective grounds. Hathaway suggests that in assessing fear of persecution refugees' subjective fear should not be the only basis, but they must be genuinely at risk. In other words, having a subjective fear is not a sufficient ground in itself, but should be endorsed with State practices. [74] In this respect, the *UNHCR Handbook on Procedures and Criteria for Determining Refugee* Status[75] breaks down and explains the various components of the definition of refugee set out in the 1951 Convention and the 1967 Protocol. Paragraph 38 of the Handbook reads that;

> To the element of fear--a state of mind and a subjective condition--is added the qualification "well-founded". This implies that it is not only the frame of mind of the person concerned that determines his refugee status, but that this frame of mind must be supported by an objective situation. The term "well-founded fear" therefore contains a subjective and an objective element, and in determining whether well-founded fear exists, both elements must be taken into consideration.

> Para 43 continues; The applicant's statements cannot, however, be considered in the abstract, and must be viewed in the context of the relevant background situation. A knowledge of conditions in the applicant's country of origin--while not a primary objective--is an important element in assessing the applicant's credibility. In general, the applicant's fear should be considered well-founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there.

In addition to that Hanbook provides a clarification between an economic migrant and a refugee in para.62-64.

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[73] UN (1951), *Convention Relating to the Status of Refugees*, Preamble.
[74] Hathaway, J. (1991), *The Law of Refugee Status*, Toronto: Butterworth's, pp.2-6.
[75] *UNHCR Handbook on Procedures and Criteria for Determining Refugee* Status, HCR/IP/4/Eng/REV.1. Reedited, Geneva, January 1992, UNHCR 1979.

> A migrant is a person who, for reasons other than those contained in the definition, voluntarily leaves his country in order to take up residence elsewhere. He may be moved by the desire for change or adventure, or by family or other reasons of a personal nature. If he is moved exclusively by economic considerations, he is an economic migrant and not a refugee. [76]

> The distinction between an economic migrant and a refugee is, however, sometimes blurred in the same way as the distinction between economic and political measures in an applicant's country of origin is not always clear. Behind economic measures affecting a person's livelihood there may be racial, religious or political aims or intentions directed against a particular group. Where economic measures destroy the economic existence of a particular section of the population (e.g. withdrawal of trading rights from, or discriminatory or excessive taxation of, a specific ethnic or religious group), the victims may according to the circumstances become refugees on leaving the country.[77]

In this respect, having economic hardships in the country of origin does not constitute a ground for refugee status itself, but, in cases where economic restrictions in the country of origin derives from one of the five grounds of the 1951 Convention this might render an asylum seeker eligible for refugee status under the 1951 Convention. The main challenge in assessing refugee status arises from the distinguishment between an economic migrant and a refugee. As mentioned earlier economic migrants leave their countries voluntarily for economic betterment whereas refugees flee their country involuntarily escaping from risk of persecution. Considering high numbers of migration from less developed countries to industrialized states distinguishing an economic migrant from a refugee became an important issue for developed countries.

Having a well-founded fear is not the sole criteria for being eligible for a refugee status but should lead to a form of persecution within its meaning. In academic literature, there are two schools of thought with regards to persecution. One is the "restrictive school'' which perceives persecution as the most serious violations of human rights, whereas the other one, "liberal school'' covers other attacks on human dignity.[78] Grahl-Madsen defines a person having a well-founded fear of persecution if he "faced with the likelihood of losing his life or

[76] *UNHCR Handbook on Procedures and Criteria for Determining Refugee* Status, HCR/IP/4/Eng/REV.1. Reedited, Geneva, January 1992, UNHCR 1979, para.62.
[77] *UNHCR Handbook on Procedures and Criteria for Determining Refugee* Status, HCR/IP/4/Eng/REV.1. Reedited, Geneva, January 1992, UNHCR 1979, para.63.
[78] Vevsad,V.(1998), *Refugee Protection, A European Challenge*, Tano Aschehoug, Oslo, p.64.

physical freedom for more than a 'negligible' period of time, if he should return to his home country, or is likewise threatened with other measures which, in his particular case and his special circumstances, appear as more severe than a short-term imprisonment…''[79] Further, Grahl-Madsen did not consider violations of freedom of belief, conscience and religion as a ground for persecution. However, UNHCR provides a more inclusive and broader definition to persecution. Although there was no explicit explanation of persecution in the 1951 Convention, the UNHCR Handbook provided that any threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group should count as a form of persecution. Other serious violations of human rights for the same reasons would also constitute persecution.[80]

As clear from above definitions, the very basic of refugee protection was to ensure the protection of human rights of those who suffer from persecution in their country of nationality or habitual place of residence. In this respect, the link between refugee protection and human rights law is worth to emphasize. The 1951 Convention was founded on the idea of protection of human rights where national states are unwilling or unable to provide necessary protection. [81]

Although persecution was basically defined as a violation of fundamental human rights, which were guaranteed under international human rights instruments,

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[79] Grahl-Madsen, A (1966), *The Status of Refugees in International Law*, Leyden:A.W.Sijthoff, Vol.I, p.216.

[80] *UNHCR Handbook on Procedures and Criteria for Determining Refugee* Status, HCR/IP/4/Eng/REV.1. Reedited, Geneva, January 1992, UNHCR 1979,para.51.

[81] There are several Human Rights which constitute basis of international refugee protection; The 1948 Universal Declaration of Human Rights, which was then followed by legally binding conventions such as the International Covenants on Civil and Political Rights; Convention on Economic, Social and Cultural Rights (entry into force on 3 January 1976); Convention on Elimination of All Forms of Discrimination (entry into force on 18 July 1976); the International Suppression and Punishment of Apartheid (entry into force on 18 July 1976), the Convention for the Repression of the Crime of Genocide in 1951, the UN Convention against the Torture and other Cruel, Inhuman or Degrading Treatment and Punishment.(entry into force on 26 June 1987) the Convention on the Elimination of All Forms of Discrimination against Women of 1979 (entry into force 3 September 1981) and the Convention on the Rights of the Child (entry into force 2 September 1990) At a regional level, the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter called the European Convention on human Rights, entry into force 3 September 1953); the American Convention on Human Rights (entry into force 18 July 1978), and the African Charter on Human rights and Peoples' Rights (entry into force on 1 October 1986)

the violation shall be exercised on non-derogable rights in order to be defined as a persecution. The rights from which derogation is not permissible cover the right to life and integrity of a person[82], the right to freedom from to torture or other cruel, inhuman and degrading punishments and treatments[83], the right to freedom from slavery and servitude.[84] Other non-derogable rights include the right to freedom of belief, conscious, and religion.

Persecution can be perpetrated by the local populace or by the State. When the perpetrator is the local populace there should be no availability for the individual to enjoy legal remedies in the country of origin in order to be able to enjoy international protection.

> Persecution is normally related to action by the authorities of a country. It may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned. A case in point may be religious intolerance, amounting to persecution, in a country otherwise secular, but where sizeable fractions of the population do not respect the religious beliefs of their neighbours. Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.[85]

As clear by definition, persecution shall not necessarily be perpetrated by the State but the inability of the State to protect its citizens also constitutes a ground for fear of persecution.

Although the 1951 Convention had a significant role for the development of international refugee regime, it fell short of extending its protection to newly emerged refugees resulted from armed conflicts, generalized violence and public disorder since the Convention provided refugee protection on the basis of individual fear of persecution. In this respect, regional instruments were introduced providing a more comprehensive definition of refugee covering people who flee from civil disturbances, violence and war. The Organization of

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[82] International Covenant on Civil and Political Rights. General Assembly Resolution 2200A(XXI), 16 December 1966, Art.6.
[83] UN (1948), Universal Declaration of human Rights, General Assembly Resolution, 217 A(III), 10 Dec 1948, Art.5 and UN(1975), the Convention against Torture and Other Cruel, Inhuman, or Degrading Punishments and Treatments, Art.7., and the International Covenant on Civil and Political Rights, Art.7, and the European Convention on Human Rights, 4 Nov 1950, Art.3.
[84] UN (1948), Universal Declaration of Human Rights, General Assembly Resolution, 217 A(III), 10 Dec 1948, Art.4.
[85] UNHCR Hanbook, para.65.

African Unity (OAU) and the Cartagena Declaration were the two regional instruments expanding refugee concept of the 1951 Convention.

The first regional refugee Convention was the **Convention Governing the Specific Aspects of Refugee Problems in Africa** adopted by the Organization of African Unity (OAU) in 1969. The OAU was adopted to address refugee problems in Africa in the period of decolonisation and wars. The need to introduce OAU Convention with expanded definition of refugee has emerged as a result of liberation movements, which caused struggle for national dependence. While acknowledging the 1951 Convention as the primary instrument relating to the status of refugees, OAU broadened this definition covering all people compelled to cross the national borders by reasons of any man made disaster. Article 1 (1) reiterates conditions of the 1951 Convention whereas Article 1(2) extends protection to other persons not covered by the Convention. In the context of OAU, the term refugee shall apply to 'every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality'.[86] By this definition, OAU recognizes the legitimacy of flight by reasons of generalized violence and acknowledges that the flight might not only occur as a result of government's actions but moreover might be an outcome of the loss of authority of the government. [87]

The spirit of the OAU Convention was to admit that African refugees were essentially an African responsibility. According to the Executive Committee Working Group on Solutions and Protection the Member States of the OAU undertake not to reject refugees at the frontier, return or expel them to the country of origin through this Convention.

> Where a Member State finds difficulty in continuing to grant asylum to refugees, it may appeal directly to other Member States and, through the OAU, take appropriate measures to lighten the burden of the Member State granting asylum. Where a refugee has not received the right to reside in any country of asylum, he may be granted temporary

[86] Organization of African Unity, *Convention Governing the Specific Aspects of Refugee Problems in Africa (''OAU Convention''*), 10 September 1969,1001 UNTS 45.
[87] Musalo, K., Moore, J., and Boswell, R.A., (2002), *opt.cit.,* p.48.

> residence in any country of asylum in which he first presented himself as a refugee pending arrangements for his resettlement. [88]

At present, African countries are mainly characterized with armed conflict and generalized violence; these conflicts might be inter-racial or inter-ethnic rivalries, which cause mass displacement of people within the continent. Hence, the OAU is more operational in the current context of Africa given that the 1951 Convention does not include those fleeing from armed conflict and violence into its refugee definition.

The Cartagena Convention was developed during the first half of 1980s, in the wake of a period of great confusion and violence in Latin America. The Cartagena Convention was introduced as response to massive flows of refugees caused by the violence. It is stated in its Conclusion No.3 that

> in view of the experience gained from the massive flows of refugees in the Central American area, it is necessary to consider enlarging the concept of a refugee, bearing in mind, as far as appropriate and in the light of the situation prevailing in the region, the precedent of the OAU Convention (article 1, paragraph 2) and the doctrine employed in the reports of the Inter-American Commission on Human Rights. Hence the definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.[89]

The Declaration explicitly defined those who would fall within the definition of refugee; the categories contemplated in the 1951 Convention and in its 1967 Protocol, generalized violence, foreign aggression, internal conflicts, massive violation of human rights, and other circumstances leading to a serious disturbance of public order. The last category offered wide range of possibilities analyzing circumstances leading to a serious disturbance of public order. The Cartegana Declaration defined "serious disturbance of public order from the angle of covering all circumstances which may impact on the maintenance of

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[88] UN High Commissioner for Refugees, *Persons covered by the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and by the Cartagena Declaration on Refugees* (Submitted by the African Group and the Latin American Group), 6 April 1992. EC/1992/SCP/CRP.6. para 10.

[89] Americas - Miscellaneous, *Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America*, Mexico and Panama, 22 November 1984. Conlusion III.

public order to such an extent that the life, security and liberty of persons are put into serious danger'[90]

Although the Cartagena Declaration was inspired by the OAU Convention, there were some differences in terms of their refugee definition. The Cartagena Declaration included three elements which were not mentioned in the OAU Convention; "generalized violence'', "internal conflicts'' and ''massive violations of human rights'' whereas the OAU contained two elements which were not included in the Cartagena Declaration; "occupation'' and ''foreign domination'' However, in practice, both the Cartagena Declaration and the OAU Convention extended the refugee concept to cover victims of generalized violence.

In addition, the Declaration performed two important functions. One was the establishment of regional legislation dealing specifically with refugees; another one was to make governments of countries in the region more sensitive to eliminate root causes leading to the massive displacement of persons from their countries of origin.[91] Further, the Declaration pronounced the necessity to assist refugees in the fields of health, education, labour and security [92] in order to safeguard their human rights. It prohibited the return of refugees to other countries against their will.[93] The Declaration accepted voluntary repatriation as a durable solution and recommended resettlement in certain cases in order to alleviate the burden of countries with a large number of refugees. [94]

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[90] UN High Commissioner for Refugees, *Persons covered by the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and by the Cartagena Declaration on Refugees* (Submitted by the African Group and the Latin American Group), 6 April 1992. EC/1992/SCP/CRP.6. para.39.

[91] UN High Commissioner for Refugees, *Persons covered by the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and by the Cartagena Declaration on Refugees* (Submitted by the African Group and the Latin American Group), 6 April 1992. EC/1992/SCP/CRP.6. para.33. also see Americas - Miscellaneous, *Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America*, Mexico and Panama, 22 November 1984. II(m), III (I)

[92] Americas - Miscellaneous, *Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America*, Mexico and Panama, 22 November 1984. para. II (h)

[93] Americas - Miscellaneous, *Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America*, Mexico and Panama, 22 November 1984. III(5). II(L)

[94] Americas - Miscellaneous, *Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America*, Mexico and Panama, 22 November 1984. II (n) (o) and UN High Commissioner for Refugees, *Persons covered by the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and by the Cartagena Declaration on Refugees* (Submitted by the African Group and the Latin American Group), 6 April 1992. EC/1992/SCP/CRP.6. para.33

The Cartagena Declaration introduced an expanded definition of refugee providing protection to those who fled their home country as a result of generalized violence and public disorder, which had serious impact on the Central American region. This new approach was to provide solution to the refugee problem in a regional context with an emphasis to their commitment to the 1951 Convention. The Cartagena Declaration established a regional and unified approach within the states to cope with the complex refugee problem in the Central American region.

In overall, both the OAU Convention and the Cartagena Declaration broadened the concept of the refugee enshrined in the 1951 Convention relating to the Status of Refugees and its 1967 Protocol. They emerged as an outcome of the latest experiences in Africa and Latin America aiming to provide adequate responses to new dimensions of mass displacements of persons in need of international protection and assistance. [95]

Although the two regional instruments, the OAU and the Cartagena Declaration, aimed to expand refugee protection covering people fleeing from generalized violence and public disorder, the 1951 Convention was still limited to provide protection only to those being persecuted based on the five grounds set out in Article 1 (A). In this respect, the 1951 Convention fell short of providing efficient solution to current refugee problem leaving aside people in need of protection whose life and freedom were threatened as a result of war and other forms of armed conflicts. International refugee definition brought by the 1951 Geneva Convention reflects a dilemma in international refuge protection not responding the needs of current refugee inflows that were forced to seek asylum as result of armed conflicts and general insecurity situation.

In the current refugee concept, majority of refugees seek asylum as a result of wars, generalized violence and public disorder as in the examples of Iraq, Afghanistan and Somalia. As of the end of 2007, there were almost 3.1 million Afghani refugees, and Iraqis constituted 27 per cent of the global refugee population as the second largest refugee group, with 2.3 million having sought refuge mainly in neighbouring countries. Afghani and Iraqi refugees account for

[95] UN High Commissioner for Refugees, *Persons covered by the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and by the Cartagena Declaration on Refugees* (Submitted by the African Group and the Latin American Group), 6 April 1992. EC/1992/SCP/CRP.6.

almost half of all refugees under UNHCR's responsibility worldwide, followed by Colombians (552,000), Somalis (457,000), Burundis (376,000), and the Congolese from Democratic Republic of the Congo (370,000) [96]

Although the 1951 Convention did not cover war, external aggression, and generalized violence as a ground for meeting refugee criteria ExCom Conclusion No. 22, 1981 noted that persons who "owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part of, or the whole of their country of origin or nationality are compelled to seek refuge outside that country" are asylum-seekers who must be "fully protected," and "the fundamental principle of non-refoulement including non-rejection at the frontier-must be scrupulously observed."[97]

There were different approaches with regard to the extension of the 1951 refugee definition; i.e. P.Weis argues that an additional instrument should be introduced to extend the 1951 Convention covering the "de facto'' refugees[98] whereas G.Jaeger claims that war refugees and other displaced persons should be covered by the existing definition of the 1951 Convention. However, P.Nobel argued in 1990 that the States would not agree to extend the definition of the 1951 Convention due to the existing political environment and even in contrary they are more close to apply the Convention at the strictest manner. [99]In 1992, the Sub-Committee recommended to develop the protection for "de facto'' refugees through regional and national level first and then to extend to global scale.[100]

Above cited countries, i.e Afghanistan, Iraq and Democratic Republic of Congo, are producing refugees as a result of armed conflicts or generalized violence in which sometimes people are not targeted personally and hence do not fall into definition of the 1951 Convention. However, a person fleeing his home country

[96] UNHCR 2007 Global Trends: Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless Persons, June 2008
[97] UN Documents, *Protection of Asylum Seekers in Situations of Large Scale Influx*, EXCOM Conclusions, No:22 (XXXII), 21 October 1981.
[98] In 1976, during a Council of Europe Conference, P.Weis defined "de facto'' refugee as persons who are not recognized as refugees within the meaning of Article 1 of the Convention relating to the status of Refugees as amended by the Protocol of 10 January 1967 relating to the status of Refugees and who are unable or, for reasons as valid, unwilling to return to their country of nationality or, if they have no nationality, to the country of their habitual residence.''
[99] Vevsat,V. (1998), *opt.cit*., p.127.
[100] UN Document, EC/1992/SCP/CRP.5, April 1992

because of war has no less valid reasons for protection than a person who is personally targeted and has a fear of persecution based on one of the five grounds of the Convention. It is not a fair practice to grant refugee status to a person being persecuted based on one of the five grounds but, to exclude the other one from international protection whereas his life and dignity would certainly be at risk in the country of nationality in war conditions; both of the cases have well-founded fear of persecution but the latter does not meet the criteria for refugee status within the meaning of the 1951 Convention given that he is not individually targeted based on the five Convention grounds. I believe that refugee definition of the 1951 Convention shall be updated regarding current refugee context, of course, if the States are indeed willing to provide protection on humanitarian basis rather than perceiving refugee problem as a homework deriving from their international responsibilities.

In this Chapter, development in international refugee protection has been provided in chronological order covering the period of World Wars, adoption of the solely legally binding international instrument in refugee protection, the 1951 Geneva Convention. This Chapter presented an outline of the circumstances in the aftermath of World Wars, which created a refugee crisis among European States and the need of establishing a common humanitarian and international regime. The eras in the aftermath of World Wars were mainly characterized by international organizations that fell short of resolving refugee problem at global level limiting international protection to certain nationalities. This Chapter shed light to the standpoint of European States to the refugee problem in the aftermath of the World Wars and their failure in providing effective protection to refugees at global level. The Chapter has an importance since it presents a background of European Countries attempts in solving the refugee problem prior to the establishment of the EEC in 1957**.** In the first mid of 20th century, European Countries were in view of defining a 'refugee', the rights and durable solutions to be accorded to them. In other terms, protection needs of refugees shaped the policies of European States in the first mid of 20th century prior to the establishment of EEC. However, as will be analyzed in a comprehensive manner in the following chapter this attitude of European States changed drastically towards the end of 20th century. European States started to implement stricter immigration and asylum measures in order to keep refugees out of the European borders and to consider 1951 Geneva Convention not as an instrument of international refugee protection but as an impediment for

European States in the implementation of their own asylum policies with immunity without the respect of asylum seekers' protection needs. The following Chapter aims to analyze evolvement of asylum policy in the European Union and to provide an objective analysis of the European Union asylum policy.

CHAPTER 2

EVALUATION OF ASYLUM POLICY IN THE EUROPEAN UNION: FROM *AD HOC* COOPERATION TO THE ESTABLISHMENT OF EUROPEAN COMMON ASYLUM POLICY

Harmonization of asylum policies at the EU level has arisen from an increasing number of asylum seekers coming to European countries in the end of 1980s. Especially, since the collapse of Berlin Wall in 1989, the influx of people from Eastern Europe has grown significantly when frontier barriers were largely removed. In the post- Cold War era, the continuous ethnic and political conflicts all over the world created an increase in the number of refugees and asylum seekers. These developments significantly affected the number of asylum seekers reached to European Countries. A considerable increase in the number of asylum applications was witnessed in Western Europe between the early 1980s and 199Os, reaching a peak of some 700 000 in 1992. This escalation in asylum inflows (much of it from Eastern Europe after 1989) has coupled with the mass displacement of population caused by the outbreak of conflict in the former Yugoslavia. The inflows from Yugoslavia put pressure at a time of worsening economic recession and political uncertainty in Western Europe, while governments were inclined to restrict immigration into their territories. [101] Another major reason for the flights of Eastern European citizens was the prospect of having prosperous future in Western Europe. Globalization and the development in transportation played a facilitating role in crossing the national borders. The low transportation costs in recent decades was one of the factors which motivated and facilitated the flows of asylum seekers and immigrants into Western Europe during this period.

The increased asylum applications and migration flows because of the abovementioned reasons, and especially due to the fall of the Berlin Wall in

[101] Collinson, S. (1995), V*isa requirements, carrier sanctions, 'safe third countries' and 'readmission': the development of an asylum 'buffer zone' in Europe*, Royal Geographical Society, p.5.

1989, put the international refugee protection system in Western Europe under serious pressure. The politicians in Western Europe began to express increasing concern over the perceived threat of mass uncontrolled migration from Eastern Europe and the former Soviet Union, as well as from poorer countries to the south. The increase in immigration into the Western Europe changed the perception of asylum seekers in the West; asylum seekers have been considered as a threat to national security and stability. In addition to that, the increase in the number of asylum seekers was unequally experienced in each Member States. For instance, in the German Federal Republic the increase was 37,000 requests in 1982, 99,700 in 1986, in the Nederlands 1,800 requests in 1982, 5,9000 in 1986, in Belgium 2,900 requests in 1982, 7,700 in 1986, in France 22,500 requests in 1982, 26,290 in 1986. [102]

Thus, responding to increasing levels of immigration and unequal distribution of asylum applications, European countries have focused on strengthening their external borders and improving all other immigration-control mechanisms at their disposal. These challenges brought the asylum and immigration issue to high-level politics throughout the Western states with the expression of the need of common coping mechanism at the EU level. [103]

The framework of this chapter has been elaborated in the light of the following questions; Why the EU needed Common asylum policy? Why the communitarization of asylum policy was important? Did the national laws fall short of controlling illegal immigration and external borders? Is there a common application of European Asylum System among the Member States? Did the CEAS prevented different practices among the Member States? How effective is CEAS? What are the defficiencies of European CAP? Does the EU have a ell functioning CEAS?

This Chapter seeks to shed light on gradual development of a Common European Asylum Policy into three separate subchapters. Subchapter I tries to find out 'why the EU needed common asylum policy' in reference to the latest population movements of 1980s which considerably affected EU's perception of asylum

[102] Vevstad,V.(1998), *Refugee Protection: A European Challenge*, Tano Aschehoug., p.253.
[103] Kale, B. (2005), *The Impact of Europeanization on Domestic Policy Structures: Asylum and Refugee Policies in Turkey's Accession Process to the EU*, Thesis for the Degree of Doctor of Philosophy, p.116.

related matters. Section II provides developments at the level of intergovernmental cooperation starting from the initiatives of the Council of Europe and followed by the Single European Act (1985), Schengen Agreement (1990), Dublin Convention (1990), and the Treaty of Maastricht (1992). Third Section provides an overview to the developments at 'Community Level' taking the Amsterdam Treaty as a starting point and concluding with the Hague Programme (2005). This section covers Tampere Conclusions as well as Council Directives that were adopted as an outcome of the Treaty of Amsterdam. In overall, this Chapter aims to study gradual development of the Common European Asylum System providing with a critical analysis of asylum practices in the EU. Following the analysis, 'possible' effects of CEAS on Turkey will be addressed in the next Chapter.

2.1 Why the EU needed common asylum policy?

Following the Second World War number of displaced persons in need of repatriation or resettlement was over 40 million and the refugee issue had ideological aspect in an East-West divided Europe. The main refugee influxes from the Soviet Union or Eastern European countries were hosted by the Western States, or by North America, New Zealand, and Australia. The first refugee arrivals from other countries occurred in 1970s as a result of conflicts military coups in Chile, Uruguay in 1973 and in Argentine in 1976. [104] Further, 230 000 refugees fleeing from Indochina were resettled in Western Europe after 1975. The number of asylum seekers in Western Europe increased from 50,000 in 1983 to over 200,000 in 1989 as a result of internal armed conflicts in Africa, Asia, Latin America and the Middle East. [105]

In addition to above refugee influxes, during 1960s European States acquired immigrants as labour force to accelerate their economies. Immigrants were provided with 'temporary work permit' and were called as 'guest workers'. Although this period faced some developments on immigration it was limited to the migration of workers and their families. During the 60s, immigration policy

[104] UNHCR (2000), *The State of World Refugees*: Fifty Years of Humanitarian Action, Oxford: Oxford University Press, p.156.
[105] *Ibid.*

was in line with the economic character of the EEC. [106] In the early 1970s there were about 10 million guest workers and 2 million people from former colonies admitted to the Western European countries. [107] However, with the economic recession of 1970s the situation has drastically changed. The European Countries applied more restrictive immigration policy and ended their labour immigration programmes. For instance, foreign labours in France decreased to 15.000 in 1989 from 100.000 in 1971.[108] On the other hand, immigrants continued to come to European states to enjoy better economic opportunities and using 'family reunification' as a tool in order to remain within the territory of the European community. Economic restriction, unemployment, and increasing number of asylum seekers had a negative impact on the perception of foreigners in the European States. As the other immigration channels were closed with the economic recession, applications for asylum had increased significantly. Furthermore, increased communication links, easy access to transportation means, growing number of people in seek of better employment and economic opportunities had an impact in the increase of asylum application. [109]

In addition to increased immigration in Europe, German unification and collapse of Communism in Eastern Europe generated the need of common immigration policy. With the opening of borders Germany became vulnerable to migration influxes from Eastern and Central European Countries and carried the highest burden of asylum applications. Consequently, with the crisis of Bosnia and Kosovo, asylum seekers migrated to Western European Countries and preferred seeking asylum in the countries with higher recognition and liberal asylum policies. As in the case of Germany, countries with higher asylum applications and higher recognition rates have also raised concerns in relation to 'unequal burden sharing mechanism' among the EU Member States. In this regard, a need of mechanism respecting 'burden sharing' and 'equal distribution of asylum applications' has come into EU agenda. The following subchapter will analyze gradual development of the European Common Asylum Policy into two sections; cooperation at intergovernmental level and cooperation at community level.

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[106]Siderorenko, O.F. (2006), *European Asylum Law and Policy, The EU and Slovak Perspectives*, Doctorate Thesis for Erasmus University Rotterdam, p.10.
[107] Loescher,G. (1992), Mass Migration as a Global Security Problem, *World Refugee Survey*, Washingthon D.C:US Committee for Refugees, p.12.
[108] *Time*, 26.8.1991, p.22.
[109] Lavanes, S (2001), *Europeanization of Asylum Policies: Between Human Rights and Internal Security,* Hampshire: Ashgatet, p.95.

2.2 Towards a Common Asylum Policy: Intergovernmental Developments in the field of asylum

2.2.1. Initiatives at the Council of Europe

As discussed in Chapter I, the 1951 Convention and its Protocol were the main international conventions regulating asylum and refugee policies at worldwide level. At a regional level, African and Latin American countries have adopted legally binding instruments regulating asylum, such as OAU and Cartegana Declaration. Europe, as a regional actor, took asylum issue into its agenda through 'soft law' Instruments, Council of Europe recommendations and resolutions, in which 'right to asylum' was not included.[110] In Europe refugee and asylum matters were initially discussed at intergovernmental level in the context of the Council of Europe. The European Convention on Human Rights (ECHR) of 1950 has significant importance as a legal international safeguard for the fundamental human rights. Although the ECHR did not include right of asylum as a human right; Article 3 of the Convention reads that 'no one shall be subjected to torture or to inhumane or degrading treatment or punishment'. This Article is the basic principle of the right to asylum as it safeguards non-refoulment of a person to a country where he is likely to face torture, inhumane or degrading treatment or punishment. Although the ECHR does not pronounce 'right to asylum' it provides a legal basis to right to seek asylum within the meaning of Art.3.

The most important attempt within the framework of the Council of Europe was the Consultative Assembly of the Council of Europe's initiative to include right of asylum in the second protocol of the ECHR. However, this initiation failed as a result of Member States 'hesitation to grant their asylum decisions control to an international system instituted by the Convention.'[111] In this respect, with the purpose of strengthening the right to non-refoulment, the Council of Europe introduced a resolution in 1965, ''which, by prohibiting inhuman treatment, binds contracting Parties not to return refugees to a country where their life or freedom would be threatened.''[112] In the Recommendation No.878, in 1976, the Council of Europe expressed the need of harmonization of asylum procedures

[110] Vevstad,V.(1998), *opt.cit,* p.179.
[111] Lavenex, S. (2001), *opt. cit*, p.76.
[112] Council of Europe (1965), Parliamentary Assembly, Recommendation, No.434.

within the Members States and establishment of a common guideline, which is expected to diminish disparate assessment of asylum claims in each Member States. [113]

The main contributions of the Council of Europe in the refugee and asylum related matters were 'strengthening cooperation and solidarity among European states and with the countries of origin and transit, elaboration of common principles for a harmonized approach towards de facto refugees and asylum procedures, and efforts to establish a system of regional cooperation based on the 'first country of asylum' concept.'[114] These elements were reflected in the recommendation No.1016 of the Council of Europe indicating that 'a growing number of asylum seekers are unable to find a state willing to consider their application because of failure in a country of first asylum and thus suffer the tragic living conditions of so-called "refugees in orbit", that is to say, placed in a position of being unable to reside legally in any receiving country.' In this respect Parliamentary Assembly recommends the Committee of Ministers to ''set up, in consultation with the Office of the United Nations High Commissioner for Refugees, a permanent body to deal with refugee and migration problems, in order to establish direct cooperation with the member states concerned in seeking and implementing the most appropriate legal and practical solutions at the European level.'[115] The UN Conference on Territorial Asylum in 1977 proposed Draft Convention on Territorial Asylum asking the States 'while acting in the exercise of its sovereign rights, shall make efforts, in a humanitarian spirit, to grant asylum in its territory to all persons meeting the required conditions in order to benefit from the provisions of this Convention.'[116] Further, the Convention contains the principle of non-refoulment indicating that 'asylum should not be refused by a Contracting State solely on the ground that it could be sought from another state.'[117] Unfortunately, the Conference of Plenipotentiaries on Territorial Asylum was concluded without adopting the Convention. However, since the failure of the Conference of Plenipotentiaries on Territorial Asylum, the General Assembly advised governments to respect the

[113] Council of Europe, (1976), Parliamentary Assembly, Recommendation, No.878.
[114] Kale, B. (2005), *opt.cit.,* p.132.
[115] Council of Europe, (1985), Parliamentary Assembly, *Recommendation*, No 1066.
[116] United Nations (1977), *Draft Convention on Territorial Asylum*, Text of Articles Considered at the United Nations Conference on Territorial Asylum held in Geneva from 10.1-4.2.1977, Art.1.
[117] United Nations (1977), *Draft Convention on Territorial Asylum*, Art.1.

non-refoulment principle. The European States as a reaction to the failure of the Conference of Plenipotentiaries adopted the Declaration on Territorial Asylum. The Convention on Territorial Asylum not only refers to 'Convention refugees' but also expands this definition referring to ''….any other person Member States consider worthy to receive asylum for humanitarian reasons.'' [118] Further, the principle of non-refoulment was emphasized in the Convention which is the core of the humanitarian norm of international refugee regime.

The 1988 recommendation states that 'certain measures taken or envisaged in some member states may increase the burden laid on the other member states of the Council of Europe.' In this respect, it outlines the necessity ''to examine jointly the problems arising out of the growing number of refugees in certain countries, with a view to apportioning the burden on the basis of greater solidarity.'' Further it sets out principles with regards to refugee protection throughout Europe. These principles included 'granting temporary residence permit to true asylum seekers, detect concurrent asylum applications, to screen true asylum seekers from those who are not, to exchange information on measures adopted and statistical information.'' [119] The idea of establishment of Common European Asylum System takes its roots from the end of 70s, rising from the concerns of 'unequal distribution of asylum applications in the EU', 'multiple asylum applications', 'problems arising from the growing number of refugees', and the need of 'burden sharing mechanism'.

The Council of Europe recommendations firstly attempted to establish a 'burden-sharing' mechanism within the European States in asylum related matters and a common approach for the assessment of asylum claim in order to prevent 'refugee in orbit' situation. The Council of Europe recommendations had 'humanitarian' and 'inclusive' character for the assessment of asylum claims and for refugee protection. However, the Council of Europe fell short of providing a permanant solution to asylum and immigration problems in the EEC. The Council of Europe had an idealistic perspective which impeded the states to agree on a common policy. Therefore, the late 80s and the beginning of 90s faced a shift on the policy from the humanitarian aspect of the UN and Council of Europe to more exclusive policies characterized with intergovernmental cooperation of the

[118] Visvad, V. (1998), *opt.cit.,* p.182
[119] Council of Europe, (1988), Parliamentary Assembly, *Recommendation*, No. 1088.

Member States. The European States applied more restrictive measures to combat with illegal immigration, controlling their borders and national interests. Therefore, the 80s was mainly shaped with the attempts to establish common measures for border protection and establishment of a system for equal distribution of responsibility among Members States in the assessment of asylum claims. During this period, the policy of the European Community in the field of 'asylum' and 'immigration' was formed of two different approaches; one was the abolishment of internal borders, in other terms, establishment of internal market with free movemnet of persons, goods, capitals, and services and in the other hand implementation of strict control measures on external borders in order to establish internal security and to combat against illegal immigration, drug smuggling and terrorism.

The integration in the filed of justice and home affairs, accordingly in the field of asylum, was not envisaged in the Treaty estabishing the European Community. However, as the time went, the need to create freedom of movement for persons with the same level of protection and justice came to the agenda of European Countries. In fact, the right to free movement of persons originally included free movement of workers, however, by the time past, and the Europen Community gained more social and humanitarian dimension, the right to free movement have been extended to Community citizens. In this respect, an area of fredoom, security and justice was created gradually over twelve years through the amendments to the original treaties under the Single European Act (1985), Treaty on European Union (Maastricht Treaty), the Amsterdam Treaty and through enactment of the Schengen Agreement (1985) and the Schengen Convention (1990).

2.2.2 The Single European Act (1985)

One of the main objectives of the Treaty of Rome in 1957 was the creation of the European Economic Community and establishment of free movement of European workers within the framework of the establishment of internal market.

The first amendment to the Treaty establishing the European Economic Treaty (Treaty of Rome) was introduced through the Single European Act (SEA) on 17 February 1986, which entered into force on 1 July 1987. The main objective of

the SEA was to expedite the process of 'European construction' as well as the completion of the internal market. Altough the unanimity was replaced by the QMV for measures designated to establish the Single Market the freedom of persons remained one of the areas requiring unanimity for decision-making. Article 8A clearly defines the objective of the Act, which is to progressively establish the internal market over a period expiring on 31 December 1992 based on four fundamental freedoms. The Single Market is defined as "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty".[120] Within the meaning of this definition, the SEA envisaged abolishment of internal borders in a definite period of time. The SEA did not prounce the word 'asylum' or 'refugee' but referred only to the Community citizens. The Member States, in a general declaration, affirmed they would preserve their national rights with regard to immigration of third country nationals, terrorism, crime, and trafficking of drugs.[121] In a political declaration to the SEA Member States affirmed that they would cooperate in the mentioned areas on intergovernmental basis. As clear, Member States were unwilling to transfer their national sovereignity on asylum related matters but preferred to cope with immigration from third countries under intergovernmental cooperation.

2.2.3 The Shengen Agreement (1985) and Schengen Convention (1990)

Following the Single European Act, one of the most important step for the achievement of free movement within the EC has taken place in 1985 when the governmnets of Belgium, France, Germany, Luxembourg and the Netherlands signed Schengen Agreement in 1985 in order to overcome standstill on community development. With the Shengen Agreement the States agreed to abolish all checks on persons, regardless their nationality at their shared borders, to harmonize control over non-European borders, and to introduce a common policy on visa. The original five states adopted the Schengen Agreement as a Convention on 19 June 1990, which came into effect in March 1995; the Schengen Convention supplemented the Agreement and laid down the arrangements and safeguards for implementing freedom of movement. The Schengen area which was formed by five Member states have gradually

[120] The European Union, (1986), *The Single European Act*, OJ L 169 of 29.06.1987.
[121] European Council (1985), *Declaration*, Luxembourg, 09.09.1985.

expanded[122], by the end of 2007, all members were party to Schengen area except Irelands, the UK, Cyprus, Bulgaria, Romania, together with non-EU countries Iceland and Norway, who also fully apply Schengen rules. [123] Measures adopted by the Member States under the Schengen Convention were; the abolition of checks at common borders, replacing them with external border checks, a common definition of the conditions for crossing external borders and uniform rules and procedures for checks there, separation in air terminals and ports of people travelling within the Schengen area from those arriving from countries outside the area, harmonisation of the conditions of entry and visas for short stays;, coordination between administrations on surveillance of borders (liaison officers and harmonisation of instructions and staff training), the definition of the role of carriers in measures to combat illegal immigration, requirement for all non-EU nationals moving from one country to another to lodge a declaration, the drawing up of rules governing responsibility for examining applications from asylum seekers, the introduction of cross-border rights of surveillance and hot pursuit for police forces in the Schengen States, the strengthening of judicial cooperation through a faster extradition system and faster distribution of information about the enforcement of criminal judgments, the creation of the Schengen Information System (SIS). [124]

Further, the Schengen Convention containes principles with regard to the assessment of asylum applications in Member States. It confirms in Article 29 that the parties "undertake to process any application for asylum lodged by an alien within any one of their territories."[125] The Schengen Convention also affirms that " only one state shall be responsible for processing the application." It also covers principles on determining responsible state for assessing an asylum application, which was later re-worded in the Dublin Convention in 1990.

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[122] Italia signed the Schengen Convention in November 1990. Spain and Portugal signed in June 1991. Greece signed in November 1992. Australia signed in April 1995. Denmark, Finland and Sweden signed in December 1996, Norway and Iceland, not member States to the EU, signed association agreements for membership in December 1996. Belgium, Denmark, Germany, Greece, Spain, France, Italy, Luxembourg, Netherlands, Austria, Portugal, Finland and Sweden signed in March 2001.

[123] *The Schengen Area and Cooperation*, available at: http://europa.eu/scadplus/leg

[124] The Schengen Information System (SIS) was set up to record refusals of entry for asylum-seekers, arrest warrants, missing persons and stolen objects.

[125] *The Schengen acquis,* 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, Article 29, Official Journal L 239 , 22/09/2000 P. 0019 - 0062

With the entry into force of the Agreement a person in a Schengen country was able to move freely to another country; this rose security concerns within the EC since the Member States were no longer controlling their internal borders. Therefore, extra security measures were to be implemented on external borders of the Community in order to combat with criminals, terrorists, drug smuggling, and illegal migration. Therefore, a closer cooperation was required within the EU, national police forces, and judicial authorities. Abolishment of internal borders had an impact on EC's immigration policy, as well as its asylum and security policy. The Schengen Treaty was a step forward to promote intergovernmental cooperation to take a commmon standing against common challenges such as organised crime, terrorism, illigal immigration and asylum seekers.

The Schengen provisions rose some concerns with regard to refugees and asylum seekers. One of them is the implementation of visa restrictions. Asylum seekers and others in need of international protection often flee their country without proper documents as they flee from the State authorities or general conflicts. Therefore, in most cases, they are not able to approach the authorities and to apply for necessary travel documents since it would mean disclosing themselves to persecutors, the authorities and in other terms, informing them about their flights. In this respect, implementing visa restrictions to asylum seekers and refugess would be inconsistent with the idea of the 1951 Convention in which it was cleraly stated that asylum seekers shall not be punished for their illegal entry to a country. Another point is the implementation of 'carrier sanctions', according to which airlines and other carriers are fined for bringing into a country any person who lacks a visa or other requisite documentation for entry. This practice can lead to non-repairable effects on asylum seekers life. The fact that the airline staffs are required to do the work of immigration officers with less experience and knowledge they can fail to assess 'genuine cases' in order to avoid high amount of fines and can refuse travel of a person claiming they will be killed if remained in the country of origin. [126]

[126] Selm-Thorburn, J. (1998), *Refugee Protection in Europe*, Martinus Nijhoff Publishers, p.62. "Indeed, visa requirements and carrier sanctions have played an important part in restricting the numbers of refugees arriving in western Europe from Bosnia-Herzegovina, for the majority of governments in western Europe have imposed a visa requirement for Bosnian nationals in response to rising refugee outflows since the outbreak of hostilities there. As in other cases, the 'containment' of refugee flows out of the former Yugoslavia is supported by the argument made by governments that refugees should, if possible, stay in the nearest 'safe areas' to their homes, as outlined in the Conclusion on certain common standards relating to the reception of particularly vulnerable groups from former

Schengen Agreement was incorporated into the EU legislation and framework as a protocol attached to the Amsterdam Treaty. The Schengen *acquis* is the set of rules adopted under Schengen Convention and its 1985 Agreements, in other words it is a body of law which has to be applied by all Member States applying the Schengen provisions and which has to be adopted into national legislation of countries seeking EU membership.

2.2.4 The Dublin Convention (1990)

The Dublin Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities (hereby the Dublin Convention) was signed in Dublin on 15 June 1990, and entered into force on 1 September 1997 for the twelve original signatories[127], for Austria and Sweden on 1 October 1997 and for Finland on 1 January 1998. The Dublin Convention was not an instrument of community law within the meaning of the Treaty establishing the European Community (TEC), but a treaty under international law. [128]

The Dublin Convention was a mechanism for determining the responsible Member State for examining an application for asylum lodged in one of the contracting States. The Dublin Convention had three main objectives; firstly the Convention was an essential step to the creation of common asylum system; secondly it aimed to avoid ''asylum shopping situation'', where an asylum seeker claims asylum in a number of states, this term was also related to the fact that asylum seekers may choose one State to another on the basis of higher living conditions and social assistances; another prospect of the Convention was to avoid ''refugee in orbit'' situation, which was the referral of an asylum seeker from one state to another where no State willing to take responsibility for examining his/her claim.

Yugoslav states' reached by EU governments in June 1993.'' Collinson, S. (1995), *opt.cit*., p.5.

[127] Belgium, the Netherlands, Luxemburg, France, Germany, Italy, Denmark, Greece, Ireland, Portugal, Spain and the United Kingdom.

[128] 'The Dublin Convention has been replaced by Council Regulation 343/2003 of 18 February 2003 establishing the criteria and mechanism for determining the member States responsible for examining an asylum application lodged in one of the member States.' Siderorenko, O.F. (2006), *opt.cit*., p. 14.

With the Dublin Convention the Member States affirmed their commitment to the 1951 Convention and its 1967 Protocol without any geographic limitation and their commitment to continuing cooperation with the United Nations High Commissioner for Refugees in applying these instruments. (Art.2) They also undertook to examine the application of any alien who applies at the border or in the territory of any one of them for asylum. [129]

The idea of the Dublin Convention was the assessment of asylum applications by a single Member State in accordance with its national law and obligations. Therefore, it sets out criteria to determine which Member state is responsible examining the application, as follows;

a) The state where a spouse, child under 18, or parents of a child has been recognized as having refugee status with the meaning of the Geneva Convention shall be responsible. (Art.4)

b) The State that issued residence permit or valid visa to the applicant.[130] (Art.5)

c) The State where illegal entry was made outside the European Union. (Art.6)

d) The State responsible for controlling the entry through the external borders (Art.7)

e) Where no Member State is responsible for examining application, the State where the first application was lodged is responsible. (Art.8)

It is worth to note that in consequence of Article 3(5) of the Convention, any Member State had the discretion to send an asylum-seeker to a third (non-Community) State (in application of the safe third country principle) before applying any of the rules on determination of responsibility mentioned in the Convention. The Dublin system did not operate on the basis of 'equal distribution' of total numbers of asylum applicant among Member States. The

[129] European Union, Convention Determining the State Responsible For Examining Applications For Asylum Lodged In One Of The Member States Of The European Communities (''Dublin Convention''), 15 June 1990. Official Journal C 254, 19/08/1997, p.001-0012.
[130] For details see Art 5 (a)(b)(c), Art5(2)(3)(4)

allocation of asylum applications did not provide a picture of 'equal burden sharing mechanism' but put considerable burden on the countries at the external borders of the Union. ECRE in its report in March 2008 stated that ''The Dublin system places a much greater strain on the Member States near the EU's external borders, which often have less capacity to handle asylum claims, and therefore can not guarantee adequate reception conditions for refugees. While in 2005 Germany had a net outflow of 32 asylum cases, Poland saw its 2005 case load increase by 19% and Slovakia by 12%.''[131] This unequal allocation of asylum seekers indicates the lack of solidarity between the Member States and does not reflect the idea of the establishment of Common European Asylum System which was expected to be based on a well-balanced system of burden-sharing among the Member States. The most problematic situation occurs if the documentary evidence, such as travel tickets, passports, identity cards, are destroyed in order to hide illegal entry. In cases, ''where there is indicative evidence only, there is disagreement about how to treat it. The results appeared to be that in the great majority of cases, the Member State in which the asylum application was lodged is sooner or later forced to accept responsibility under Article 8 of the Convention.''[132] Article 8 is one of the most criticized criteria in the Dublin Convention. This Article considers the State received the first asylum application as the responsible states in the absence of other criteria.

In the light of above articles, if a Member state designates another Member State responsible it may then request another Member state to 'take charge' of the Applicant. However, the Member State shall be informed about this request within the six months following the date on which the application was lodged, otherwise, responsibility for examining the application for asylum shall rest with the State in which the application was lodged. (Art 11) The Dublin Convention has been criticized for operating slowly in practice. For ex, especially Member States were criticized for long periods to respond to transfer requests. Nonetheless, there was not an emphasis on the time limit within which a Member State must reply to a request. In response, Decision 1\97 instructed that the Member State concerned shall make every effort to reply to the request

[131] European Council on Refugees and Exiles (2008), *Dublin mechanism: obstacle to future European Asylum System*, PR4/3/2008/Ext/CN/SP
[132] The Dublin Convention, Article 8.

if possible immediately and in any case within one month. [133] It would be worth to take look at the following statistics in order to better understand the efficiency of the practice of asylum transfer from one country to another:

Table.3. Application of the Dublin Regulation

APPLICATION OF THE DUBLIN REGULATION[134] **September 2003- December 2005**	
Request	55.310 (1)
EURODAC based requests	28.393 (2)
Acceptances	40.180 (1)
Refusals	10.536 (1)
Transfers	16.842 (3)

This scheme shows us that between September 2003 and December 2005, there have been 55.310 requests for the transfer of asylum seekers to another Member States. Although 40.180 of these requests have been accepted by the Member States only 16.842 of these requests have been transferred. This low number of transfer indicates us the inefficiency of the application of the Dublin System. The referral of asylum seekers from one state to another based on their entry point to the EC puts a higher burden on the bordering countries. In this respect, it would be worth to note that, once Turkey becomes a part of the Dublin system, it would carry the highest burden among the Members states due to its geographical situation laying down between West Europe and 'asylum producing' countries. As the effects of Common European Asylum System on Turkey will be analyzed in the following Chapters, I will not refer the case of Turkey within this section.

[133] Decision 1/97 of the Committee set up by Art.18 of the Dublin Convention of 15 June 1990 (''Article 18 Committee'') concerning provisions on implementation of the Convention, OJ L 281, 14.01.1997, 1. Decision 1/97 was supplemented by Decision No 1/98 of June 1988, OJ L 196, 14.7.1998, 49.
[134] European Commission (2007), *Report on the Evaluation of the Dublin System*, COM(2007) 299 final, Brussels, 06.06.2007.

The responsible Member States for examining an asylum application was also supplemented with the so-called *sovereignty clause (Art.3)* and the *humanitarian clause*. (Art.9)[135] Under the sovereignty clause the Member States obtained the right to examine asylum application 'even if such examination is not its responsibility under the criteria defined in this Convention provided that the applicant for asylum agrees thereto.' The sovereignty clause provided flexibility giving discretion on the Member States to examine asylum application for which they are not responsible. Humanitarian clause indicated that ''Any Member State, even when it is not responsible under the criteria laid out in this Convention, may, for humanitarian reasons, based in particular on family or cultural grounds, examine an application for asylum at the request of another Member State, provided that the applicant so desires.'' These two clauses provided a flexible dimension for the determination of responsible Member States referring to State sovereignty and humanitarian reasons.

The Dublin Convention has been highly criticized because of its application limited to persons seeking protection under the 1951 Convention, as amended by the New York Protocol. As an outcome of this application, those who are in seek of asylum resulting from 'generalized violence', or 'armed conflict', or those in need of subsidiary protection are excluded from the scope of the Dublin Convention.

The Dublin Convention pronounced the need to establish a mutual information exchange system with regard to ''national legislative or regulatory measures or practices applicable in the field of asylum, statistical data on monthly arrivals of applicants for asylum, and their breakdown by nationality, general information on new trends in applications for asylum, general information on the situation in the countries of origin or of provenance of applicants for asylum [136]and information on individuals including personal data, the members of his family(name, surname, date of birth, place of birth, nationality), identity and travel documents, places of residence and travel routes, residence permits, or visas issued by a Member State, the place where the application was lodged'' [137] In

[135] Sidorenko, O.F. (2006), *opt.cit.,* p.13.
[136] The Dublin Convention determining the State responsible for examining applications for Asylum Lodged in one of the Member States of the European Communities, 15.06.1990, Dublin, entry onto force 01.09.1997, Official Journal, No.254, 19.08.1997, Art.14 (1)(2)
[137] *Ibid*, Art.15 (2)

this respect, the Dublin Convention had a greater role for the harmonization of European Asylum System introducing several measures applicable in the field of asylum. The Dublin Convention established the basis of computerized data sharing mechanism and data system on fingerprints of asylum seekers and other aliens, which was established through Council Regulation No 2725/2000 in December 2000.

> The EURODAC Regulation has established a tool for facilitating the application of the Dublin Regulation, by registering and comparing fingerprints of asylum seekers. Member States have to take the fingerprints of each third-country national above 14 years of age who applies for asylum on their territory or who is apprehended when irregularly crossing their external border. They can also take the fingerprints of aliens found illegally staying on their territory in order to check whether they have applied for asylum (on their territory or that of another Member State). They have to send these data promptly to the EURODAC Central Unit, managed by the Commission, which will register them in the Central database and compare them with already stored data. Such comparison can produce "hits", when the data introduced match with already stored data. Where hits reveal that an asylum seeker has already applied for asylum or that she/he entered the territory irregularly in another Member State, the Member States together can act in accordance with the Dublin Regulation. [138]

According to information provided by the European Commission[139] in 2005, %15 of asylum applications within the EU were multiple. This number indicates us the inefficiency of the Dublin System in preventing 'asylum shopping' situation within the Union. The Commission expressed its concern about multiple information entry into EURODAC System which had a negative effect in the application of the Dublin System. Therefore, the Commission propose ''mechanisms for Member States to keep each other informed of the status of EURODAC data subjects, as well as technical amendments to the transmission mechanism of data to the EURODAC Central Unit, notably in order to introduce more information about the status of asylum.''[140]

As aforementioned, the Convention fell short of establishing an equal burden sharing mechanism and solidarity among Member States putting a considerable burden on bordering countries. The main challenge behind the ineffectiveness of

[138] European Commission (2007), Report on the Evaluation of the Dublin system, COM(2007) 299 final, Brussels, 06.06.2007.
[139] For details please see European Commission (2007), *ibid*, p.5.
[140] European Commission (2007), Report on the Evaluation of the Dublin system, COM (2007) 299 final, Brussels, 06.06.2007.

the Dublin System should be sought in the failure of Member States in responding the challenge of equal distribution of asylum applications and burden-sharing; if the Convention introduced more equal and fair system upon each Member States, not putting higher burden on bordering countries, a more co-ordinated and better functioning Dublin system would be established based on 'burden sharing' and 'equal distribution of asylum applications.' In response to these concerns ECRE Secretary Geenral, Bjarte Vandik stated that "Europe must act now to devise an efficient responsibility-sharing regime that serves European solidarity and promotes the integration of people who seek, and deserve, international protection. As long as the Dublin system continues in operation, Europe can never build a true Common Asylum System".[141]

On 18 February 2003, the Dublin II Convention[142] under the form of a Council Regulation was introduced to replace an instrument of a public law, the Dublin Convention. The Regulation, which replaced the Dublin Convention, is binding in its entirety and directly applicable on all Member States. The Dublin II Regulation was based on the same principles of the Dublin Convention and aimed to reach the goals of the convention at Community level.

Before the entry into force of the Dublin II Regulation, some legislative measures have been introduced, which I believe are worth to analyze within the scope of this study, they were; Resolution on manifestly unfounded applications for asylum December 1992 (London Resolution on manifestly unfounded applications for asylum), Resolution on a harmonized approach to questions concerning host third countries, 1 December 1992 (London Resolution on safe third countries), Conclusions on countries in which there is generally no serious risk of persecution, 1 December 1992 (Conclusions on safe countries of origin), Council Resolution on minimum guarantees for asylum procedures, 20 June 1995 (Resolution on minimum guarantees)

Resolution on manifestly unfounded applications for asylum (**London Resolution on manifestly unfounded applications for asylum,** December

[141] European Council on Refugees and Exiles (2008), Dublin mechanism: obstacle to future European asylum system, PR4/3/2008/Ext/CN/SP

[142] Council Regulation 343/2003/EC of 18.2.03 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L 50/1, 25.2.03. It is known as "Dublin II", because it revised and replaced the earlier Dublin Convention

1992) sets out rules in which cases an asylum application can be considered as manifestly unfounded and dealt with in accelerated procedures. The safe country of origin notion is intended to prevent the submission of asylum applications by nationals or residents of countries generally considered safe. Applications for asylum which do not meet the criteria laid down by the 1951 Geneva Convention are regarded as unfounded: either because there is no substance to the applicant's claim to fear persecution in his own country or because he could obtain effective protection in another part of his own country; or because the claim is based on deliberate deception or is an abuse of asylum procedures (false identity, forged documents, false representations, application in another country using another identity, claim made to forestall an impending expulsion measure, etc.). Furthermore, without prejudice to the Dublin Convention, an application for asylum may not be subject to determination by a Member State of refugee status under the terms of the Geneva Convention on the Status of Refugees when it falls within the provisions of the Resolution on host countries adopted by Immigration Ministers meeting in London on 30 November and 1 December 1992. These applications may be considered under accelerated procedures, without a full examination, or be rejected very rapidly on objective grounds. This Resolution allows Member States to use admissibility procedures where applications may be quickly rejected on unfounded grounds. This Resolution shall be analyzed together with the principle of 'safe country of origin' which was introduced through Conclusions on countries in which there is generally no serious risk of persecution, 1 December 1992 and 'safe third country' principle which was introduced though the Resolution on a harmonized approach to questions concerning host third countries, (Resolution on safe third countries). The Resolution on manifestly unfounded applications for asylum includes a reference to the concept of countries in which there is in general terms no serious risk of persecution. This concept means that it is a country which can be clearly shown, in an objective and verifiable way, normally not to generate refugees or where it can be clearly shown, in an objective and verifiable way, that circumstances which might in the past have justified recourse to the 1951 Geneva Convention have ceased to exist. The following elements should be taken into consideration in any assessment of the general risk of persecution in a particular country: (a) Previous numbers of refugees and

recognition rates, (b) Observance of human rights, (c) Democratic institutions, (d) Stability. [143]

Resolution on a harmonized approach to questions concerning host third countries, 1 December 1992 (Resolution on safe third countries) establishes the criteria determining whether a country, in which an applicant has stayed or through which he has transited before coming to a Member State where he has applied for asylum, can be considered as a safe country; if so, the applicant can, subject to certain safeguards, be sent back to this third country, and he is expected to file his application there. Host third country principle is applicable where the applicant has already been granted protection in the third country or has had an opportunity, at the border or within the territory of the third country, to make contact with that country's authorities in order to seek their protection, before approaching the Member State in which he is applying for asylum, or that there is clear evidence of his admissibility to a third country. "The Resolution expressly states that the determination of whether there exists a safe third country to where the asylum-seeker shall be sent precludes a substantial examination of the asylum claim, and also that the safe third country principle precludes determination of responsibility according to the Dublin Convention."[144] However, allocation to third countries under safe third-country concept will only work if the travel route of the asylum seeker is established and the third-country is willing to take over the protection seeker. Requirements and criteria for establishing whether a country is a host third country are as followings;; the asylum applicant must be afforded effective protection in the host third country against refoulement, within the meaning of the Geneva Convention; in those third countries, the life or freedom of the asylum applicant must not be threatened, within the meaning of Article 33 of the Geneva Convention; the asylum applicant must not be exposed to torture or inhuman or degrading treatment in the third country. The principle of the host third country allows the Member States, where appropriate, to send applicants for asylum to that destination after an accelerated examination of their application.

[143] For details please see *Conclusions on Countries in Which There is Generally no Serious Risk of Persecution*, London, 30 November and 1 December 1992.
[144] European Parliament, (2003), Directorate-General for Research, Research Paper, *Asylum in the EU Member States*, Civil Liberties Series, LIBE 108 EN., p. 6.

Within the European Union, the London Resolutions established that the return of asylum-seekers to a safe country of asylum precludes any obligation of Member States to investigate the merits of a claim to refugee status as required by the Dublin Convention. The Dublin Convention applies only if no such safe third country principle exists. With these Resolutions, expulsion of asylum seekers to a third country became a common rule rather than an exception. These Resolutions establish guidelines for when a country outside the European Union can be considered as safe; when applications by asylum-seekers from that country may be declared manifestly unfounded and dealt with in accelerated procedures. The majority of EU States consider claims to be unfounded if the application was made by an asylum seeker coming from a country considered to be a 'safe country of origin', or passed through a 'third safe country', which will be elaborated below. All of the EU countries are considered to be safe countries of origin and posses a list of countries they considered to be 'safe country of origin.'[145]

> Given the level of protection of fundamental rights and freedoms by the Candidate States, Member States agree to the presumption that Candidate States with which an accession treaty is being negotiated are safe countries of origin for all legal and practical purposes in relation to asylum matters, as from the date of signature of such accession treaty.
>
> Accordingly, any application for asylum of a national of any such Candidate State shall be dealt with on the basis of the presumption that it is manifestly unfounded, without affecting in any way, whatever the cases may be the decision-making power of the Member State concerned.[146]

The fact that all asylum applications from Member States are precluded from individual assessment is against the core of the Geneva Convention, in which necessity of individual analysis of a claim was highly emphasized.

In 1994, Council Recommendation concerning a specimen bilateral readmission agreement between a Member State and a third country was introduced to facilitate the readmission of third-country nationals to their country of origin which would serve as a basis for negotiation when a Member State wished to establish this type of relation with a third country. Agreements must comply with

[145] Musalo, K., Moore, J., A.Boswell, R (2002), *Refugee Law and Policy, A Comparative and International Approach*, Carolina Academic Press, p. 136

[146] Ministers of Justice and Home Affairs of the Member States of the European Union, having met in Luxembourg on 15 October 2002, http://www.statewatch.org/news/2002/oct/05safe.htm

the 1951 Geneva Convention and the 1967 Protocol on the status of refugees, internal treaties concerning extradition, transit, readmission of foreign nationals and asylum (in particular the 1990 Dublin Convention) and the 1950 European Human Rights Convention. Readmission Agreements facilitate the expulsion of third-country nationals. In the light of this Agreement, Contracting parties will readmit to their territory without any formality persons with the nationality of that country who are residing without authorisation in the other country or who have crossed its frontier illegally.[147] Readmission Agreements were a tool for controlling illegal migration and keeping asylum seekers outside the boundaries of EU by transposing the burden from European States to Third Countries. Through 'safe country of origin', 'safe third country' principles, and 'Readmission Agreements' neighbouring countries to the EU and transit countries will play a role as a buffer zone, keeping migration influxes into their territories, given that the EU prevents them from entering into the EU and sends them back to their counties of origin or countries of transit. Signing Readmission Agreements was the practical implementation of 'safe third-country' rule and of the London Resolutions on 'Host Third Countries'. In order to control entry, almost all EU States have signed Readmission Agreements, binding the contracting parties to readmit their own national or third-country national who entered into the EU in an illegal way. Readmission Agreements were brought to community level since the Amsterdam Treaty conferred powers on the Community in the field of Readmission. The European Council at Tampere invited the Council to conclude readmission agreements or to include standard clauses in other agreements between the European Community and relevant third countries or groups of countries. In November 2002, the European Community adopted its first Readmission Agreement with Hong Kong.

In overall, application of 'manifestly unfounded claims', 'safe third country' and 'safe country of origin' principles were impediments for a fair assessment of individual applications. By introducing these principles, the Member States intended to shift their burden into third countries, and to send asylum seekers to countries they consider to be safe without the examination of individual claims.

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[147] European Council (1994), *Council Recommendation of 30 November 1994 concerning a specimen bilateral readmission agreement between a Member State and a third country,* Official Journal C 274, 19.09.1996.

These principles are far from meeting humanitarian grounds, but so far aim to 'give up' their responsibilities towards asylum seekers.

2.2.5 The Treaty of Maastricht (1992)

''Europe is now in the process of trying to reinvent itself in an era of globalization as an interdependent community of shared values, markets, labour, and capital. In order to achieve this goal, the European Union has set about the task of creating an area of freedom, security, and justice with open internal borders.''[148]

The core objectives of the EC were centered on economic integration since the creation of the Common Market in the 1950s, the establishment of the Single Market in the late 1980s, and the move to Economic and Monetary Union (EMU) from the 1990s. The EC was transformed to a EU by the Treaty of the European Union (the Maastrict Treaty), which was signed at Maastrict on February 7, 1992 and came into force in November 1993. In Maastricht Treaty, asylum policy was transferred to an area of common interest in the area of Justice and Home Affairs (JHA), under Article K.1 of Title VI. It was addressed through intergovernmental cooperation as a 'third pillar' of the EU. The Maastrich Treaty under Title VI, Article K replaced 'previous ad hoc arrangements by a new structure forming part of the Union.'[149] The New Pillar differs from previous intergovermental cooperations in the following ways; firstly, Article K.1 refers to nine matters of common interest for the purposes of achieving the objectives of the Union, in particular the free movement of persons. These areas of common interest include; asylum policy, control of external borders, migration by nationals of non-member States, judicial cooperation in civil and criminal matters, customs and police cooperation. Secondly, Article K.2 requires the matters referred to in Article K.1 to be dealt with in compliance with the European Convention for the Protection of Human Rights and Fundamental Freedoms and Convention relating to the Status of Refugees. Thirdly, Member States are required to consult with the Council to coordinate their views. Following the consultation, the Council could adopt two kinds of instruments 'joint positions' and 'common positions'. Article K.4 gave the Commission the

[148] Shepherd, H.(2004), Towards a Common European Asylum System: Asylum, Human Rights, and European Values, *Refuge, Vol II, No:1*, p.1.
[149] Denza, E. (2002), *The Intergovernmental Pillars of the European Union*, Oxford University Press, New York, p.75.

right to initiative in six of nine areas of work. Member States upheld the right of initiative sensitive areas such as in criminal matters, customs cooperation, and police cooperation on serious international crime. Although Second Pillar and the Third Pillar resembled in many ways, there were some significant differences such as; Firstly, while the Second Pillar expressed the legally binding nature of both common positions and joint actions it was not clear from Article K whether joint actions and common positions were legally binding upon Member States. In Article K there was no express or requirement that joint positions and actions shall be binding on Member States. This difference between the Second Pillar and the Third Pillar reflects the reluctance of Member States to comply with joint actions and common positions in sensitive areas such as immigration and asylum without an approval from their national parliament. Unlike the Second Pillar, Article K authorized 'the establishment or development of closer cooperation between two or more member States in so far as such cooperation does not conflict with, or impede, that provided for in this title.' This expression was already reflected in the creation of Schengen Agreement and Implementing Convention. Thirdly, Article K.9 authorized the Council to transfer any of the first six of the nine areas of competence described in Article K.1 into the First Pillar. The three areas excluded sensitive areas including judicial cooperation in criminal matters, customs cooperation, and police cooperation, the same areas where Commission rights were excluded. By doing this, Member States showed their interest in transferring these areas from intergovernmental cooperation to the Community Law level. [150]

Member States, in a Declaration on Asylum attached to the Maastricht Treaty stated that they would give priority to harmonize aspects of asylum policy, in the light of the report on asylum drawn up in the European Council meeting in Luxembourg in June 1991. During the Maastricht era, (1993-1999), EU Member States adopted some additional non-binding instruments, such as a Resolution on minimum guarantess for asylum procedures[151] and a Joint Position on the harmonized application nof teh refugee definition of the 1951 Convention[152]. In addition to that, EU Member States agreed on a non-binding bilateral

[150] Denza, E.(2002), *The Intergovernmental Pillars of the European Union*, Oxford University Press, New York, p. 77-79.
[151] Council Resolution on minimum guarantees for asylum procedures, 20 June 1995, OJ C 274/13
[152] Joint Position on the harmonized application of the definition of 'refugee' in Article 1 of the 1951 Convention, 4 March 1996, OJ L 63/10, 13 March 1996.

readmission agreements[153], and in the wake of the Bosnia crisis, a Resolution outlining some general principles governing a burden sharing mechanism for the admission of temporary protected persons in the situations of mass influx[154]. They also adopted a Resolution on the treatment of unaccompanied minors,[155] referring to minor asylum seekers.

As a result, after the entry into force of the Maastrict Treaty intergovernmental cooperation in the field of asylum was institutionalized within the EU through the introduction of so-called 'Third Pillar.' However, this institutionalized co-operation was still intergovernmental since Member States themselves took final decisions on the basis of consensus. The Masstricht era was mainly characterized by non-binding soft law instruments. The Treaty of Amsterdam, which entered into force on 1 May 1999, took a step further not defining asylum and immigration as common interest but also considering as a part of Community Policies. [156]

2.3 Cooperation at Community Level

2.3.1 The Amsterdam Treaty (1999)

A significant development took place when the Treaty Establishing the European Community was amended by the Treaty of Amsterdam amending the Treaty of the European Union, the Treaties Establishing the European Communities and Certain related Acts, signed on October 2, 1997, and entered into force on May 1, 1999 (the Treaty of Amsterdam). The Amsterdam Treaty was the cornerstone for the formation of the Common European Asylum System transferring asylum policy from the Third Pillar of Intergovernmental Co-operation as a matter of Justice and Home Affairs to the First Pillar of Community Law. Although a considerable amount of work has been done until the adoption of the Treaty of Amsterdam the instruments adopted were 'soft law' instruments, such as

[153] Council Recommendation of 30 November 1994 concerning a specimen bilateral readmission agreement between a Member State and a third country, OJ 274/20, 19 September 1996.
[154] Council Resolution on burden-sharing with regard to the admission and residence of displaced persons on a temporary basis, 25 September 1995, OJ C 262/1, 7 October 1995.
[155] Council Resolution of 26 June 1997 on unaccompanied minors who are nationals for third countries (OJ C 221/23 of 19 July 1997)
[156] Van Krieken, P.J. (2000), *The Asylum Acquis Handbook*, T.M.C. Asser Press, p.21.

resolutions or recommendations that have no legally binding effect, and the system lacked monitoring arrangements. Under Title IV of the Amsterdam Treaty (Article 63), these soft law instruments were replaced by binding community Instruments such as Regulations, Directives, or Decisions. Their application will be subject to judicial scrutiny by the European Court of Justice. With the shift of asylum and immigration issues to the Community level, Community Institutions were given the duty of monitoring asylum policies and correction of necessary weakness. [157]

The Treaty of Amsterdam set a number of targets in the field of asylum and immigration. In order to establish progressively an area of freedom, security and justice'' a number of measures was needed to be taken by the Council within five years period, these measures were;[158]

a) measures with a view to ensuring, in compliance with Article 7a, the absence of any controls on persons, be they citizens of the Union or nationals of third countries, when crossing internal borders;
b) standards and procedures to be followed by Member States in carrying out checks on persons at such borders;
c) rules on visas for intended stays of no more than three months,
d) measures setting out the conditions under which nationals of third countries shall have the freedom to travel within the territory of the Member States during a period of no more than three months.
e) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum submitted by a national of a third country in one of the Member States,
f) minimum standards on the reception of asylum seekers in Member States,
g) minimum standards with respect to the qualification of nationals of third countries as refugees,
h) minimum standards on procedures in Member States for granting or withdrawing refugee status;
i) minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country of origin and for persons who otherwise need international protection,
j) illegal immigration and illegal residence, including repatriation of illegal residents;

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[157] Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice, Text adopted by the Justice and Home Affairs Council of 3 December 1998**,** *OJ C 19, 23.1.1999, p. 1–15*

[158] Article 73j and Article 73k of *Treaty of Amsterdam Amending the Treaty of European Union, The Treaties Establishing the European Communities and Related Acts*, Official Journal C 340, 10 November 1997

Other measures, which were not subject to the five-year period deadline, concern;

a) promoting a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons, (Article 73k (2) (b))
b) conditions of entry and residence, and standards on procedures for the issue by Member States of long term visas and residence permits, including those for the purpose of family reunion, (Article 73 k (3) (a))
c) defining the rights and conditions under which nationals of third countries who are legally resident in a Member State may reside in other Member States, (Article 73 k (4))

Thus, with the Amsterdam Treaty the Council has been given an enourmous work as it has to adopt formal legally binding EC instruments on the measures set out above.

Article 67 provided that during this five year transitional period the Council had to take these measures by unanimously based on a proposal from either the European Commission or a Member State after consultation with the European Parliament. Even though consensus decision making would persist for the following five years, the Council had to accomplish a whole range of measures within this five years period. The European Parliament would have increased consultation power as its opinions and proposals for amendments needed not to be followed up by the Commission or the Council. By the end of transitional period, Member States would no longer have the right to bring proposals directly to the Council as the European Commision would be in charge to consider proposals whether to submit it to the Council. This procedural change had considerably strengthened the Commission's hand after May 2004. With the increased monitoring power of the Council and Commission it is likely to achieve more in harmonization policies and practices.

3.2.3.2 Tampere Conclusions (1999)

The intention to establish a Common European Asylum system was worded for the first time in the Conclusions adopted by the Council and the Commission of the European Union at the Council meeting in Tampere in 1999.

Since its establishment, the EU has given great value to 'human rights', democratic institutions', and 'the rule of law'. 'The EU provided its citizen with a

shared area of prosperity and peace, a single market, economic and monetary union, and the capacity to take on a global political and economic challenges.(para 2 of the Tampere Conlusions) Amsterdam Treaty, under Title II, Article 73 i(a) ensured the free movement of persons – EU citizens- in accordance with respect to external border controls, asylum and immigration.

Tampere Conclusions took this freedom of movement one step further including non-EU citizens. It would be inconsistent with Europe's traditional values to deny such freedom to those whose circumstances forced them justifiably to seek access into EU territory.

> This in turn requires the Union to develop common policies on asylum and immigration, while taking into account the need for a consistent control of external borders to stop illegal immigration and to combat those who organise it and commit related international crimes. These common policies must be based on principles which are both clear to EU citizens and also offer guarantees to those who seek protection in or access to the European Union… The aim is an open and secure European Union, fully committed to the obligations of the Geneva Refugee Convention and other relevant human rights instruments, and able to respond to humanitarian needs on the basis of solidarity. A common approach must also be developed to ensure the integration into our societies of those third country nationals who are lawfully resident in the Union. [159]

In the light of these prospects, the European Council, at its meeting in Tampere, Finland in October 1999, agreed "to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention, thus ensuring that nobody is sent back to persecution, i.e. maintaining the principle of *non-refoulement*." The establishment of a Common European Asylum system takes its root from the preliminary European Asylum Law, Title IV of the Treaty on European Community.

Tampere Conclusions set out ''long term'' and ''short terms'' priorities. In the 'long term' it required establishment of 'a common single asylum procedure', 'a uniform status for those who are granted asylum throughout the Union', it also set out measures and standards to be adopted by May 2004; it required in the 'short term' ''clear and workable determination of the State responsible for the examination of an asylum application, common standards for a fair and efficient asylum procedure, common minimum conditions of reception of asylum seekers,

[159] Para.3-4 of the Tampere Conclusions.

and the approximation of rules on the recognition and content of the refugee status.''

Tampere Conclusions also included provisions with regard to the treatment of third nationals in the Member States. It affirmed that the legal status of third country nationals should be approximated to that of Member States' nationals. A person, who has resided legally in a Member State for a period of time to be determined and who holds a long-term residence permit, should be granted in that Member State a set of uniform rights which are as near as possible to those enjoyed by EU citizens; e.g. the right to reside, receive education, and work as an employee or self-employed person, as well as the principle of non-discrimination vis-à-vis the citizens of the State of residence. The European Council endorsed the objective that long-term legally resident third country nationals be offered the opportunity to obtain the nationality of the Member State in which they were resident. Most of the short term priorities of the Tampere Conclusions are now in place and endorsed through several legislations;

i) ''clear and workable determination of the State responsible for the examination of an asylum application'' Dublin II Regulation (2003) established objective criteria for determining which member state was responsible for a particular asylum application and stopped the practice of "asylum shopping".
ii) ''common standards for a fair and efficient asylum procedure'', ''common minimum conditions of reception of asylum seekers'', and ''the approximation of rules on the recognition and content of the refugee status'' These objectives were achieved through four Directives;

   a) Directive on minimum protection for refugees (2001/55/EC);

   b) Directive on minimum standards of accommodation, healthcare etc on reception of refugees; Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers

   c) Directive on common definition for "refugee"; Council Directive 2004/83/EC of 29 April 2004 laying down 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.

   d) Asylum procedures directive guaranteeing minimum level of protection for refugees (adopted 1 Dec 2005);

The longer term priority of Tampere Conclusions was the achievement of Common European System and a uniform status for those who are granted asylum valid throughout the Union. Long term priorities were confirmed by The Hague programme in 2005, which set the agenda for the achievement of long term priorities in the following five years. Long term priorities will be analyzed below under the Hague Programme.

Further, finalization of Eurodac was mentioned in the Tampere Conclusions (para.17) and accordingly, as mentioned in the analysis of the Dublin II System, Eurodac (15 January 2003) was established to 'enable a member state to compare fingerprints of asylum seekers or foreign citizens who are illegally on its territory, in order to verify whether they have submitted an asylum application in another member state'; European Refugee Fund was established in reference to para. 16 of the Conclusion having a role in receiving financial help from EU for reception centres and voluntary repatriation schemes.

In the Conclusions, the EU affirmed the importance of the partnership with countries of origin. The EU expresses the need of ''a comprehensive approach to migration addressing political, human rights and development issues in countries and regions of origin and transit. This requires combating poverty, improving living conditions and job opportunities, preventing conflicts and consolidating democratic states and ensuring respect for human rights, in particular rights of minorities, women and children.'' With this expression the EU reflected the Union's interest in solving refugee problems in the country of origins before it comes to the gates of the EU. This approach will be taken into the agenda in Hague programme under the establishment of Regional Protection Programmes. Although this is the ideal solution to combat against asylum and immigration, in the current context, considering recent 'asylum producing events' such as the invasion of Iraq and the war in Afghanistan, this prospect does not reflect a realistic view. The fact that the EU fails to prevent these 'asylum producing events' in the worldwide, the Member States are expected to provide with fair, comprehensive and effective asylum and immigration policies in order to find solution to asylum seeker' and refugees' vulnerabilities. In this respect, it would be rational to admit that in the future the EU will have to introduce additional legislative measures into its acquis unless it fails to keep potential asylum influxes in the country of origins, of course, with respect to dignity and human rights of refugees in accordance with international human rights instruments.

As mentioned earlier, short term priorities set out in the Amsterdam Treaty and later in the Tampere Conclusions were achieved through four major Council Directives. The following subchapter aims to provide detailed analysis of the four Council Directives.

2.3.2 Legally Binding Instruments: Council Directives

2.3.2.1 Council Directive 2003/9/EC on minimun standards for the reception of asylum applications

Setting minimum standards for the reception of asylum applicants was set as a priority in the Amsterdam Treaty and then was pronounced in the Tampere Conclusions in 1999 as a short term priority for the establishment of a Common European Asylum System.

The Directive laying down minimum standards for the reception of asylum seekers entered into force on 6 February 2003 and applied to all EU Member States, except Denmark and Ireland. All Members States except Denmark and Ireland were bound by the Directive and undertook to adopt national legislations to comply with the Directive of 6 February 2003. The Directive established minimum standards for the reception of asylum seekers in the European Union, which were deemed sufficient to ensure "a dignified standard of living and comparable living conditions in all Member States''. Directive defined reception conditions as full set of measures that Member States granted to asylum seekers, which included residence and freedom of movement, family unity, material reception conditions, schooling and the education of minors, employment and access to vocational training.

The Directive aimed to ''ensure asylum seekers a dignified standard of living and comparable living conditions in all Member States should be laid down.'' (para 7)

By doing this, it aims to ''limit the secondary movements of asylum seekers influenced by the variety of conditions for their reception.''(para8)[160]

It would be worth to analyze asylum seekers situation in the EU Member States prior to 2000, prior to the introduction of the Directive, in order to have a better understanding of the improvements brought by the Directive in 2003.

[160] Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers *OJ L 31, 6.2.2003, p. 18–25*

	Work Permit	Education-training courses	Freedom of movement	Heath care	Financial assistance
AUSTRALIA	Asylum-seekers are not allowed to work in Austria	School is compulsory for minors between 6 and 15	Applicants for asylum have the right to move freely	Minors under Federal care enjoy specialised health-care services	Asylum-seekers who are under Federal care get free board and lodging. In addition, they get about 500 Austrian Shilling in monthly pocket-money.
BELGIUM	(1)	All children have access to school, Asylum-seekers also have access to universities on the same conditions as other foreigners,			financial assistance is allocated by the local assistance department and equivalent to assistance for nationals in need
DENMARK	Not allowed to work	Provides Danish language courses	Free to travel within the country	Urgent and specialist treatment is free of charge	(2)
GERMANY	Not allowed to work during any stage of the asylum determination procedure	It is not compulsory, it depends on financial situation of asylum seekers, majority is not able to receive education in his/her own language	Free movement within the boundaries of the local district to which they have been allocated	N/A	Small amount of daily pocket money
GREECE (3)	Asylum-seekers can apply for a work permit for a specific job	Access to educational system	Asylum-seekers are free to move within the country (4)	N/A	The State does not grant any financial assistance to asylum seekers. Some financial and material assistance is provided by NGOs

(*1) During the admissibility procedure the asylum-seeker does not have a work permit. If he is admitted to the regular determination procedure there is the possibility of a work permit at the request of a prospective employer. In such a case a temporary permit is issued, limited to a renewable period of twelve months. The permit is only valid for that particular employer.*

(2) Asylum-seekers receive board and lodging. In most centres they are given a food allowance, while in some centres food is provided in canteens. Applicants are also given weekly pocket money, and after having stayed in Denmark for five months they are given a monthly clothing allowance. The asylum-seekers who stay in private accommodation do not receive these allowances. Likewise, asylum-seekers who have money or valuables on arrival in Denmark may have to cover their own expenses

(3) The number of places at reception centres are very limited, and most asylum seekers have to rely on welfare agencies for shelter.

(4) They are obliged to keep the Aliens Department of the Police informed of their whereabouts. If the alien moves from his place of residence and does not notify the authorities, the examination of his claim can be interrupted.[161]

The above scheme pointed out different reception measures applied to asylum seekers prior to 2000, in other terms prior to the introduction of Directive on minimum standards for the reception of asylum applications in 2003. The Directive was introduced to improve reception conditions in some Member States and oblige them to provide with adequate minimum standards.

In this respect, minimum rights to be accorded to asylum seekers were: information about any established benefits and of the obligations with which they must comply relating to the reception conditions within 15 days of applying for asylum (Article 5); documentation certifying the person as an asylum seeker within 3 days of an application being lodged (Article 6); freedom of movement within the territory of the host Member State or within an area assigned to them by the Member State (Article 7); family unity (Article 8); schooling and education of minors provided in either mainstream schools or in accommodation centres (Article 10); conditional access to the labour market after 12 months of waiting for a decision at first instance (Article 11); material reception conditions sufficient to ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence (Article 13); and emergency health care and essential treatment of illness (Article 15).

[161] European Parliament (2000), Directorate General for research Working Paper, Asylum in the EU Member states, Civil Liberties Series, LIBE 108 EN.

According to the Directive adopted, asylum seekers who were allowed to stay in the country to wait for the outcome of the procedure were entitled to a reception, including housing, food, clothing and an allowance for the daily expenses. Asylum seekers would be also entitled to proper health care, information and documentation, schooling for minors and, in limited number of cases, to access to labour market. Although the Directive sets out minimum standards Member States may always provide for more favourable provisions.

It is worth to note that the Directive applies only to those who make an application under the 1951 Geneva Convention excluding those who apply for subsidiary forms of protection. (Art.3) I believe there is no substantial reason to exclude persons applying for subsidiary forms of protection from the rights accorded to 'genuine' refugees taking into account their similar conditions in the country of asylum.

Despite of introduction of Council directives, by 2007, there were still discrepancies in the application of the Reception Directive among EU Member States.

In terms of the application period of the Directive there were discrepancies among EU Member States, for instance, some Member States did not apply the Directive to persons at the admissibility stage (Spain, Kingdom of the Netherlands). Others only applied the Directive to applicants who have already registered or hold a particular ID card (Greece, United Kingdom, Republic of Cyprus). Some Member States also limited the applicability of the Directive during the period to determine which Member State was responsible for processing the asylum claim under the Dublin Regulation (Republic of Austria, French Republic, Kingdom of Spain).

In terms of material reception conditions the most common form of accommodation was collective housing. Only a few Member States (UK, Kingdom of Belgium, Italian Republic, Kingdom of Sweden) provided individual housing. The Member States that granted financial assistance were still in the minority (Republic of Austria, Republic of Finland, Luxembourg, Kingdom of the Netherlands, Republic of Poland, United Kingdom of Great Britain, Kingdom of Spain, Kingdom of Sweden, Portuguese Republic, Republic of Cyprus) The majority of Member States granted the right to free movement for their entire

territory. A few member States (Czech Republic, Republic of Austria, Republic of Lithuania) reserved the right to limit free movement for public order reasons. Two Member States (Federal Republic of Germany, Republic of Austria) regularly restricted the free movement of asylum seekers to one district. In certain other Member States free movement was restricted in practice as asylum seekers have to report to or stay in their accommodation centres at certain times (Kingdom of the Netherlands, Slovak Republic , Republic of Slovenia, Republic of Hungary, Republic of Lithuania, Republic of Estonia, Czech Republic).

In terms of access to labour market half of the Member States restricted this to a maximum authorised period, i.e. to one year (Czech Republic, Republic of Estonia, Federal Republic of Germany, French Republic, Republic of Hungary, Republic of Latvia, Republic of Malta, Republic of Poland, Slovak Republic, Republic of Slovenia, United Kingdom of Great Britain and Northern Ireland, Republic of Cyprus, nine Member States (Hellenic Republic, Portuguese Republic, Republic of Austria, Republic of Finland, Kingdom of Spain, Kingdom of the Netherlands, Grand Duchy of Luxembourg) authorised access after shorter periods, from immediately – Greece – to 9 months – Luxembourg. Only Lithuania violated the Directive and does not provide for this possibility at all. [162]

Bjarte Vandvik, Secretary General of ECRE criticized limited access of asylum seekers in the labour market in EU States stating that "Asylum seekers should be allowed to work as soon as possible once they arrive in Europe. By restricting their access to employment, communities not only deprive themselves of motivated workers but also make the integration process in the long run more difficult. [163]

Although the Council's adoption of the Reception Directive represented a significant milestone in the path towards a Common European Asylum System it fell short of providing similar application of the reception conditions for asylum seekers in the EU Member States, and therefore, requires further progress for the achievement of a Common European Asylum system.

[162] Report from the Commission to the Council and to the European Parliament on the application of Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, COM/2007/0745 final

[163] ECRE (2008), ECRE calls on EU to do more to promote self-sufficiency of asylum seekers, Press Release

2.3.2.2 Council Directive 2004/83/EC 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

Just after the Treaty of Amsterdam, in 2000, there were several discrepancies in the determination of refugee status among Member States. For instance, some states like France, Germany and Spain awarded refugee status for persecution perpetrated by non state agents only when the authorities *tolerate* or *encourage* the persecution, but not when the same authorities *want to* but *cannot* offer protection. However, inability of a state to provide protection can lead to refugee status in Austria, Belgium, Denmark, Finland, Ireland, Italy, the Netherlands, Sweden and the United Kingdom. [164]

Taking these discrepancies into account the Tampere Conclusions set the approximation of rules on the recognition of refugee and the content of refugee status as a short term priority for the establishment of a Common European Asylum System. In this respect 'The Directive 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' was adopted as an outcome of the Tampere Conclusions. The main objective of this Directive was, on the one hand, to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection, and, on the other hand, to ensure that a minimum level of benefits is available for these persons in all Member States. By doing this, the Directive aimed to prevent secondary movement of applicants for asylum between Member States, where such movement is purely caused by differences in legal frameworks. In addition to providing minimum criteria for determination of refugee status in accordance with the 1951 Convention, it also sets out principles to be taken into account when assessing a claim for subsidiary forms of protection. ECRE criticized

[164] European Parliament, (2003), Directorate-General for Research, Research Paper, *Asylum in the EU member States*, Civil Liberties Series, LIBE 108 EN.

In Article 6 of the Directive 2003/09 inability of a state to provide protection to the individual applicant was also considered to be a ground for granting refugee status.

deficiencies in the application of this Directive stating that ''While states try to assign responsibility, asylum seekers wait for many months with their claims unheard, and some claims are never heard. Vastly differing refugee recognition rates create an 'asylum lottery': for example, over 80% of Iraqi asylum claims succeed at first instance in some Member States, versus literally none in some others.''

The Directive contained provisions regulating the assessment of applications for international protection. It outlined a guideline for the assessment of an individual claim, elements to be considered in the assessment of a claim (Art.3), defines acts and actors of persecution[165] (Art.6-Art.9), reasons for persecution (Art.10), Cessation clauses (Art.11), and Exclusion clauses (Art.12).

The Directive guaranteed social rights to be accorded to refugees with the aim ''to avoid social hardship for beneficiaries of refugee or subsidiary protection status, to provide without discrimination in the context of social assistance the adequate social welfare and means of subsistence.'' [166] The Directive, under Chapter VII, defined rights accorded to refugees and those in need of other forms of protection, they were; (1) right to non-refoulement[167] (art.21), right to information (Art.22), right to maintain family unity (Art.23), right to travel document (article.25), right to employment (art.26)[168], right to education

[165]''ECRE pronounced it concerns by the provision in Article 7 (1) (b) that protection can be provided by *"parties or organisations, including international organisations, controlling the State or a substantial part of the territory of the State"*. ECRE has consistently expressed its opposition to this provision on the following grounds. State-like authorities are not and cannot be parties to international human rights instruments and therefore cannot be held accountable for non-compliance with international refugee and human rights obligations. Their lack of accountability in international law makes it impossible for persons within their jurisdiction to hold them responsible at international level for ensuring that human rights standards are safeguarded.''
European Council on Refugees and Exile, (2004) *ECRE Information Note on the Council Directive on minimum standards for the qualification of third country nationals and stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted***,** 2004/83/EC, 29 April 2004, pg7.
[166] Council Directive, (2004), Council Directive 2004/83/EC 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, para 33.
[167] *Ibid*, Article 21. Members States may refoule refugees when (a) there are reasonable grounds for considering him or her as a danger to the security of the Member State in which he or she is present; or he or she, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that Member State
[168] *Ibid,* Art.26, 1. Member States shall authorise beneficiaries of refugee status to engage in employed or self-employed activities subject to rules generally applicable to the profession and to the public service, immediately after the refugee status has been granted.

(Art.27)[169], right to enjoy social welfare as provided to nationals (Art.28), access to health care services under the same conditions as nationals (Art.29), access to accommodation as accorded to other third country nationals legally resident in their territories. (Art.31), freedom of movement within the Member States under the same conditions and restrictions as those provided for other third country nationals legally resident in their territories (Art.32), access to integration facilities (Art.33). However, it is worth to note that rights accorded to refugees were more favourable that those accorded to persons in need of subsidiary protection. [170]

Although having introduced minimum standards the Directive gave an option to Member States to introduce or retain more favourable standards for determining who qualifies as a refugee or as a person eligible for subsidiary protection, and for determining the content of international protection, in so far as those standards are compatible with this Directive. (Art.3)

Directive shall be considered as a success providing clarification to following elements; the inclusion of provisions recognising persecution from non-state actors (Article 6); the express obligation for Member States to grant subsidiary forms of protection (Article 15); the recognition of child-specific and gender-

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2. Member States shall ensure that activities such as employment- related education opportunities for adults, vocational training and practical workplace experience are offered to beneficiaries of refugee status, under equivalent conditions as nationals. However for persons with subsidiary protection Article 26 (3) states that *"the situation of the labour market in the Member States may be taken into account, including the possible prioritisation of access to employment for a limited period of time to be determined in accordance with national law."* ''*E*qual access to the labour market for persons with subsidiary protection is not provided for and that no time limit has been specified for this possible derogation. In this respect, employment restrictions upon status determination seriously hinder refugee integration in the long term as they risk pushing people into illegal work or encouraging dependency on social welfare.'' European Council on Refugees and Exile, (2004) *ECRE Information Note on the Council Directive on minimum standards for the qualification of third country nationals and stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted***,** 2004/83/EC, 29 April 2004, p. 16.

[169] Ibid, Article 27. Member States shall grant full access to the education system to all minors granted refugee or subsidiary protection status, under the same conditions as nationals.

2. Member States shall allow adults granted refugee or subsidiary protection status access to the general education system, further training or retraining, under the same conditions as third country nationals legally resident.

[170] For comparative analysis please refer to European Council on Refugees and Exile, (2004) *ECRE Information Note on the Council Directive 2004/83/EC on minimum standards for the qualification of third country nationals and stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted***,** 29 April 2004

specific forms of persecution (Article 9), and provisions aimed specifically at the needs of unaccompanied minors (Article 30); the principle that the assessment of applications should be carried out on an individual basis (Article 4).

It would be worth to analyze the Directive in a closer perspective in order to better understand basic components of the Common European Asylum System since the Directive provides common principles on how to determine refugee status and how to treat refugees in the EU territory. In this regards, it would be interesting to first focus on the definition of refugee under Article 2 (c) of the Directive. Although it broadly reflects Article 1 A (2) of the 1951 Geneva Convention except for the unfortunate fact that it is limited to a "third country national" or a "stateless person", it does not include nationals of Member States of the European Union. [171] ECRE in its Note on EU Minimum standards for Qualification Directive expresses that ''Not only is this restriction discriminatory and therefore in breach of Article 3 of the 1951 Geneva Convention, but the potential repercussions may be greater as the EU enlarges. Given the export value of EU asylum policies, it also sets a very bad precedent for other regions of the world.''[172] Although the EU considers all Member States to be respectful to human rights and Human Rights Instruments this definition is against the core of refugee definition brought by the 1951 Convention as 'refugee status' shall be assessed on individual basis not in regards of States' general practices. Therefore, excluding European citizens from the application of the Directive does not reflect the accurate analysis of refugee definition under the 1951 Geneva Convention. In this respect, when Turkey becomes a member of the EU, it would be considered as a safe country and would be excluded from the provisions of this Directive. However, considering that Turkey is among the most asylum producing countries[173], it is problematic how the EU will cope with this ambiguous situation.

[171] ECRE had recommended that the terms "third country national" and "stateless person" be replaced by the term "any person" in order to properly reflect Article 1A of the 1951 Geneva Convention

[172] *ECRE Information Note on the Council Directive on minimum standards for the qualification of third country nationals and stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted*, 2004/83/EC, 29 April 2004, pg5.

[173] During the first half of 2008, Turkey was the tenth country, with 1,266 applications, on the list of Top-40 countries based on applications lodged in Europe Union by origin. Iraq retained the first rank with 5,964 applications. UNHCR (2008), *Asylum Levels and Trends in Industrialized Countries First Half 2008, Statistical Overview of Asylum Applications Lodged in 38 European and 6 Non-European Countries*, p.13.

In sum, the Directive aimed to establish minimum standards for the qualification of third country nationals and stateless persons as refugees or beneficiaries of subsidiary protection within EU Member States, and also the minimum levels of rights and benefits accorded to them.

The adoption of this Directive represents another step towards the development of a Common European Asylum System, as called for at Tampere. The Directive is an important step for the approximation of asylum procedures and for the establishment of a common, more efficient, fair system capable of coping with asylum seekers' physical, social and protection needs.

2.3.2.3 Directive 2001/55/EC on Mass Influxes, Temporary Protection

By 12 November 1992, there were 740,000 displaced Bosnians and 70,000 displaced people by the earlier conflict in Croatia on the territory of Bosnia Herzegovina, and 725,000 Bosnians elsewhere in former Yugoslavia.[174] Amnesty International stated in its report in 1992 that it was almost impossible for Bosnians to come to the border of Western European states or to be admitted into their territories; even those who managed to enter into European States were returned to the country of first asylum, especially to Slovenia, Croatia, or Hungary. [175]

> The policy of EU Member States was that those fleeing the conflict, other than former detainees, those who had been injured or were ill and could not be treated locally and those were ''under direct threat to life or limb and whose protection cannot otherwise be secured'' were to be considered as manifestly not falling into the category of refugee, and as such not admissible to regular asylum procedures, even if they managed to arrive at the borders of Member States.[176]

The EU, prior to the conflict in the former Yugoslavia, did not have a temporary protection policy to cope with mass influxes of displaced persons. In 1999, in Kosovo crisis the Council adopted conclusions on displaced persons from Kosovo,

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[174] Selm-Thorburn, J. (1998), *Refugee Protection in Europe,* Martinus Nijhoff Publishers, p. 110.
[175] Amnesty International (1992), *Report on the Former Yugoslavia,* EUR 48/WU 05/92.
[176] Selm-Thorburn, J. (1998), *Ibid.*, pg 110.

which were latter called on the Commission and the Member States to establish measures in accordance with the Treaty. (para.3 of the Preamble of Directive)

As the population movements in recent years were mainly characterized by mass influxes of displaced persons who are unable to return their country of origin, the necessity to regulate these influxes and to introduce common standards to cope with these increasing numbers of refugees and asylum seekers has come to the agenda of EU countries. In this respect, the appropriate solution was ''to set up schemes to offer them immediate temporary protection.'' [177]

The Directive 2001/55/EC was introduced in order to establish ''solidarity mechanism to contribute to the attainment of a balance of effort between Member States in receiving and bearing the consequences of receiving displaced persons in the event of a mass influx. The mechanism should consist of two components. The first is financial and the second concerns the actual reception of persons in the Member States.'' (Preamble para.20)

It also aims to establish minimum standards for giving 'temporary protection'[178] in the event of a mass influx of displaced persons from third countries who are unable to return to their country of origin and to promote a balance of effort between Member States in receiving and bearing the consequences of receiving such persons. (Art.1) 'Temporary protection' was defined as '' a procedure of exceptional character to provide, in the event of a mass influx or imminent mass influx of displaced persons from third countries who are unable to return to their country of origin, immediate and temporary protection to such persons, in particular if there is also a risk that the asylum system will be unable to process this influx without adverse effects for its efficient operation, in the interests of the persons concerned and other persons requesting protection.'' (Article 2) 'Displaced persons' within the scope of Article 1A of the Geneva Convention or

[177] European Council, (2001), Council Directive 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, 2001/55/EC, 20 July 2001, Official Journal L 212/12. Preamble para.2

[178] Directive also provides definition to 'mass influx', 'displaced person', 'refugee', 'unaccompanied minor', 'residence permit' and sponsor', for details, see Directive 2001\EC\55, Article 2.

other international or national instruments giving international protection, are defined as:

(i) persons who have fled areas of armed conflict or endemic violence;
(ii) persons at serious risk of, or who have been the victims of, systematic or generalized violations of their human rights;

Within the meaning of this definition temporary protection applied to a whole group of persons coming from certain country, region, religion or ethnicity designated by the Council. Therefore, those enjoying temporary protection did not have to prove that they have suffered or would suffer harm based on individual reasons.

Persons enjoying temporary protection were required to obtain residence permit (Art.8), which in turn provides them with right to employment (Art.12), right to accommodation (Art.13), right to education to minors (Art.14), right to family unity (Art.15). These rights prevented refugees from becoming a burden for the society and encouraged their self-sufficiency during their stay in the territory of Member States.

Article 4 stated that temporary protection status could come to an end either with the expiry of temporary protection offered to displaced persons, which was limited to one year, or with the Council Decision. [179] Persons enjoying temporary protection were also accorded the right to seek asylum that they could apply upon the expiry of their temporary protection. Although Member States encouraged voluntary repatriation after the end of temporary protection (Art.21), they should not encourage forced return of persons whose temporary protection has ended in accordance with international laws.

In terms of solidarity, Member States were required to indicate their capacity of receiving persons in need of temporary protection. (Art.25) During this period, Member States should to be in communication with regard to transferral of the residence of persons enjoying temporary protection from one Member State to another. (Art.26) When the transfer has been completed, residence permit in

[179] Where reasons for temporary protection persist, the Council may decide by qualified majority, on a proposal from the Commission, which shall also examine any request by a Member State that it submit a proposal to the Council, to extend that temporary protection by up to one year

one state expired and the new Host Member State should grant temporary protection to the person concerned. (Art.26)

As in the previous Directives, the Council allowed Member States to introduce more favorable treatment to persons enjoying temporary protection rather than those introduced in the Directive. (para 12)

2.3.2.4 Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status

The fifth piece of legislation in the asylum agenda of the Amsterdam Treaty came into force in December 2005 twenty days after its publication in the Official Journal of the European Union on 13 December 2005. The purpose of the 'Directive on procedures in Member States for granting and withdrawing refugee status' was to establish minimum standards on procedures in Member States for granting and withdrawing refugee status. In its Preamble the Directive refers to the Council's commitments made at Tampere in 1999, in which it "agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention…thus affirming the principle of non-refoulement and ensuring that nobody is sent back to persecution*." (Preamble Para 2.)*

Chapter II of the Directive detailed basic principles and guarantees, including access to the procedure (Article 6), the right to remain in the Member State pending the examination (Article 7), requirements for the examination of applications (Article 8), requirements for a decision (Article 9), guarantees for applicants for asylum (Article 10), obligations of the applicants (Article 11), personal interview provisions (Articles 12-14), provisions on legal assistance and representation (Articles 15 and 16), guarantees for unaccompanied minors (Article 17), detention (Article 18), procedures in cases of explicit or implicit withdrawal of an application (Article 19 and 20), and the role of UNHCR (Article 21).

Chapter III covered provisions on procedures at first instance, including on the examination procedure (Article 23), inadmissible applications (Article 25), the first country of asylum concept (Article 26), safe third countries (Article 27, 29

and 30), and safe countries of origin (Article 31), subsequent applications (32-34), border procedures (Article 35) and the exceptional application of the safe third country concept (Article 36).

Although the Directive has been an important step towards Common European Asylum System, it fails to provide effective protection to refugees for the following reasons;

The first criticism addressed to the Directive shall be its definition of refugee. The Directive Article 2(f) restricted its refugee definition to third country nationals and stateless persons excluding European citizens. As discussed above this limitation introduced in refugee definition is inconsistent with Member States' obligations under Article 1A of the 1951 Geneva Convention. [180]

Another concern, as discussed by ECRE, was the formulation of Article 7 with regard to the right to remain in Member States pending the examination of an application. Article 7 allows asylum seekers to remain in territory of Member States until the first instance decision has been taken. In this regard, right to appeal becomes meaningless if it would be granted to a refugee after he/she is sent to a country where they would be at risk of persecution. Asylum-seekers should be accorded the right to remain in the territory of the country of asylum until a final decision has been reached in order to prevent possible risks of non-refoulement and/or to torture or inhuman or degrading treatment contrary to Article 3 ECHR. However, with regard to Article 7 asylum –seekers will be at risk of refoulement during the appeal process.

Although Article 12 expresses the right of a personal interview for each applicant for asylum, it also sets out unclear provisions under which an interview might not deem to be necessary. As such;

1- the competent authority has already had a meeting with the applicant for the purpose of assisting him/her with completing his/her application and submitting the essential information regarding the application, in terms of Article 4(2) of Directive 2004/83/EC; According to ECRE, "the term 'meeting' is inadequately and imprecisely defined, and thus creates the

potential for applicants to be denied the opportunity to fully and fairly present their claims''

2- the determining authority, on the basis of a complete examination of information provided by the applicant, considers the application to be unfounded in cases where the circumstances mentioned in Article 23(4)(a), (c), (g), (h) and (j) apply. (Art.12 (2) (c)). These circumstances are; submission of irrelevant information, (Art.23 (4) (a)), when the applicant's claim is considered to be unfounded; safe third country/safe country of origin (Art.23 (4) (c)); when the claim is 'clearly unconvincing' due to the applicant's "inconsistent, contradictory, unlikely or insufficient representations" (23(4)(g)); when the applicant has made a subsequent application raising no new issues (23(4)(h)); when the application is made "to delay or frustrate the enforcement of an earlier or imminent decision which would result in his/ her removal" (23(4)(j)).

These provisions did not guarantee that an asylum seeker would be given the opportunity of a personal interview upon the completion of his/her application. The Member States failed to fulfil their obligations deriving from international laws and the Qualification Directive as they avoided the right to personal interview under the above mentioned 'unclear' circumstances. In addition to that, Para 4 of Article 12 allowed determining authority to reach a decision on an application of asylum in the absence of a personal interview. [181] However, I believe that the only way to reach a fair and effective decision on asylum application is to conduct a full personal interview with each applicant with the presence of well qualified interpreters and interviewing officer.

Another point worth to criticize was the asylum seekers' right to legal assistance and representation. Art.15 accorded asylum seekers the right to enjoy legal assistance on their own costs during first instance process whereas they are entitled to enjoy free legal assistance for appeals. (Art.15 (2)) ECRE argues that, by limiting free legal assistance to the appeals stage, Article 15 renders the right to legal assistance meaningless in cases where accelerated procedures are used and suspensive effect of appeals denied. The right to legal assistance and

[181] European Council on Refugees and Exile (2005),ECRE Information Note on the Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, IN1/10/2006/EXT/JJ, pg. 14.

representation is an essential safeguard in the asylum process. In the light of this view, it is recommended that applicants have access to free legal assistance at every stage of asylum procedures. [182]

Although Art.18 provided that persons shall not be detained solely for seeking asylum, and that detention shall be subject to "speedy judicial review", it did not define detention and conditions under which asylum seekers might be subject to detention. In addition to that, maximum duration of detention was not specified in the Directive. In this respect, Directive failed to provide a clarification with regards to detention of asylum seekers and to provide principles in accordance with international human rights law.[183]

The most important principles of the Directive were; 'accelerated procedures', 'safe third country', and 'safe country of origin' principles.

Art.24 set out where accelerated procedures were to be used; for any asylum application where applications raise little relevant evidence (23(4)(a)), applicants from a safe country of origin or a safe third country (23 (4) (c)), the applicant has misled the authorities by presenting false information or documents or by withholding relevant information or documents with respect to his/her identity and/or nationality that could have had a negative impact on the decision (23(4)(f)), applicants who provide inconsistent information (23(4)(g)), and applicants who do not file their applications as soon as they have the opportunity to do so (23(4)(i))[184]

I believe refugee status determination process is the most important process in the asylum procedures. It requires effective and fair assessment of a refuge claim through well-qualified and trained interviewing officers and experienced interpreters. Of course, time reduction in RSD would also be for the benefit of asylum seekers. However, the purpose of refugee status determination is not reaching a decision at the earliest time limitation but to assess effectively a refugee claim. In this respect, I suggest that if Member states are in view of reducing long processes in asylum procedures they should invest more staff with

[182] *Ibid*., pg 16.
[183] *Ibid.*, pg 18
[184] For details see Art.23 Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status, L 326/13.

adequate education and should apply accelerated procedures at appeal process rather than first instance decision interviews.

Another point that I would like to raise is the principle of 'safe country of origin' which has been superseded by the Dublin II Regulation. The Directive considers as a country to be a first country of asylum if he/she has been recognised in that country as a refugee and he/she can still avail himself/herself of that protection; or he/she otherwise enjoys sufficient protection in that country, including benefiting from the principle of non-refoulement;

Art.27 provides circumstances under which 'third safe country' principle shall be applied; life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion; the principle of non-refoulement in accordance with the Geneva Convention is respected; the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected; and the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention. The main concern pronounced by ECRE was the fact that Member States did not require 'safe third countries' to ratify the 1951 Geneva Convention without geographical limitation and implemented in practice the 1951 Geneva Convention and/or 1967 Protocol as well as other international human rights treaties, especially the Convention Against Torture (CAT) and the International Covenant on Civil and Political Rights (ICCPR).

In the light of the Article, if a Member State decides to transfer an asylum seeker to a third safe country, ''Member State shall inform the applicant and the authorities of the third country, in the language of that country, informing that the application has not been examined in substance. In addition to that, if 'safe third country' does not admit asylum seeker into its territory, Member States shall ensure that access to a procedure is given in accordance with the basic principles and guarantees described in Chapter II.'' (Article 27 (3))

In line with EXCOM Conclusion 15 (XXX), asylum should not be refused solely on the grounds that it could be sought from another State; the applicant's family ties and cultural ties in the country shall be taken into consideration. Article 27 (2) (a) leaves it to national legislatures to elaborate 'rules requiring a connection

between the person seeking asylum and the third country concerned based on which it would be reasonable for that person to go to that country.' ECRE considered that this Article thus failed to provide adequate clarity concerning this important principle limiting the proper application of the safe third country concept.[185]

In addition to that, no country can be labeled as 'safe third country' for all asylum seekers, since every individual might have a fear of persecution in a country which is labeled as safe. A decision on the safety of a country must always be reached with an individual assessment of claim and not generally accepted safety conditions.

Although Member States provided safeguards in order protect asylum seekers from persecution under the 'safe third country' principle it would be more appropriate to apply 'safe third country' concept in a very limited way taking into account Human Rights records and asylum policy in the EU periphery countries. For instance, Turkey still maintaining geographical limitation to the 1951 Convention would not be able to provide non-European asylum seekers with 'refugee status' and adequate protection in addition to social and economic assistance.

Another controversial Article is Article 29 on minimum common list of third countries regarded as safe countries of origin. According to this Article, minimum common list of third countries shall be regarded by Member States as safe countries of origin in accordance with Annex II. Annex II requires that "there is generally and consistently no persecution" and after taking into account "observance of the rights and freedoms laid down in the European Convention for the Protection of Fundamental Freedoms and/or the International Covenant for Civil and Political Rights and/or the Convention against Torture". However, refuge law is not about what happens generally but is about what happens to an asylum seeker individually. Determining a country as a safe country of origin includes political aspects and therefore can lead Member States to reach a wrong decision with regard to asylum claims. In addition to that, it is worth to note that human rights situation is changing rapidly and therefore listing 'safe country of origins' could have a misleading effect in the assessment of well-founded fear of

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persecution of asylum seekers. Applications of asylum seekers who fall within the list of safe country of origins, or stateless persons who were formerly resident in that country are considered to be unfounded unless they submit any serious grounds for considering the country not to be a safe country of origin. (Art.31 (1))

In the light of above, following Articles are likely to lead to the *refoulement of* those in need of protection, Application of safe third country concept (Article 27), Exceptional application of the safe third country concept (Article 35A), Application of the safe country of origin concept (Article 30, 30A, 30B, and Annex II), Effective remedy/suspensive appeal (Articles 6 and 38), Right to legal assistance (Article 13), Right to a personal interview (Articles 10 and 11), Accelerated and manifestly unfounded procedures (Articles 23, 24, and 29).

With the adoption of the Asylum Procedures Directive, the EU completed the first phase of the Common European Asylum System. This Directive, along with the other legislative instruments on asylum, guarantees a minimum level of protection and safeguards in all Member States for those genuinely in need of international protection. Nonetheless, as discussed above, the EU Member States have to introduce more inclusive and clear legislations in the field of asylum in order to respond asylum challenges in a more effective way.

Vice President Franco Frattini, Commissioner for Justice, Freedom and Security, said referring to the Asylum Procedures Directive that:

> We have reached a major milestone. The importance of the adoption of the Asylum Procedures Directive cannot be underestimated. This Directive will significantly contribute to a level playing field on asylum across all 25 Member States and promote mutual confidence in Member States asylum systems. Adoption also means that further approximation of legislation and practice can be agreed in co-decision with the European Parliament and under the rules of Qualified Majority Voting.

The Vice President added:

> This is one area where the EU really does add value. Asylum is an international challenge that can only be tackled through Member

> States acting together. In establishing a common system we are ensuring that the rights of asylum seekers are protected wherever they make their claim in Europe but that Member States are also well equipped to deal efficiently and fairly with those who do not qualify for protection.

However, the Vice President also underlined that there was still work to be done in the EU asylum field,

> The agreement of these minimum standards measures represents an important first step. The evaluation of the implementation of these measures will be essential in deciding what the Commission proposes next. The new role of the European Parliament in the decision-making process should also help us to raise standards and enable the EU to show much more ambition in deciding on a fully fledged Common European Asylum System.[186]

Despite of the attempts to establishing a Common European Asylum System, in the meantime, Members States were in view of keeping asylum seekers outside the EU borders, which was clearly endorsed through 'safe third country, 'safe country of origin', 'accelerated procedures', 'manifestly unfounded claims' principles and 'Readmission Agreements'. In 2003, the United Kingdom presented a paper entitling New International Approaches to Asylum Processing and Protection. This proposal entailed the ''creation of 'regional protection areas' (RPAs) to improve protection in the region, the return of spontaneous arrivals in the United Kingdom or cooperating countries to an RPA, International recognition of the need to intervene to reduce flows of genuine refugees and enable refugees to return home, resettlement would be granted as a limited option.''[187] With this proposal, the UK has overtly expressed its interest in keeping asylum seekers in the bordering countries stating that she wanted to increase protection for refugees in countries that are geographically closer to their homes. By doing this, the UK aimed to decrease number of asylum

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[186] EUROPA Press Release (2005), Vice President Frattini welcomes 'major milestone' on asylum in the EU, IP/05/1520, Brussels.

[187] UNHCR (2006), *The State of World's Refuges, Safeguarding asylum: Box 2.2 Outsourcing refugee protection: extraterritorial processing and the future of the refugee regime*, www.unhcr.org.

applications in the UK. The UK was in view of establishing 'processing centers' in the neighbouring countries so that asylum seekers' application would be assessed in these centres before they head their way to Europe.

The U.K. proposal calls for improving "protection in source regions" for refugees, and to "prevent the conditions which cause population movements" However, the proposal's immediate purpose was to ensure that many refugees "remain in the regions close to their country of origin." Human Rights Watch stated that " in the short term, the proposal promises to overwhelm underdeveloped and poorly resourced countries, many of which already host thousands of refugees, with a new and unfairly distributed burden of Europe's refugees. Shifting refugees from the U.K. or elsewhere in the E.U. to poor countries shatters notions of burden sharing upon which the international refugee protection system was established."[188] The UK's proposal was establishing processing centers in the following countries; Albania, Croatia, Iran, Morocco, northern Somalia, Romania, Russia, Turkey, and Ukraine; countries have serious records of violating the rights of asylum seekers, refugees, and migrants.[189] In response to the UK Government's proposals for zones of protection for asylum seekers announced by the Home Secretary David Blunkett, the Head of the Refugee Council's International Section Julia Purcell said:

> We are extremely concerned about the implications of these proposals, which amount to a shifting, rather than sharing, of responsibilities. We must keep this issue in perspective. These proposals will leave the poorest countries of the world carrying an ever-growing proportion of the world's refugees. These countries currently provide safety to well over 70% of the total number of refugees worldwide. By refusing to offer protection in the UK to those arriving on our shores in search of sanctuary, the Government is setting a dangerous precedent which could lead to other countries similarly closing their borders, some of which may well be the last hope for those fleeing conflict or persecution from neighbouring areas.

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[188] The Regional Processing Centers proposed by the United Kingdom Violate Human rights and Refugee Principles.
http://www.hrw.org/legacy/backgrounder/eca/refugees0603/2.htm#_Toc43115284
[189] *Ibid.*

Altough the UK's proposal has not been agreed by majority of Member States, the UK's attempt and the support she received from Denmark, the Netherlands, Italy and Spain endorsed interest of Member States in transposing burden of asylum seekers from EU States to Third Countries.

2.3.4 The Hague Programme

In the view of establishing a 'fully fledged' Common European Asylum system, the European Council adopted the Hague Programme in November 2004 as a successor to Tampere Programme. The Hague programme was a five-year, first multi-annual, programme for closer co-operation in justice and home affairs at EU level from 2005 to 2010. The programme's main focus was on setting up a common immigration and asylum policy for the 25 EU Member States. It reflected the ambitions of the Treaty establishing a Constitution for Europe (Nice Traty) and builds on the measures already outlined in the Tampere Program. It further expressed its commitment to fundamental rights, as guaranteed by the European Convention on Human Rights and the Charter of Fundamental Rights in Part II of the Constitutional Treaty, as well as the Geneva Convention on Refugees.

The Hague Programme affirmed that the second phase of development of a common policy in the field of asylum, migration and borders started on 1 May 2004. It expressed that the common policy should be achieved with respect to 'solidarity and fair sharing of responsibility including its financial implications and closer practical co-operation between Member States: technical assistance, training, and exchange of information, monitoring of the adequate and timely implementation and application of instruments as well as further harmonisation of legislation' and called for the completion of the second phase of the Common European Asylum System (CEAS) by 2010.

The objective of the Hague programme was ''to improve the common capability of the Union and its Member States to guarantee fundamental rights, minimum procedural safeguards and access to justice, to provide protection in accordance with the Geneva Convention on Refugees and other international treaties to persons in need, to regulate migration flows and to control the external borders of the Union, to fight organised cross-border crime and repress the threat of

terrorism, to realise the potential of Europol and Eurojust, to carry further the mutual recognition of judicial decisions and certificates both in civil and in criminal matters, and to eliminate legal and judicial obstacles in litigation in civil and family matters with cross-border implications.''[190]

In the field of asylum, immigration and border control, the Hague programme contained the following key measures: a common European asylum system with a common procedure and a uniform status for those who are granted asylum or protection by 2009; measures for foreigners to legally work in the EU in accordance with labour market requirements; a European framework to guarantee the successful integration of migrants into host societies; partnerships with third countries to improve their asylum systems, better tackle illegal immigration and implement resettlement programmes; a policy to expel and return illegal immigrants to their countries of origin; a fund for the management of external borders; Schengen information system (SIS II) - a database of people who have been issued with arrest warrants and of stolen objects to be operational in 2007 common visa rules (common application centres, introduction of biometrics in the visa information system)

The Hague Programme also introduced external dimension of asylum and immigration. It pronounced the need to cooperate with third countries in their efforts to improve their capacity for migration management and refugee protection, prevent and combat illegal immigration, inform on legal channels for migration, resolve refugee situations by providing better access to durable solutions, build border-control capacity, enhance document security and tackle the problem of return. In addition to that, it expressed the need to cooperate with country of origins, and transit countries and regions. In other words, the Hague Program envisioned promoting refugee protection beyond the European Union and incorporated migration management within broader foreign policy concerns.

Following the Hague Programme, United Nations High Commissioner for Refugees, Ruud Lubers stated in his speech that;

[190] Council of European Union (2004), *The Hague Programme: strengthening freedom, security and justice in the European Union*, 16054/04, JAI 559.

> The EU approach to asylum rests on a key premise: that all EU states have similar asylum systems of equally high quality. The harmonization process, now entering its second five-year phase, is designed to bring the national systems closer together. But there is one glaring omission: there is no system of burden-sharing. Instead, we see a tendency to shift the burden - to other EU states or even to countries outside the EU that are ill-equipped to handle asylum claims.
>
> Then there is the issue of who actually gets recognized as a refugee. The premise is that an applicant will have the same chance of finding protection as a refugee in all EU countries. But this is not the case. In the Slovak Republic, for example, many of the asylum seekers are Chechens - a group that, for good reason, has a recognition rate of well over 50 percent in several EU countries - yet by 30 September only two people had been granted asylum in the Slovak Republic out of 1,081 cases examined this year. In Greece, even when Saddam Hussein was still in power, less than 1 percent of Iraqi applicants were given refugee status, and the overall recognition rate fell last year to 0.6 per cent. It is not surprising that many asylum seekers move to countries where they think they have a better chance of having their claims recognized.
>
> Everyone pays lip-service to the notion that "genuine refugees need and deserve protection" - this is the raison d'etre of the international asylum system. The reality, I'm afraid, is that Europe's asylum systems do not always afford refugees the protection they need or even the chance to state their claim -- and I'm not just thinking of recent events involving Italy. As they prepare to set the EU's asylum and migration agenda for the next five years, I urge European leaders to acknowledge these realities and concentrate on creating a good system that is fair and efficient, not simply one that is fast. A reliable system that identifies and then protects refugees is what Europeans want and refugees deserve.[191]

The EU took important steps towards the creation of Common European Asylum Policy and now is at the last stage of the completion of the CEAS. Approximation of asylum policies within the EU has taken into two different levels; intergovernmental cooperation and cooperation at community level. During intergovernmental era, asylum matters did not fall within the competencies of the Community institutions and was characterized as ad-hoc cooperation outside the procedures provided for in the Treaty Establishing the European Communities (TEEC). With the Maastricht Treaty, the Member States recognized 'asylum and immigration policy' as an area of common interest in the area of Justice and Home Affairs (JHA), which would be addressed through

[191] United Nations High Commissioner for Refugees, Speech of Ruud Lubbers, the UN High Commissioner for Refugees, *EU Should Share Asylum Responsibilities, Not Shift them,* available at: http://unhcr.bg/statements.

intergovernmental cooperation as a 'third pillar' of the EU. The entry into force of the Amsterdam Treaty on May 1, 1999 marked a new stage for the formation of the Common European Asylum System transferring asylum policy from the third pillar of intergovernmental co-operation - where unanimity of Member States is required in decisions, and the decision making process is inter-governmental to the first pillar of community law -where the EU institutions would play a larger role on the field of asylum within five years. The intention to establish a Common European Asylum system was worded for the first time in the Conclusions adopted by the Council and the Commission of the European Union at the Council meeting in Tampere in 1999.

This Chapter has indicated both negative and positive aspects of CEAS. The positive effects of the establishment of CEAS has been the introduction of common principles in regards to the assessment of asylum claims, the rights of asylum seekers awaiting their result, and the rights of refugees during their stay in the European States.

Just after the Treaty of Amsterdam, in 2000, there were several discrepancies in the determination of refugee status among Member States. For instance, some states like France, Germany and Spain awarded refugee status for persecution perpetrated by non state agents only when the authorities *tolerate* or *encourage* the persecution, but not when the same authorities *want to* but *cannot* offer protection. However, inability of a state to provide protection can lead to refugee status in Austria, Belgium, Denmark, Finland, Ireland, Italy, the Netherlands, Sweden and the United Kingdom[192] In order to overcome these discrepancies the Qualification Directive[193] has been adopted in view of ensuring that Member States apply common criteria for the identification of persons genuinely in need of international protection and that a minimum level of benefits is available for these persons in all Member States. However, this Directive failed to adopt common standards within the Member States, as stated in the ECRE report in 2008 'Vastly differing refugee recognition rates still created an 'asylum lottery'

[192] European Parliament, (2003), Directorate-General for Research, Research Paper, *Asylum in the EU member States*, Civil Liberties Series, LIBE 108 EN.
In Article 6 of the Directive 2003/09 inability of a state to provide protection to the individual applicant was also considered to be a ground for granting refugee status.

[193] The Directive 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

in the EU for example, over 80% of Iraqi asylum claims succeed at first instance in some Member States, versus literally none in some others'[194]. Another critic to the Qualification Directive has been addressed in regards of its refugee definition. The Directives limited refugee definition to third country nationals or stateless persons excluding European National from the scope of refugee definition. Although the European nationals have been excluded from the refugee definition in view that European States fully respect human rights of its citizens and implemented International Human rights Instruments will full respect, this exclusion had a discriminatory aspect and therefore was in breach of Article 3 of the 1951 Geneva Convention.

Another attempt for the approximation of asylum standards was the adoption of Council Directive on minimum standards for the reception of asylum applications.

Prior to the introduction of the Directive there have been several discrepancies within the EU States in terms of the rights granted to asylum seekers; for instance, in Australia and Belgium asylum seekers did not have the right to work whereas in Belgium if an asylum seeker was admitted to the regular determination procedure there was the possibility of a work permit at the request of a prospective employer. In such a case a temporary permit was issued, limited to a renewable period of twelve months. Such differences existed in terms of freedom of movement, financial assistance, access to health care services and education. The Directive was introduced to improve reception conditions of asylum seekers in some Member States and to oblige them to provide with adequate minimum standards. However, by 2007, there was no common standards applied to asylum seekers within the EU states and therefore the Directive failed to achieve its target. For instance, some Member States did not apply the Directive, for example, to persons at the admissibility stage (Spain, Kingdom of the Netherlands). Others only applied the Directive to applicants who have already registered or hold a particular ID card (Greece, United Kingdom, Republic of Cyprus). Some Member States also limited the applicability of the Directive during the period to determine which Member State was responsible for processing the asylum claim under the Dublin Regulation (Republic of Austria, French Republic, Kingdom of Spain). Such differences existed in terms of employment and social rights. Hence, by the end of 2007, EU

[194] ECRE (2008), Sharing Responsibility for Refugee Protection in European: Dublin Reconsidered.

States did not have a common application of the Directive and far from having a common asylum system.

At last but not least, the chapter provided the analysis of the 'Directive on procedures in Member States for granting and withdrawing refugee status' which was introduced to establish minimum standards on procedures in Member States for granting and withdrawing refugee status. This Directive has been criticized on several aspects. The Directive allowed asylum seekers to remain in the territory of Member States until the first instance decision has been taken. In other words, asylum seekers were not granted the right to remain in the country during the appeal process. However, asylum-seekers should be accorded the right to remain in the territory of the country of asylum until a final decision has been reached in order to prevent possible risks of non-refoulement and/or to torture or inhuman or degrading treatment contrary to Article 3 ECHR. With this rule, refugees' primary right to non-refoulment has been breached by the European Countries.

The Directive has also set out where accelerated procedures were to be used; for any asylum application where applications raise little relevant evidence, applicants from a *safe country of origin* or a *safe third country*, the applicant has misled the authorities by presenting false information or documents or by withholding relevant information or documents with respect to his/her identity and/or nationality that could have had a negative impact on the decision, applicants who provide inconsistent information, and applicants who do not file their applications as soon as they have the opportunity to do so (in short if he/she has an unfounded asylum application)

This chapter gave emphasis to the application of 'safe country of origin', 'safe third country' and 'manifestly unfounded claims' principles. Within this Directive, application of these principles has been legitimized at community level following their adoption with London Resolutions in 1990. The Directive considered as a country to be a first country of asylum if he/she has been recognised in that country as a refugee and he/she can still avail himself/herself of that protection; or he/she otherwise enjoys sufficient protection in that country, including benefiting from the principle of non-refoulement. However, application of this principle is completely against the core of the 1951 Geneva Convention given that no country can be labeled as 'safe third country' for all asylum seekers,

since every individual might have a fear of persecution in a country which is labeled as safe. A decision on the safety of a country must always be reached with an individual assessment of claim and not generally accepted safety conditions. Another controversial issue was the adoption of minimum common list of third countries regarded as safe countries of origin. This principle is against the idea of the 1951 Convention and international refugee law. The refuge law is not about what happens generally in a country but is about what happens to an asylum seeker individually. Determining a country as a safe country of origin includes political aspects and therefore can lead Member states to reach a wrong decision with regard to asylum claims. In addition to that, it is worth to note that human rights situation is changing rapidly and therefore it would be misleading to list 'safe country of origins' in assessing well-founded fear of persecution of asylum seekers. As a conclusion of what has been above, the Directive is likely to lead to the *refoulement of* those in need of protection, with the application of safe third country concept, exceptional application of the safe third country concept, application of the safe country of origin concept and manifestly unfounded claims.

This Chapter provided two outcomes with regard to European Common Asylum Policy. First outcome was that the EU did not have a common asylum policy and was war from implementing common procedures and standards with regard to refugee protection. Second outcome was the EU's position in keeping 'unwanted' asylum seekers and refugees outside the borders of the EU. The EU in order to reach this aim introduced the three important principles 'safe country of origin', 'safe third country' and 'manifestly unfounded claims' eventhough they were completely against the core of the 1951 Geneva Convention and international refugee law. The 1951 Geneva Convention is now far from being a guideline for the European Union Member States but so far an impediment in the implementation of their own asylum policies with immunity without the respect of asylum seekers' protection needs.

The EU's asylum policy inclines to 'shift' its burden to third countries and countries of origin with the application of above cited principles. In addition to all above, despite of all these progress, the EU failed to introduce an effective burden sharing mechanism during its 15 years of asylum harmonization process.

[195] Still, countries at external border of the EU carry the highest burden both in terms of asylum applications and border control. In the light of above, it would be worth to analyze the case of Turkey as a candidate country to the EU and having closest borders to the Middle East and Africa, which are the main asylum producing regions. In the next Chapter, Turkey's current asylum policy will be studied which will then be followed with the analysis of the harmonization of Turkey's asylum policy within the EU Asylum Acquis.

[195] In 2006, Annual asylum applications lodged in industrialized countries were; Austria: 3,508, Belgium: 11. 587, Bulgaria: 567, Czech Republic: 3.016, Denmark: 1,920, Romania: 378, Luxembourg: 524, Greece: 12, 267.
UNHCR (2008), *Asylum Levels and Trends in Industrialized Countries, 2007, An Overview of Asylum Applications Lodged in Europe and Selected Non-European Countries*, p.15.

CHAPTER 3

LEGAL ARRENGEMENTS IN THE FIELD OF ASYLUM AND MIGRATION IN THE REPUBLIC OF TURKEY

As pointed out in Chapter I, the Turkish Government grants refugee status with a geographical limitation only to European nationals or to persons having their permanent residence in Europe or being without any nationality. There is no mention in the Constitution of the Republic of Turkey with regard to the right to seek and enjoy asylum in Turkish territories. The only national legislation with regard to asylum seekers and refugees is the Regulation of 1994 on the Procedures and Principles Related to Population Movements and Foreigners Arriving in Turkey either as Individuals or in Groups Wishing to Seek Asylum either from Turkey or Requesting Residence Permission in order to Seek Asylum from Another country (hereafter the 1994 Regulation). Apart from the 1994 Regulation, Turkey is bound by International Instruments and, in this regard, is obliged to respect International Instruments in the application of its asylum policy. Article 90 of the 1982 Constitution stipulates that,

> The ratification of treaties concluded with foreign states and international organisations on behalf of the Republic of Turkey, shall be subject to adoption by the Turkish Grand National Assembly by a law approving the ratification. International agreements duly put into effect bear the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional. In the case of a conflict between international agreements in the area of fundamental rights and freedoms duly put into effect and the domestic laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail.

International Bills of Human Rights applicable for asylum seekers and refugees in Turkey are as followings;

a) Universal Declaration of Human Rights, 10 December 1948
b) European Convention for Protection of Human Rights and Fundamental Freedoms, 4 May 1963
c) International Covenant on Civil and Political Rights, 16 December 1966

d) International Covenant on Economic, Cultural and Social Rights, 16 December 1966
e) International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965
f) Convention against Torture and other Cruel and Degrading Treatment and Punishment, 10 December 1984
g) Convention on the Rights of the Child, 20 November 1984
h) International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 18 December 1990
i) Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979

National Legislations applicable to asylum seekers and refugees are as followings:

a) The 1934 Settlement Law; the Settlement Law regulates residence of immigrants of Turkish descent in Turkey and their acquisition of Turkish citizenship.
b) The 1950 Passport Law; the Passport Law regulates exit and entry of foreigners into Turkish territory.
c) The 1950 Law related to the Residence and Travel of Foreigners; the Law related to the Residence and Travel of Foreigners regulates residence and travel of foreigners in Turkey.
d) The 1964 Citizenship Law; the citizenship Law regulates acquisition of Turkish citizenship
e) The Regulation of 1994 on the Procedures and Principles Related to Population Movements and Foreigners Arriving in Turkey either as Individuals or in Groups Wishing to Seek Asylum either from Turkey or Requesting Residence Permission in order to Seek Asylum from Another country; the 1994 Regulation sets out procedures applicable to asylum seekers and refugees in Turkey.

3.1. Domestic Legal Instruments

3.1.1 The Settlement Law

In the early years of the Turkish Republic the population had remained considerably low as a result of the loss of massive number of people during the Balkan Wars of 1912-1913, the Greco-Turkish War of 1912-1922, and the World War I of 1914-1918. In addition to these wars, forced migration and death of Armenians, Greeks and Muslims caused a decrease in the number of Turkish population. In 1920s the population stood around at 13 million. This low level of population generated the need of an efficient policy, which would carry this level of population to its previous dimensions. The founders of the Republic of Turkey were in the view of creating a homogenous nation state instead of maintaining diverse nations and cultures into its territory. The idea to create a pure nation state was expected to be reached with the admission of immigrants who were either Muslim Turkish speaker or ethnic Turks who could easily integrate into Turkish identity, such as; Albanians, Bosnians, Circassians, Pomaks and Tatars from Balkans. Therefore, the Settlement Law number 2510 was introduced on 14 June 1934 and went into effect on 21 June 1934 with respect of regulating acquisition of immigrants of Turkish ethnic origin or Muslim Turkish speakers. [196]

The Settlement Law provided a definition to the words 'immigrant' and 'refugee'. The primary objective of the Settlement Law was to regulate Turkish state practices with regards to immigrants. It primarily determined those whose entry and settlement in Turkey was permitted and those who were eligible to apply for refugee status. With regard to the provisions of this Law those who were of Turkish descent and culture were accepted as immigrant and refugee in Turkey.

'Immigrants' under Article 3 was defined as 'sedentary or nomadic persons of Turkish descent who wish to come to Turkey individually or collectively from abroad with the intention of settling in Turkish territories.' The Ministry of Interior was responsible for the admission of individuals who had an intention of settling in Turkey, provided that the opinion of Ministry of Health and Social Assistance is obtained; however, the admission of those who wish to come collectively to Turkey with the aim of settlement was carried out upon the

[196] K.Kirişçi., (2003),Turkey: A Transformation from Emigration to Immigration, *Center for European Studies, Boğaziçi University*, p. 3.

instructions issued by the Ministry of Health and Social Assistance provided that the opinion of Ministry of Interior is obtained. The Council of Ministers was assigned as the responsible body to determine who and which countries fall in the definition of Turkish descent and Turkish culture.

Article 3 provided definition to the term 'refugee' referring to persons who had an intention to reside in Turkey temporarily due to a need or a compelling reason without an intention of permanent resettlement. The refugees who notified their intention to reside in Turkey to the highest administrative authority of the place where they were located should be treated as immigrants by the Ministry of Health and Social Affairs. Other refugees should be treated within the provisions of the Law of Citizenship and under the supervision of the Ministry of Interior.

The Ministry of Interior and the Ministry of Health and Social Welfare were responsible ministries to arrange local settlement of refugees and immigrants in accordance with the program prepared by the Council of Ministers for the purpose of promoting devotion to Turkish Culture and improving dwelling and spreading of the population (Article1) As it is clear from the wording of this Article, primary purpose of the Settlement Law was to promote devotion to Turkish culture, to protect purity of Turkish nation and to improve integration of people from Turkish descent into Turkish Republic.

Immigrants were required to register themselves and their family members to the highest civil administrative official of the location of their entry or their place of disembarkation and to sign a declaration for admission into citizenship and obtain an immigrant paper. With regard to this Article, those who were accepted as immigrant should be immediately admitted into citizenship by a decision of the Council of Ministers. Immigrants and refugees who failed to register themselves with responsible authorities within two years of their arrival might not be granted with settlement assistance as provided in this Article. (Article 6) This Article demonstrated the willingness of Turkish Republic to create a pure Turkish nation state through naturalization and integration of all considered to be of Turkish descent into Turkish Republic. (Article 6)

Article 4 defined people who shall be excluded from immigrant status in Turkey. With regard to this Article ''those who are not devoted to Turkish culture,

anarchists, spies, itinerant gypsies and those who are deported from Turkey shall not be accepted as immigrants into Turkey.''

The Settlement Law was introduced as an outcome of the Turkish Republic's willingness to increase its population through acquisition of immigrants of Turkish descent and to sustain a pure Turkish nation state. Therefore, primary purpose in introducing the Settlement Law was to regulate immigration of ethic Turks into Turkish Republic with the aim of increasing the low level of population, which stood at 13 million by 1920s. As clear from the wording of the Law those who were not of Turkish origin were not included in the framework of the Settlement Law. The Settlement Law does provide immigrant status only to those of Turkish descent and regulates their naturalization. Within the context of this Law, refugees who fulfilled criteria set forth in Article 3, in other words who were considered to be of Turkish descent and culture, had the right to obtain immigrant status, which in turn granted them the same treatment as Turkish citizens. In other words, the Settlement Law granted settlement permit only to those devoted to Turkish Culture, whose integration into Turkish society was perceived to be easy.

The Settlement Law was the main domestic legislation that governed state practices of the Turkish Republic with regards to refugees and immigrants prior to the promulgation of the 1951 Convention. The Settlement Law did not foresee any difference between asylum seeker and refugee and did not provide any definition to the term 'asylum-seeker'.

Turkey has always been a homeland for immigrants of Turkish ethnic origin. Thousands of people of Turkish descent and culture benefited from this Law, including; Turkish speaking communities in the Balkans (Yugoslavs, Bosnians, Albanians Greeks) and in Caucasus (Circassians, Pomaks, Tatars). There were two groups of immigrants within the framework of this Law; 'independent immigrants' who sponsored themselves and 'settled immigrants' who were in need of state assistance. The last group who benefited from State assistance under the Settlement Law was in 1989 when more than 300 000 Turks and Pomaks were expelled from Bulgaria refusing assimilation into Bulgarian Slav identity as a result of a campaign supported by the Communist regime. Iraqi Turkomans and Azeris also benefited from this Law on individual basis. In recent years, Turkish government became reluctant in applying this Law firstly due to

geopolitical concerns, with the aim of keeping ethnic Turks in their place of residence, and secondly for preventing potential influxes of Turkish origins residing in unstable areas close to Turkish territories. [197]

3.1.2 The Citizenship Law

The Citizenship Law No. 403 dated 11 February 1964 went into effect on 22 February 1964. The Citizenship Law put forward under which circumstances Turkish citizenship might be acquired. With regard to the Citizenship Law one can acquire Turkish nationality by three ways; by law, by a decision of an authorized government agency or by right of choice.

Acquisition of Turkish citizenship by Law set out principles applicable to the children of asylum seekers and refugees born in Turkey. The Citizenship Law affirmed that a child born to a Turkish father and mother shall acquire Turkish nationality regardless of his place of birth and adds that only children born in Turkey and who cannot acquire nationality of their father and mother shall acquire Turkish nationality starting from their date of birth.

Acquisition of Citizenship upon the decision of the Competent Authority necessitates some prerequisites to be fulfilled by the foreigners. Article 6 of the Law set out requirements for acquisition of citizenship; such as 'being an adult by his national law, residing in Turkey for 5 years prior to his date of application, confirming his decision to settle in Turkey by his behaviours, having good conduct, not being harmful for society, being free of diseases that could endanger public health, being able to express himself in Turkish language in some extend, having an income to afford himself and his dependents.' Those who fulfil these criteria maybe granted Turkish Citizenship upon the decision of the Council of Ministers.

Apart from general provisions provided in Article 6, one who fulfils the following requirements may also be granted citizenship upon the decision of Council of Ministers pursuant to the recommendation of the Ministry of Interior. This category of people involves 'children whose parents lost their citizenship and who are over eighteen, those who are married to a Turkish citizen and children

[197] Kirişçi, K., (2003), *opt.cit.,* p. 3.

of such spouse, those who are from Turkish descent, their spouse and children, those expected to bring good service to Turkey, technology etc. those whose citizenship application was found to be eligible by the Council of Ministers. (Article 7)

It is worth to note that acquisition of citizenship for refugees was much easier within the framework of the Settlement Law. In Article 6 of the Settlement Law the only prerequisite for refugees was to register themselves to the highest civil administrative official of the location of their entry and to sign a declaration for admission into citizenship. Those who were accepted as immigrant would be immediately admitted into citizenship by the Council of Ministers. However, the Citizenship Law stipulates further requirements in order to be able to obtain citizenship as set out under Article 6.

3.1.3 The Passport Law

The Passport Law No 5682 dated 15 July 1950 went into effect on 24 July 1950. The Passport Law regulates entry and exist procedures within Turkish territories. Entry of foreigners without legal documents or passport or with invalid passport or documents is prohibited under Article 4 of the Passport Law. Those who approach to Turkish borders without legal documents or passport shall be subject to return. (Article 4) However, admission of refugees and foreigners who enter to Turkey with the aim of settlement but who do not fall in the scope of the Settlement Law, is left on the discretion of the Ministry of Interior, regardless their acquisition of a passport or legal documents. (Article 4) This Article has a great importance for asylum seekers and refugees given that a considerable number of refugees, being unable or unwilling to flee their country by legal means, prefer crossing the borders illegally, whereas many of them are not even able to obtain passport of their nationality, as in the case of Somalia, or do not have the opportunity to take their identity documents while leaving their country of origin. With regard to this Article, admission of refugees is regulated different than other foreign subjects, not being subject to return for not holding legal documents or passport; their admission was left on the permission of the Ministry of Interior. Article 5 stated that apart from the exceptions set out in the Law (as stipulated in Article 18), foreign subjects are

obliged to obtain visas from the Turkish authorities to enter from the Turkish border. Admission of persons who approach to Turkish borders without valid visas depends on the permission of the concerned security officials. Article 8 of the Law 5682 identifies persons whose entry in Turkey is forbidden; this category of people include;

> tramps and beggars, persons who are insane and who suffer from contagious diseases, persons who have been driven out of Turkey and still no entry, persons who are threat to national security and public order, prostitutes, those who incite women to prostitution, those who cannot prove that they can support themselves during their stay in Turkey or have someone to support them, person who are accused or condemned of one of the crimes accepted as base for return according to agreements concerning returning the criminals.

With regard to Article 26 of the Passport Law, Ministry of Interior holds the discretion to grant entry visas to ‘‘stateless persons, bearers of Nansen Passports, bearers of the travel documents and alike documents such as affidavit, laisser passer’’ However, transit visa may be issued to the bearers of such documents without the permission of the Ministry of Interior with the condition that they will depart subsequently or they have entry visa of the country they come from.

Passport Law introduced penal sentences for illegal entry (Article 34) and illegal departures of foreigners (Article 33). Article 33 foresees that those who departed or attempted to depart from Turkish Republic without a passport or a valid document would be sentenced to fine or to imprisonment. Those who committed this offence ‘‘ for the purpose of special aims such as to release themselves from investigation of punishment, to desert from the military service, not to pay their tax debt would be sentence to a higher amount of fine or longer imprisonment or would be awarded both of the penalties together.’’ With regard to Article 34 those who entered to Turkey illegally from the borders of the Republic of Turkey shall be sentenced to fine from 250 to 1250 TL or imprisonment of 1 to 6 months or both penalties together shall be awarded to foreigners and citizens. Foreign subjects shall be deported upon the completion of their terms.

3.1.4 The Law Related to the Residence and Travels of Foreign Subjects

The Law related to the Residence and Travels of Foreign Subject number 5683 dated 15 July 1950 went into effect on 24 July 1950. This Law regulates residence and travel of foreigners in the Republic of Turkey. With regard to Article 1 of the Law No 5683 foreigners whose entry to Turkey was permitted by law and was in accordance with the Passport Law are granted the right to reside and travel in Turkey. The Council of Ministry has the power to restrict or prohibit places for the travel or residence of foreign subjects. The Council of Ministers has also the power to award for application of such measurements to the specific subjects of the state as reprisal. (Article 2) Further, according to Article 17 of the Law No. 5683, refugees reside in a place that is designated by the Ministry of Interior. Article 25 adds that refugees who leave their designated places without a permission from the authorities may be sentenced to terms of imprisonment ranging from one month up to two years.

Article 19 provides that "aliens whose sojourn is considered by the Ministry of Interior to be contrary to national security or political or administrative practice are requested to leave Turkey within the specific time given. Those who have not left Turkey where the period has elapsed shall be expelled"

The foreigners with the aim of residing in Turkey more than one month shall apply to the authorized security in order to obtain residence permit. (Article 3) Duration of residence permit is maximum 2 years. Residence permits are issued personally, but spouses and children below the age of 18 can be issued joint residence permit by inscribing 'accompanied by' sections of the father or the mother. Residence permit fee for 6 months is subject to 274 YTL, plus 81 YTL for *defter*, which is in fact an additional financial burden for asylum seeker and refugees difficult to be paid. [198]Although Article 9 (c) of the Law 5683 stated that refugees who can prove their financial situation is not good enough to obtain residence permit may be exempted from the tax of residence permit, in practice, it is very rare that asylum seekers are exempted from residence fees. Asylum seekers and refugees who can not afford to pay their residence fee shall fill the

[198] Information available to UNHCR Ankara, 2008.

petition form and submit it to the Governorate of the satellite city where they reside.

Within the framework of the Act on Residence and Travel of Foreigners, Article 15 (1) underlines general principle with regard to the rights related to employment of foreigners stating that "foreigners may only carry out work in Turkey which is not prohibited for them by law". [199] This principle clearly states that some professions and crafts may be prohibited or restricted for foreigners by law. Employment related rights and freedoms for foreigners will be discussed in the following section under 'the Law on the Work Permit of Foreigners.'

3.1.5 The Law on the Work Permit of Foreigners

Article 48 of the Turkish Constitution of 1982 guarantees in principle the rights and freedoms of employment for both nationals and foreigners. Article 48 provides that ''everyone has the freedom to work and conclude contracts in the field of his choice, the establishment of private enterprises is free.'' However, Article 16 of the Constitution submits that ''the fundamental rights and freedoms of aliens may be restricted by law in a manner consistent with international law''. In view of Article 16, these restrictions can also be applicable to employment related rights.

The Law on the Work Permit of Foreigners Law No. 4817 was enacted on 27 February 2003. This law regulates conditions under which the foreigners may be granted work permit and sets out occupations that the foreigners are allowed to perform within the Turkish territories. Within the context of this Law foreigners shall obtain work permit before they start to work dependently or independently

[199] The professions requiring Turkish citizenship are; Lawyer, Security and Safeguarding Staff, Customs Broker, Customs Counsellor Assistant, Stock Exchange Broker, Professional Tourist Guide, Responsible Manager of Travel Agency, Public Notary, Founder of a Trade Union, Independent Accountant, Financial Advisor, Certified Public Accountant, Captain and Seamen, Board Member of Cooperative Society. Professions restricted for working of foreigners are; Nurse, Doctor, Dentist, Midwife, Carer in Hospital, Pharmacist, Responsible Manager in Private Hospital, Veterinary. *Screening Chapter II Freedom of Movement for Workers. Access to Labour Market.* Available at: http://www.abgs.gov.tr Last access: 26 April 2008.

in Turkey. The Ministry of Labour and Social Security is responsible for granting work permit or to extend its duration. Article 8 of this Law explicitly refers to the case of refugees and asylum seekers stating that work permissions may be granted to 'foreigners that are accepted as an emigrant, refugee or nomadic according to the Residence Law 2510.'

Article 12 states that foreigners who have legal residence in Turkey or the employers of legal residents shall submit an application to the Ministry of Labour in order to obtain a work permit. The extension of work permits would be given upon the request of foreigner who has a legal residence or upon the request of his employer to the Ministry of Labour and Social Security. The applications shall be answered within at most ninety days by the Ministry.

> Work permits may be restricted, for a certain period of time, with reference to agricultural, industrial or service sectors, or a certain profession, branch of work or administrative and geographical area, in cases where required by the situation of labour market and developments in working life, sectoral and economical conjectural changes concerning employment. However, such limitation will be subject to the provisions provided by bilateral and multilateral international treaties, to which Turkey is a party, and on the basis of the principle of reciprocity (Article 11*).*

Article 13 of the Law No 4817 states that work permits to foreigners will be given by the Ministry of Labour taking into account opinions of relevant authorities concerning professional competency of foreigners so that occupations, arts and jobs that foreigners may work at would be determined accordingly. Article 13 further requires that other laws that are in force in relation to the restriction of works and occupations of foreigners would be presevered.

With regard to Article 14 applications for work permits may be rejected " if the situation of the labour market, developments in working life, sectoral and economical conjectural changes concerning employment is not appropriate to issue work permits, if a foreigner has no valid residence permit, if a foreigner submits second request to obtain a work permit for the same workplace, enterprise, or profession within one year from the date of rejection of his first request for the same workplace, enterprise, or occupation, if a foreigner is

considered to be a threat for national security, public disorder, general security, public interest, general ethics and general health, if a Turkish national with the same qualifications for the same job is found in 4 weeks.'' (Art.14 (b))

The Turkish Employment Agency determines the equivalence of professional qualification certificates of foreigners who wish to work in Turkey. (Article 13(3) of the AR)[200] The Turkish Employment Agency reports to the Ministry of Labour at four week period about "the jobs and professions in which foreign employment is not seen appropriate" (Article 13(3) of the AR). These reports are taken into account for the assessment of the Ministry of Labour. The Ministry of Labour takes into account such information and documents as the specific nature of the job, certificate of good service, reference and assignment letters, which justify foreign employment instead of domestic employment (Article 13(3) of the AR). When there is a Turkish national who applied for the same job, the foreigner's application for work permit is rejected if the national has the same qualifications as the foreigner. (by virtue of Article 14 (b) of the Law on Work Permit of Foreigners)

The foreigner or his employer shall be informed, in accordance with the provisions of Notification Number 7201, by the Ministry of Labour with regard to rejection, cancellation or refusal of extension of work permits. The foreigners and the employers have the right to object against the decision of the Ministry within thirty days from the date notification. In case the objection is rejected by the Ministry of Labour, foreigners have the right to apply to administrative judgment. (Article 17)

Article 21 sets out penal provisions with regard to illegal employment of foreigners. Within this Article 'the foreigner that works independently without a work permit is fined with an administrative penalty of 783 YTL.' The employer representatives are also sentenced to an administrative penalty of 3.922 YTL for each foreigner that does not have work permit.[201]

[200] Application Regulation of the Act on Foreign Work Permit, No. 25214, Official Gazette on 29.08.2003 (called as the Application Regulation (AR) from hereinafter)
[201] Screening Chapter, Freedom of Movement for Workers, Access to Labour Market, 14 September 2006, available at http://www.abgs.gov.tr/

The foreigners are required to submit following documents for their application of work permit, these documents include a petition for work permit, an application form, copy of passport and its Turkish translation approved by notary public, copy of diploma and its translation by notary public, residence permit for at least 6 months for the applications made in Turkey and a standard CV form. [202]

3.1.6 Regulation on the Procedures and Principles Related to Population Movements and Foreigners Arriving in Turkey either as Individuals or in Groups Wishing to Seek Asylum either from Turkey or Requesting Residence Permission in order to Seek Asylum from Another country (hereafter the 1994 Regulation)

3.1.6.1 Why the Republic of Turkey needed to introduce the 1994 Regulation: A General Overview to migration movements to Turkey prior to the enactment of the 1994 Regulation

Turkey being situated at the crossroad between Asia, Africa and Europe has always been an attractive transit zone for asylum seekers. In order to better understand the circumstances under which the 1994 Regulation was introduced, it would be appropriate to analyze population movements to Turkey prior to the 1994 under two categories as follows.

3.1.6.1.1 Asylum seekers and refugees coming from Europe prior to the 1994 Regulation

Nation-building efforts of the Republic of Turkey were mainly characterized with acquisition of immigrants/asylum seekers who could adapt into Turkish identity with the purpose of creating a pure nation state. Therefore, in the first years of the Republic the terms 'immigrant' and 'refugee' have been used in parallel mainly including those of Turkish descent whose naturalization have been facilitated. On 30 January 1923, the Agreement and the Additional Protocol regulating the population exchange had been signed six months prior to the

[202] Application Regulations for the Law on Work Permits of Foreigners, Annex II

main body of the Lausanne Peace Agreement. Article 1 of the Agreement and Protocol states that 'Turkish citizens of Greek-Orthodox religion present in Turkey and Greek citizens of Islam religion present in Greece would be subject to a mandatory population exchange as of May 1st, 1923. The population exchange agreement of 1923 demonstrates that integration into Turkish culture and identity was mainly related with religious identity. During the initial years of the Republic of Turkey, the term 'Turk' was defined based on religious grounds, in other words, the term 'Turk' reflected Muslim people of Anatolia and Roumeli. [203] Following the abolition of the Caliphate, the 1924 Constitution defined a Turk as 'Everyone who is a citizen of the Republic of Turkey and who adopts the Turkish language, culture and ideal [204] In this regard, in 1934, the Settlement Law was introduced in order to admit immigrants who were believed to integrate into Turkish nation easily.

In the early 1930s the Turkish Government gave speed in westernisation process. In this regard, Turkey had acquired Jewish asylum seekers fleeing Europe, who had been discriminated based on their religious belief or political opinion. These asylum seekers included Jewish intellectuals who also enjoyed employment opportunities, for instance; in 1933, 50 Jewish professors who fled from Nazi regime and sought asylum in Turkey have been employed in Turkish universities. During the population movements of 1930s, many Jewish people have been recruited in the public sector, houses and operas etc. [205] Despite of being in the view that hosting Jews would be an advantage for westernization process, the Turkish State had been careful not to draw international attention until it became certain that Western Allies won the Second World War in 1943. [206]As of 1943, when the victory of Western Allies became clear, Turkey started to support openly asylum seekers fleeing from persecution in Germany, Austria, Romania, Hungary, Bulgaria and Poland. With the establishment of Israel a considerable number of Jewish asylum seekers had left Turkey and settled in Israel.

[203] Nişanyan, S., *Defining The Turk,* A.Yalçın and S. Kara (Ed) (2001), *Modernleşme ve Çok Kültürlülük,* İstanbul:İletişim Yayınları, p.21.
[204] Yalçın, A and Kara, S.(ed) (2001), *opt.cit.,* p.217
[205] Levi, A., (1992), *Türkiye Cumhuriyeti'nde Yahudiler*, İstanbul, İletişim Yayınları, p.99.
[206] Levi, A., (1992), *opt.cit.,* p.149.

As of the end of the Second World War the population overweighed state owned lands, and agricultural production; economy was not able to support the needs of population. Therefore, Turkish State was more restrictive even in admitting immigrants of Turkish descent and culture. The first example of restrictive approach in admitting Turkish descents occurred at the time when Bulgarian State implemented segregationist policy against ethnic Turks. The Bulgarian State had pursued segregationist policy mainly based on two reasons, first reason was that Bulgaria and Turkey were in opposing camps during the Second World War and the second reason was that Turkish minorities in Bulgaria resisted to assimilation policies which in result led them to be perceived as a threat to communist regime.[207] In a meeting in 1947, the Council of Ministers decided that only those with an immigration visa would be admitted in Turkey. [208] However, with the establishment of multi party system, the DP government, in contrast with the decree of 1947, decided to open the borders to Bulgarian refugees. Consequently, between the years of 1950-1951 154.000 immigrants emigrated, or have been expelled from Bulgaria to Turkey. All these immigrants have been provided with temporary settlements, and support for their acquisition of settled immigrant status. [209]Second mass influx from Bulgaria occurred in 1990, when Theodor Zhivkov (Todor Jıvkov) government reintroduced forced assimilation policies. In return, on 2 June 1989, Turkish government opened its border to Bulgarian ethnic Turks without a visa requirement; all these ethnic Turks were granted Turkish citizenship, and their money was converted to Turkish Lira. [210]The fact that Bulgarian immigrants did not meet criteria set forth in the Settlement Law an additional clause which requires the recognition of immigrants from Bulgaria to Turkey following 1st January 1984 as independent or settled immigrants was added into the Settlement Law dated 14th June 1934. Their acquisition of citizenship was facilitated, out of 96.341 individual application, 82.841 individuals were granted Turkish citizenship.[211]

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[207] Armaoğlu, F.(1995), *20. Yüzyıl Siyasi Tarihi,* İstanbul, Alkım Yayınevi, p.
[208] Lutem, Ö.E.(2000), Türk-Bulgar İlişkileri 1983-1989, Ankara Avrasya Stratejik Araştırmalar Merkezi Yayınları, p.74.
[209] Kirişçi, K.,(2000) Zorunlu Göç ve Türkiye'., T.Akın (ed.), Sığınmacı, Mülteci ve Göç Konularına İlişkin Türkiye'deki Yargı Kararları, İstabul, Birleşmiş Milletler Yüskesk Komiserliği ile Boğaziçi Üniversitesi Vakfı Ortak Yayını, p.58.
[210] Doğan, K.,(1996), *Tarihi Belgeler Işığında Büyük Göç ve Anavatan (Nedenleri, Boyutları, Sonuçları),* Ankara, Türk Basın Birliği Ankara Temsilcileri, p. 56-60.
[211] Doğan, K., (1996), *opt.cit*, p.100.

Another population movement to Turkey was from Bosnia Herzegovina. In a referendum held on 1st March 1992, Bosnia Herzegovina chose to secede from the Federal Republic of Yugoslavia whereas the Bosnian Serbs had boycotted the referendum and declared the establishment of Republica Srpska by the end of March.

> When the Serbian leader Slobodan Milosevic, thorn down Vukova, Sarajevo, and other cities in Croatia and Bosnia, he had destroyed the houses, religious buildings and small scale factories; while killing people or forcing them to flee their homelands. By raping and torturing people he had disposed them of everything they could have thought of giving in. And he did so for a clearly stated strategic purpose: to re-establish The Great Serbia.[212]

In response to the ethnic cleansing in Bosnia; Western States, instead of recognizing Bosnians as refugee, granted them temporary asylum. By doing this, the States did not under undertake any obligations deriving from the 1951 Convention such as providing them with education, medical care, employment or any other benefits set forth in the 1951 Convention.[213] Turkey as well as Western Countries did not grant Bosnians refugee status but considered them as being guest and provided them temporary protection. Bosnians were accepted on prima facie basis; approximately 2,500 Bosnians were settled in the camps (Kırklareli Camp near the Bulgarian border to Turkey) without a requirement of obtaining residence permit and around 15,000 were allowed to live outside the camps with the condition that they had a sponsor or enough money to survive. Bosnians were provided health care services and education facilities. Bosnians were not granted work permit but their illegal employment was not a concern for the Turkish authorities. UNHCR contributed to the assistance for Bosnians living in the camp providing prefabricated houses, vocational courses, camp clinic, schooling and educational activities.[214] Most of the Bosnians have repatriated following the Dayton Peace in 1995. By the end of 2000, only about 850

[212] Wohlstetter, A., (1994), *Balkanlar'da Düşmanlar, Müttefikler ve Çokyönlülük,* Avrasya Etüdleri, I, İlkbahar, p.5.
[213] Schidt, F., (1994), *The Former Yugoslavia: Refugees and War Resisters,* RFE/RL Research Report, p.48
[214] Information available to UNHCR Ankara

remained in Turkey, of whom 89 were residing in the Gaziosmanpasa Center in western Turkey. [215]

Moreover, a considerable amount of asylum seekers coming from the Soviet Union, including Azeris, Ahiska Turks, Chechens and Uzbeks were not granted refugees status, but have been granted with settled immigrant status under the Settlement Law; they were given the right to settle, to work and even to obtain citizenship. The reason for not granting them with refugee status was due to political considerations for not offending Azerbaijan, Russia and Uzbekistan and the fear in the increase of the influxes into Turkish territory.

In overall, according to the statistics of Ministry of Interior the number of asylum seekers benefited from protection of the 1951 Convention between 1970 and 1996 was 13.500. [216] According to UNCR statistics, between 1945 and 1991, less than 8,000 asylum seekers from Eastern Europe and the former Soviet Union arrived in Turkey, half of them in the period from 1979-1991. [217]

Turkey's asylum policy prior to mid 1990s was to grant temporary residence to those perceived to be Turkish descents and to facilitate their naturalization instead of granting them refugee status. Turkey, by doing this, avoided her obligations deriving from the 1951 Convention and perceived these European asylum seekers as guests instead of refugees.

3.1.6.1.2 Asylum Seekers Originating from Outside of Europe

Second category of population movement involved foreigners coming outside of Europe. Although the main influx to Turkey was composed of Europeans up to 1980s, in 1980s the composition of influxes had changed and Turkey started to receive asylum seekers coming from Middle East countries especially from Iran and Iraq. Turkey laying between Middle East and European countries and being

[215] U.S. Committee for Refugees and Immigrants (2000), Country Report: Turkey, *World Refugee Survey.*
[216] Kirişçi, K., (2003), opt.cit., p.4.
[217] Içduygu, A., (2003), Irregular Migration in Turkey, *International Organization for Migration Research Series,* Bilkent University, p.23.

surrounded by unstable regions became a transit country for those who were in need of protection.

In 1980, following the Iranian Revolution and the collapse of Shah Regime, many of Iranian citizens fled their country and sought asylum in the neighboring country Turkey. During this period, Turkey had an agreement with UNHCR that UNHCR would be the responsible organization for conducting refugee status determination interviews with asylum seekers and providing them resettlement as a durable solution. Turkey did not provide any other durable solution to non-European asylum seekers limiting its obligations of the 1951 Convention to those coming from Europe. In this respect, those whose claim was rejected would be subject to deportation.

Iran-Iraq war of 1980-1988 and Iraq's invasion of Kuwait in 1991 resulted in mass influxes to Turkey. In 1988, the Iraqi government, as a result of a Kurdish rebellion, ordered chemical attacks on Kurds, in Halabja, which as a result caused the flight of approximately 60.000 Kurds from North Iraq to Turkey.[218] The first reaction of the Turkish Government had been the closure of borders in the view that admission of these people would be against the interest of Turkey. However, two days later, Turkish government announced that it would allow temporary residence of these individuals fleeing from Northern Iraq even Turkey had no obligation deriving from the 1951 Convention. These people were settled in three camps which were strictly monitored by the Turkish authorities; their treatment was significantly different from that was accorded to Eastern Europeans, ethnic Turks and Iranians. The reluctance of Western Countries in admitting refugees for resettlement created a tension between Turkey and Western Countries. Following the second influx of 1991, Turkey suggested that large number of Iraqis should be placed and protected in internationally secured camps in the territory of North Iraq. Consequently, tension between Turkey and Western countries had been overcome with the establishment of a 'safe heaven' above the 36th parallel of northern Iraq; many of asylum seekers were repatriated to safe heaven in 1991. [219] After the establishment of safe heaven in

[218] United States Committee for Refugees and Immigrants, (1998*), U.S Committee for Refugees World Refugee Survey, Turkey,* p.58.
[219] Kirişçi, K., (1991), The Legal status of Asylum Seekers in Turkey: Problems and Prospects, *International Refugee Law,* Vol.3 No.3, Oxford University Press, pp. 517-518.

North Iraq and completion of resettlement of Kurdish refugees to the safe heaven Turkish authorities considered North Iraq to be safe from Iraqi persecution and became reluctant in admitting Kurdish people as refugee. [220] In 1988 and 1991 Turkey received mass influxes of Kurdish people amounting almost to 1.5 million.

The increase in the number of illegal entries in Turkey and refoulement of asylum seekers whose claim were rejected stained Turkey's asylum practices prior to the 1994 Regulation. The main concern for Turkey with regard to asylum seekers and refugees was illegal entry and illegal stay of asylum seekers in the Turkish territories. One of the Turkish officials explained Turkish government's concern with regard to illegal stay of asylum seeker and refugees in Turkey stating that;

> Turkey's main concern was illegal entry and illegal residence of asylum-seekers in Turkey. Those asylum seekers mostly attempted to leave Turkey to European countries by illegal means. This was the major conflict between Turkey and Greece. Other than that Turkish officials often realized existence of illegal asylum seekers when they are on the way to resettlement countries exit visa on their visa in Turkish airports. When Turkey tried to prevent their departure from Turkey she faced a great pressure from international community and Western Countries. Turkey being a transit country plays an important role for the control of irregular immigration towards Western European destination. [221]

In addition to the concerns with regard to illegal stay and entry of asylum seekers, mass influxes of Kurdish population raised security concerns in the Turkish Republic. These concerns necessitated introduction of a national legislation in order to cope with mass influx situations and control of national security within Turkish territory.

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[220] Kirişçi, K., (1995), Is Turkey Lifting the 'Geographical Limitation'? – The November 1994 Regulation on Asylum in Turkey*, International Refugee Law,* Vol 8 No 3, Oxford University Press, p.298.

[221] Kirişçi, K., 1996:299.

3.1.6.2 Asylum Practices in the Republic of Turkey prior to 1994 Regulation

There was no national legislation regulating asylum policy of the Turkish Republic prior to the introduction of the Regulation on the Procedures and Principles Related to Population Movements and Foreigners Arriving in Turkey either as Individuals or in Groups Wishing to Seek Asylum either from Turkey or Requesting Residence Permission in order to Seek Asylum from Another country (hereafter the 1994 Regulation). The Ministry of Interior was responsible for conducting refugee status determination interviews only with 'European' asylum seekers whose files were submitted by the local police subsequent to their registration. MOI send the file with its recommendation to the MFA, MFA examines the file and assess whether the applicant falls under the Turkey's obligations of the 1951 Convention. If the applicant is a genuine refugee he/she is granted rights accorded to refugees under the 1951 Convention. If granted "temporary asylum seeker status," the recognized non-European is given a six-month residence permit, sent to a satellite city, and directed to UNHCR to be considered for UNHCR recognition (if not already recognized), and resettlement to another country. UNHCR plays a supervisory role with European asylum seekers in case of the rejection of their applications. UNHCR supervises whether Turkey fulfilled its obligations deriving from the 1951 Convention. [222] Refugees of European countries are allowed to reside in Turkey temporarily with the issuance of a residence permit for one year which is renewable at the discretion of the MOI. If their asylum application is approved by the Turkish authorities

[222] Under Article 35 of the 1951 UN Convention and Article II of the 1967 Protocol, both of which Turkey is a party, governments are obliged to co-operate with UNHCR and facilitate its task of supervising the application of the UN Convention. These Article reads that 'The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention. 2. In order to enable the Office of the High Commissioner or any other agency of the United Nations which may succeed it, to make reports to the competent organs of the United Nations, the Contracting States undertake to provide them in the appropriate form with information and statistical data requested concerning: (a) The condition of refugees, (b) The implementation of this Convention, and; (c) Laws, regulations and decrees which are, or may hereafter be, in force relating to refugees. Further responsibilities arise from the UNHCR Statute, in which the UN General Assembly calls upon governments "to co-operate with the United Nations High Commissioner for Refugees in the performance of his function concerning refugees falling under the competence of his office."

they are granted permanent residence in Turkish territories. European refugees can stay in Turkey as long as they need international protection and can enjoy rights accorded in the 1951 Convention.

As aforementioned, admission of refugees into Turkish territories was on the discretion of the Ministry of Interior with regard to Article 4 of the Passport Law. Prior to the introduction of the 1994 Regulation asylum seekers who entered to Turkey with passports and valid visas were not considered to be asylum seekers but as tourists. Iranian asylum seekers who entered Turkey with a valid passport used to receive a valid visa for three months at the place of their entry. They were then required to approach to the police to request asylum; they would be given temporary residence permit in return of leaving their passport with the local police. Asylum seekers who entered to Turkey without a valid visa were supposed to approach to the Foreign Section of Ankara police and register themselves after they were issued a police letter by UNHCR BO Ankara subsequent to their registration with this office. Those who approached to the police were issued a temporary residence permit of three months which was to be renewed up to two or three years. However, it was difficult to renew passport for more then 15 months. Thereafter, the asylum seekers were to approach the police for daily "signature duty". [223]

It was on the UNHCR's responsibility to interview and assess the claims of 'Non-European' asylum seekers and to protect those who have faced threats of refoulement, deportation and other actions endangering their status. The day that Non-European asylum seekers approach to UNHCR BO Ankara, a Registration Form which includes a picture of the Applicant, and his Bio-Data, such as, nationality, place and date of birth, education level, family members accompanying the Applicant and family members outside the country of origin, is completed by a legal clerk. After the registration asylum seekers are given an interview date indicating the date when they will have a refugee status determination (RSD) interview before a legal officer. In RSD interviews legal officers assess the Applicant's claim. Following the interviews, legal officers write an assessment with regard to the Applicant's claim including a summary of the Applicant's claim, a credibility assessment and an assessment regarding well-founded fear of the Applicant in the country of origin; in the conclusion part legal

[223] Information available to UNHCR BO Ankara.

officer reaches to a conclusion, which might be a recognition or rejection. The applicant is informed about the final decision of his case. In case of recognition the Applicant's case is submitted to a resettlement country given that Turkey does not provide another durable solution for non-European refugees. Non-European asylum seekers were only granted temporary residence permit until they were resettled to a third country; therefore the only durable solution for Non-European refugees is resettlement. [224] Therefore, those who were not resettled within a reasonable period of time, which was normally 15 to 18 months, were at risk of being deported by the Turkish authorities. In case of rejection, if asylum seekers wish to have their case to be reconsidered on appeal, they have to send a letter to BO Ankara within the next 30 days explaining why they believe they are refugees. [225] If an asylum seeker is granted mandate refugee status, he/she will be issued with a 'letter of concern' that proves that the asylum seeker is recognized by UNHCR BO. Although this document has no legal value in Turkey it has a preventive effect in case where refugees are subject to deportation or ill treatment. Asylum seekers are also granted right to submit a request for the re-opening of their files only if they have new elements to contribute to their claim. The same asylum procedures were applied in UNHCR even after the enforcement of the 1994 Regulation with the exception that since 1994 asylum seekers are given an information leaflet about the Turkish asylum procedure as well as a complete information about the UNHCR functions in Turkey. [226]

3.1.6.3 The Legal Analysis of the 1994 Regulation

The Regulation on the Procedures and Principles Related to Population Movements and Foreigners Arriving in Turkey either as Individuals or in Groups Wishing to Seek Asylum either from Turkey or Requesting Residence Permission in order to Seek Asylum from Another country (hereafter the 1994 Regulation) number 1994/6169 went into effect on 30 November 1994. The 1994 Regulation was introduced 30 years after the promulgation of 1951 Convention taking its legal basis from the 1951 Convention and the 1967 Protocol (Article 31 of the 1994 Regulation) With the enforcement of the 1994 Regulation, Turkish authorities undertook the responsibility of conducting parallel interviews with

[224] Information available to UNHCR BO Ankara.

[225] Information available to UNHCR BO Ankara.

[226] Information available to UNHCR BO Ankara.

UNHCR with regard to Non-European asylum seekers and introduced principles to be applied to European and non- European asylum seekers in the Turkish territories. Article 36 of the Convention states that Each States shall introduce their own laws and regulations to ensure application of the Convention. In this regard, the 1994 Regulation has a great importance of being the first and only legislation setting out responsibilities of the Turkish government and laying down implementing principles for the Government officials for the application of the 1951 Convention and the 1967 Protocol.

The 1994 Regulation is composed of five sections. Section I, in accordance with the 1951 Geneva Convention and the 1967 Protocol, introduces purposes of the Regulation and principles to be applied to individuals or to groups wishing to take refuge in Turkey and determines responsible institutions for the implementation of these principles. (Article 1) Article 3 of the Regulation provides definition to the terms 'refugee', 'asylum seeker', 'Belligerent Foreign Army Member' and 'Individual Case'. A refugee in the 1994 Regulation is defined as;

> An alien who as a result of events occurring in Europe and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it

An asylum-seeker is defined as;

> An alien who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

The 1994 Regulation incorporates the definition of 'refugee' in consistency with Turkey's geographical limitation to the 1951 Convention, applying the term refugee only to those coming 'as a result of event occurring in Europe.' The definition of 'refugee' of the 1994 Regulation is similar to that of the 1951

Convention with an additional emphasize to geographical limitation, which restricts the term refugee only to aliens coming as a result of events occurring in Europe. The 1994 Regulation defines 'asylum seeker' using the definition of 'refugee' of the 1951 Convention. Within the context of the 1994 Regulation an asylum seeker is defined as a person coming from outside of Europe but who is believed to have a well-founded fear of persecution in the country of origin. However, in the context of UNHCR, an asylum seeker is defined as 'a person who has left his/her country of origin, has applied for recognition as a refugee in another country, and is awaiting a decision on his/her application.'[227] In other words, an asylum seeker is defined as a person whose asylum application has not yet been finalized, whose well-founded fear has not yet been confirmed and thereof, whose refugee status has not yet been granted. The definition of refugee brought by the 1994 Regulation reflects one aspects of Turkey's asylum dilemma owing to its inconsistency with the internationally accepted refugee definition of the 1951 Geneva Convention. In this study the term 'asylum seeker' and 'refugee' will be used within the context of UNHCR in order to avoid any misunderstanding.

Section II (Article 4-7) puts forward 'procedures and principles with regard to individual foreigners either seeking asylum or requesting residence permits with the intention of seeking asylum from a third country'. Article 4 of the Regulation obligates individual foreigners to register themselves with responsible Governorates within 5 days from their arrival date. Individuals who enter to Turkey legally are required to approach to the local nearest Governorates whereas those who entered illegally shall register themselves with the Governorates of their city of entry. The most challenging provision of the Regulation is the prerequisite of 5 days limitation for approaching to the Turkish authorities. The consequences of this '5 days' requirement will be analyzed in detailed in the following part of this study.

Following the registration of newly arrived individual foreigners; the responsible Governorates shall conduct status determination interviews with registered individuals in accordance with the 1951 Convention. Interview documents shall

[227] UNHCR website, *UNHCR Definitions and Obligations*, http://www.unhcr.org.au/basicdef.shtml

be sent to the Ministry of Interior including the opinion of the Examiner so that the Ministry of Interior along with the decision of the Ministry of Foreign Affairs, and other relevant ministries and national agencies reviews the files and reaches to a conclusion of individual applications. (Article 5) When the final decision is reached upon the applications, the Ministry of Interior shall inform the Governorates about the final decision of individual claims so that the Governorates inform the individual foreigners. There is no mention of a right to appeal against a negative decision. With the introduction of the 1994 Regulation UNHCR and the Turkish government have maintained parallel refugee status determination procedures for Non-European asylum seekers.

Art. 6 stipulates that foreigners whose asylum/temporary residence requests are not accepted, shall be deported by the Governorship upon the instructions of the Ministry of Interior. In case of deportation, asylum seekers are granted the right to appeal to the Ministry of Interior. However, this was the right for an administrative review but not judicial; appeal submissions shall be assessed by the superior officer of the previous decision maker. (Art. 6)

Article 7 requests 'cooperation through the Ministry of Foreign Affairs with the United Nations High Commissionaire for Refugees, International Organization for Migration and other related international organizations especially with regard to residence permit, food, shelter, transport, resettlement, passport, and visa problems.' UNHCR was given a specific role in Article 7 of the 1994 Regulation primarily with regard to food, shelter, transport, resettlement, passport and visa problems. However, in practice UNHCR was responsible for providing resettlement opportunities to Non-European asylum seekers who meet the Convention criteria and there was no provision preventing Non-European asylum seekers to approach UNCHR to lodge an asylum application.

Section III of the Regulation is about the precautions to be taken against possible mass influxes and foreigners arriving in Turkey in groups with the aim of seeking asylum'. Article 8 foresees that mass population movements shall be stopped at the borders and necessary precautions shall be taken by responsible authorities. Section IV, from Article 11 to Article 25, introduces precautions and actions to be applied to refugees and asylum seekers who come to Turkish borders or enter into Turkish territory in groups. Article 9 requires disarmament

of asylum seekers and refugees, separation of belligerent foreign army members and civilians, and transfer of civilians to the camps, which are to be established. Section IV provides principles with regard to establishment of camps, reception centers, settlement and interview of foreigners, appointment of responsible personnel, responsible authority for the administration and discipline of reception centers, measures to be taken to provide protection and security within the reception centers, exemption from tax and duty, and rights granted to refugees and asylum seekers. Although Section IV introduces wide range of principles with regards to refugees and asylum seekers these principles are only applicable in the condition of mass influxes. Therefore, these principles shall not be taken into consideration when applied to individual asylum seekers and refugees.

Section V sets out common procedures to be applied to 'foreigners arriving in Turkey as *individual or in groups* wishing to seek asylum either from Turkey or requesting residence permits from Turkey with the intention of seeking asylum from a third country'. In other words the provisions of Section V are applicable to foreigners both on individual and collective basis. Within the framework of this study Section II and Section V of the Regulation have primary importance setting out the principles to be applied to individual foreigners who entered to Turkey with the aim of seeking asylum from Turkey or requesting residence permit from Turkey with the intention of seeking asylum from a third country.

In terms of employment related rights, Article 27 states that 'Within the general provisions possibilities of gainful employment and education, limited to their time of stay in our country, are accorded to refugees and asylum seekers.' The fact that the rights related to gainful employments accorded to refugees and asylum seekers have been analyzed in the previous section under the Law on the Work Permit of Foreigners, employment related rights of asylum seekers and refugees in Turkey will not be mentioned in this section in order to avoid repetition.

Article 28 of the Regulation deals with the extension of residence permits of refugees and asylum seekers. Turkish government maintains the right not to extend residence permit of a foreigner who intend to seek asylum from a third country and who is not able to obtain admission to a third country within a

reasonable period of time. The foreigner in such condition shall be invited to leave the country. In this Article Turkey expressed its impatience for resettlement of refugees stating that those who are not resettled to a 3rd country within a reasonable period of time are required to leave the country. By doing that Turkish government punishes refugees for a reason not related to them but related to the unwillingness of resettlement countries. [228]

Article 29 of the Regulation sets out circumstances in which a refugee or asylum seeker may be subject to deportation. Within this Article ''a refugee or an asylum seeker who is residing in Turkey legally can only be deported by the Ministry of the Interior within the framework of the 1951 Geneva Convention relating to the Status of Refugees or for reasons of national security and public order.'' Asylum seekers and refugees are granted the right to appeal against the deportation order to the Ministry of Interior within fifteen days. Objection shall be reviewed and resolved by a higher authority than the one who issued deportation order; the verdict shall be notified to the appellant by the competent Governorate.

Overall, the 1994 Regulation remains to be the only national legislation in force for processing asylum claims. The Regulation has brought clarification to the responsibilities of Turkish Republic with regard to non-European asylum seekers and provided a guideline on how to proceed with non-European asylum applications.

3.1.6.4 Critics to the 1994 Regulation

The 1994 Regulation was an attempt to bring status determination procedures under the responsibility of the Ministry of Interior without lifting geographical limitation. Prior to the introduction of the Regulation, Turkey did not have national legislation regulating the status of asylum seekers and refugees coming outside of Europe, it was on the UNHCR's responsibility to conduct status determination interviews and to resettle them to a third country. Turkey's refugee policy was based on some national legislations applicable to foreigners such as; 'the Law on Settlement', 'the Citizenship Law', 'the Passport Law', 'the

228 Frelick, B., (1997), Barriers to Protection: Turkey's Asylum Regulations, *International Journal of Refugee Law,* Vol.9, No 1, p.11.

Law related to the Residence and Travel of Foreigners', 'the Law on the Work Permit of Foreigners'.

Kirişçi argues that introduction of the 1994 Regulation was a progress in Turkish asylum system. Firstly, Turkey undertook the responsibility of conducting status determination interviews of asylum seekers coming outside of Europe and determined Ministry of Interior as the responsible body. This rose expectations that Turkey might remove its 'geographical limitation' in the near future. Secondly, it was believed that the Regulation would bring transparency and predictability into asylum practices in Turkey. Thirdly, Article 29 clearly identified conditions under which refugees and asylum seekers may be subject to deportation. In other terms, the wording of Article 29 was considered to be a guarantee of the principle of non-refoulement. Lastly, the Regulation seemed to be a step for further cooperation of UNHCR and other international agencies with Turkish government. [229]

However, in practice, the 1994 Regulation was far from meeting expected improvements in the asylum system. Although Turkish government admitted to pursue status determination interviews, Turkish officers in the provinces were not eligible enough to conduct these interviews due to their lack of knowledge about refugee law and status determination process. In addition to that, communication with asylum seekers and refugees remained to be a problem provided that Turkish Police lacked effective translation facilities. Turkey was mainly criticized on three subjects with regard to the 1994 Regulation; a) five days limitation for approaching to the Turkish authorities, b) issue of deportation orders for not meeting 5 days limitation, and c) not granting asylum seekers and refugees right to appeal for judiciary view.

As afore-mentioned, the Turkish Government does not recognize non-European asylum seekers as 'refugee' but provides them only temporary residence with the condition that they register themselves with Turkish authorities within 5 days from their date of entry. Those who do not comply with 5 days limitation are subject to deportation; asylum seekers obtain the right to submit an appeal against their deportation orders within 15 days to the Ministry of Interior.

[229] Kirişçi, K.,(2001), UNHCR and Turkey: Cooperating for Improved Implementation of the 1951 Convention relating to the Status of Refugees, *International Journal of Refugee Law Vol,* 13. No. ½. Oxford University Press, p.81.

After the registration, the responsible Governorate screens application of asylum seekers and refers those who are believed to be 'bona fide' refugee to the UNHCR for their resettlement process. In the meantime UNHCR conducts its own refugee status determination interview for non-European asylum seekers. A negative decision reached by UNHCR or by the Turkish Government leads to the deportation of asylum seekers. Asylum seekers were not granted the right to appeal to the Turkish authorities against a negative decision within the framework of the 1994 Regulation. However, with the amendment of 1999 to Article 6 of the 1994 Regulation asylum seekers were granted the right to appeal against a negative decision reached by the Ministry of Interior. The 1994 Regulation stated that those whose application was rejected shall be deported by the Governorates upon the instruction given by the MOI. However, within the amendment of 1999, asylum seekers are granted right to submit an appeal to the MOI within 15 days. Appeal submissions shall be assessed with a higher rank officer of the previous decision maker. The new paragraph added to the 1994 Regulation reads that,

> Those aliens whose applications not accepted may appeal before the competent governorship within 15days. The appeal letter and it's supporting documents shall be submitted to the MOI through the competent governorship. The appeal shall be assessed by the superior official of the previous decision maker and the decision shall be notified to the foreigner.

In the early years of the Regulation, Turkish government was very strict in implementing asylum regulations. The UNHCR reported that 'in February and March 1997, 70 Iranian refugees who had not registered with the Government were deported to Northern Iraq even though UNHCR had determined that they were in need of international protection and had arranged for third country resettlement.' [230]

According to the information available to Amnesty International, asylum seekers who were found to be eligible for refugee status under the Mandate of UNHCR were subject to deportation by Turkish authorities during 1997. Amnesty International reports that deportations of refugees were being held to the neighboring countries where UNHCR believed that the lives of refugees would be

[230] The US Department of State, *Country Reports on Human Right Practice*, January 1997.

in danger given that most of them were directly handed over to authorities at the border. [231] 'In early March 1997, 23 Iranian asylum-seekers were reportedly arrested in a large scale operation of house raids, in Nevsehir and Kayseri. At least 16 of these were recognized refugees. In the same month, Turkish authorities deported 66 recognized Iranian refugees to Northern Iraq. ' [232]

The US Department of State reports that despite the protest of the UNHCR representative and foreign diplomats in Ankara regarding the expulsion of Iranian and Iraqi asylum seekers to their home countries where they were believed to be persecuted, Turkey had deported more than 150 Iranians and Iraqi UNHCR-recognized refugees to their country of origin in 1997. [233]

The US Department of State adds that 'In the early 1997, there has been several deportation and refoulement of Iranian and Iraqi asylum seekers without the knowledge of UNHCR and without allowing UNHCR to examine their claims to refugee status. Following a discussion with UNHCR, the Government began to take necessary steps and introduced an official circular informing the border officer that those coming to Turkish border with the aim of seeking asylum shall be allowed to submit a claim to UNHCR and shall not be deported before their refugee claim is finalized by UNHCR. This circular explicitly decreased deportation, refoulement and apprehension of asylum seekers at the border in the end of 1997.' [234] The number of refugees refouled (turned back) decreased from 76 in 1995, to 20 in 1997, and to 15 in 1998. The refoulement of asylum seekers decreased from 61 persons in 1997 to 49 in 1998.[235]

In July 1996, UNHCR decided that all asylum seekers who had entered to Turkey illegally and had approached to UNHCR would be referred to border towns of their entry to register themselves with the Turkish authorities as required by the Asylum Regulation. Those who do not comply with this requirement would not be interviewed with a UNHCR legal officer and may not be allowed to lodge an asylum application if they refuse to register without a valid reason. Asylum seekers who fail to register themselves due to procedural obstacles or valid

[231] Amnesty International, *Turkey: Refoulement of Non-European refugees-a protection crisis,* September 1997
[232] Amnesty International, *Turkey: Refoulement of Non-European refugees-a protection crisis,* September 1997
[233] The US Department of State (1997), *Country Reports on Human Right Practice.*
[234] The US Department of State (1997), *Country Reports on Human Right Practice.*
[235] The US Department of State (1998), *Country Reports on Human Right Practice.*

reasons will be registered with UNHCR and processed by the BO Ankara. However, asylum seekers who were not registered with the authorities due to procedural or valid reasons and who were granted refugee status by UNHCR were not able to receive an exit permit from the Turkish Government because of having illegal status in the country

In the following years of the 1994 Regulation, asylum seekers were informed about the requirements of the 1994 Regulation through the leaflets distributed by the UNHCR Office, which were prepared in cooperation with the MOI. This reduced illegal residence but the 5 days limitation continued to be the major problem for refoulement of asylum seekers. Asylum seekers who entered to Turkey illegally and not informed about the asylum procedures approached to central cities such as Ankara and Istanbul within 5 days but were referred to the governorates of the cities of their entry with regard to Article 4 of the 1994 Regulation. This practice led to the excess of 5 days limitation and accordingly deportation of asylum seekers in addition to an extra financial burden to travel from one city to another.

Amnesty International gives an example of deportation of an Iranian national for exceeding 5 days limitation;

> Mehrdad Kavoussi, a member of the Peoples Mojahedin Organization of Iran (PMOI), an Iranian opposition group, had spent 10 years in prison in Iran, where he had been tortured. He fled to Turkey in 1995 but did not register with the Turkish authorities. Mehrdad was recognized as a refugee by the UNHCR in April 1996 and approached the Turkish authorities to register on 25 April 1996, accompanied by a UNHCR lawyer. However, he was arrested on the spot and returned to Iran that same day. On his return to Iran, he was arrested and interrogated. Following worldwide appeals on his behalf from Amnesty International and other organizations, he was eventually released, after agreeing to travel to Turkey and send letters to the UN and to human rights organizations criticizing the PMOI. Once in Turkey, however, he managed to escape from Iranian officials and again sought asylum. This time he was able to resettle.[236]

Asylum seekers were granted the right to appeal against deportation orders for an administrative view but not judicial. In other words, their files would be reviewed by a high rank official than the one who issued deportation order, in this context, asylum seekers were not able to approach to Judiciary Court for

[236] Amnesty International (1997), *Turkey: Refoulement of Non-European refugees-a protection crisis.*

their files to be reviewed. However, Article 125 of the Turkish Constitution makes it possible for administrative decisions to be appealed judicially even by foreigners, stating that 'Recourse to judicial review shall be available against all actions and acts of administration' [237]

In spite of having the right to appeal against the deportation order of the Ministry of Interior, asylum seekers did not use it as an option due to their lack of confidence in Turkish Police and appeal system. However, this attitude began to change in July and October 1997 when two administrative courts (idari mahkeme) ruled on the favour of two Iranians who were recognized as refugees by UNHCR and who were ready for their resettlement to a third country. Administrative Court ruled against their deportation from Turkey for exceeding 5 days limitation to approach Turkish authorities. [238] Within this decision it was ruled that exceeding 5 days limitation to approach Turkish authorities shall not be a reason for not assessing asylum claims and not granting asylum. The court decision was in conformity with Article 31 of the Convention, which 'prohibits deportation of a person who has already been accepted as refugee by a third country.'[239]

On 11 July 2000 in the case of Jabari v. Turkey, the European Court of Human Rights ruled against the deportation order issued by the Ministry of Interior. Hoda Jabari was an Iranian national who was convicted for adultery, which was an offence in Iranian Punitive Law and was sentenced to be stoned to death or to be flogged. The Applicant entered to Turkey illegally and tried to fly to Canada through France with a forged passport. She was caught by French police and sent back to Turkey. The Applicant was not sentenced for holding a forged passport but was given deportation order. In the meanwhile she lodged an asylum application to the Turkish authorities but her request was rejected given that she exceeded 5 days time limitation. Although the Applicant was granted refugee status by UNHCR Branch Office Ankara, Ankara Administrative Court did not take into consideration the Applicant's objection against deportation order

[238] T.Tahranlı, (2000), *Sığınmacı ve Göç Konularına İlişkin Türkiye'deki Yargı Kararları Konusunda Hukuki bir Değerlendirme,*UNHCR Ankara.

[239] Article 31 of the Refugee Convention states that state parties "shall not impose penalties, on account of their illegal entry or presence, on refugee who, coming directly from a territory where their life or freedom was threatened ... enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."

stating that issue of deportation order was in conformity with Turkish legislation and that its implementation would not cause irreparable harm to the Applicant. In return, Jabari lodged an application to the European Court of Human Rights.

The European Court of Human Rights concluded that implementation of deportation order will be the breach of Article 3 (prohibition of torture) of the European Convention of Human Rights and violation of Article 13 (right to an effective remedy) of the Convention. Further, the ECHR added that failure to comply with 5 day-registration shall not be a reason for not considering the risk of persecution that the applicant would be subject to if she returned back to Iran. Turkey is a party to the European Convention, which prohibits subjecting any one to forcible return to a country when there are serious reasons to believe a person might face a severe violation of basic human rights amounting to torture or inhuman or degrading treatment.[240]The Court concluded that;

> the notion of an effective remedy under Article 13 requires independent and rigorous scrutiny of a claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 and the possibility of suspending the implementation of the measure impugned. Since the Ankara Administrative Court failed in the circumstances to provide any of these safeguards, the Court was led to conclude that the judicial review proceedings did not satisfy the requirements of Article 13. [241]

Moreover, the Court criticized the 5 days deadline imposed by the Turkish government stating that: " the automatic and mechanical application of such short time-limit for submitting an asylum application must be considered at variance with the protection of the fundamental value embodied in Article 3 of the Convention"

The decision reached by two administrative courts in 1997 and the ECHR's decision of 2000 had important effect on practices of the MOI. These decisions against the MOI practices showed that decisions of the MOI were open to judicial review and appeal. Secondly, these decisions would be precedent for future court cases. Thirdly, they explicitly showed that the time limitation could not be a solely ground to reject one's asylum application and each application would be

[241] Case of Hoda Jabari vs Turkey, *European Court of Human Rights*, No 40035/98, July 11, 2000.

assessed on its own merits.[242] In addition to these Court decisions, Conclusion 15 of the UNHCR Excom states that "While asylum-seekers may be required to submit their asylum request within a certain time limit, failure to do so, or the non-fulfillment of other formal requirements, should not lead to an asylum request being excluded from consideration." This Excom conclusion explicitly affirms that excession of the time limitation required by the Country of Asylum to submit an asylum application shall not necessitate to exclude asylum seeker's claim from consideration.

As a result, Turkey being a member of Executive Committee of the Program of UNHCR (ExCom), in which various topic of refugees and conclusion are discussed, failed to comply with international obligations that she undertook by ratifying the 1951 Convention and the 1967 Protocol. Non-refoulement, Article 33 of the 1951 Convention, is the main safeguard granted to refugees prohibiting their forced return to the territory where their life would be at risk of serious human rights violations. Non refoulement is a principle of customary international law, binding on all states and should be applied without discrimination both to European nationals and non European nationals.

In addition to that Turkey's deportation of Non-European asylum seekers is a breach of Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which Turkey ratified on 2 August 1988. Article 3 of the Convention reads that 'No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.' This provision also shall be applied to all persons without discrimination. 'Other treaties to which Turkey is a party should also be appropriately utilized.

Within the amendments made in 1999, the five days limitation required for individual foreigners to apply to responsible governorates, in order to either seek asylum in Turkey or residence permit to seek asylum in a third country, was extended to 10 days. The period for registration with the authorities could be shortened if it deems to be necessary for national security concerns. Further, it was stated that 'those who did not comply with this provision would be treated according to the instructions specified in the Regulation on Passport, numbered

[242] Kirişçi, K., (2001), opt.cit., p.88.

5682 and the Regulation on Foreigners' Residence and Travelling in Turkey, numbered 5683.'

Despite the extension of time limitation from 5 days to 10 days most of the asylum seekers failed to meet 10 days requirement for registering themselves and this led to the refoulement of asylum seekers and even UNHCR recognized refugees despite the interventions of UNHCR or even before UNHCR could intervene. Nevertheless, following the 1999 amendment, there has been a decrease in the number of deportation. The number of people who were subject to deportation in 2000 decreased from 46 persons in 1999 to 25 in 2000 (21 Iranians, 2 Iraqis and 2 other nationalities) [243] Although being very strict in the application of 10 days limitation the Turkish authorities were flexible in accepting asylum applications of asylum seekers who exceeded 10 days limitation but who have done exit-entry and approached to respective authorities within 10 days of their last entry. When compared with the statistics of 1993, 2000 has faced a considerable decrease in the number of refoulement incident decreased.

A comparative table of refoulement of refugees recognized by UNHCR follows:

Table.4 Information available to UNHCR BO Ankara, 2000.

YEAR	IRANIANS		IRAQIS		OTHERS		TOTALS	
	Cas.	Pers.	Cas.	Pers.	Cas.	Pers.	Cas.	Pers.
1992	8	11	0	0	0	0	8	11
1993	6	7	15	23	1	1	22	31
1994	4	4	60	132	0	0	64	136
1995	23	40	16	31	3	4	42	76
1996	14	20	13	31	0	0	27	51
1997	6	7	8	13	0	0	14	20
1998	4	8	6	7	0	0	10	15
1999	0	0	0	0	0	0	0	0
2000	2	2	1	1	1	1	4	4

Since 1997 there has been a steady decrease of incidents and in the year 2000 the number of asylum seekers refouled dropped more than 50% as it appears in the following comparative table':

[243] UNHCR Annual Protection Report. 2000.

Table.5 Information available to UNHCR BO Ankara, 2000.

	IRAN CASES	IRAQ CASES	IRAN PERS.	IRAQ PERS.	OTHERS	TOTAL
1998	20	22	22	27		42case/49 person
1999	14	20	18	27		35c/46
2000	12	1	19	1	1c./1p.	14c./21p.

Table 6. UNHCR BO Ankara, Annual Protection Report, 2000.

	IRAN CASES	IRAQ CASES	IRAN PERS.	IRAQ PERS.	OTHERS	TOTAL
1998	20	22	22	27		42c/49p
1999	14	20	18	27		35c/46
2000	12	1	19	1	1c./1p.	14c./21p.

UNHCR relates the decline in the number of refoulement to improved communication with Turkish government and training programs provided to Turkish officials who closely work with asylum seekers and refugees either at the border or in relevant institutions. [244]

Despite the decrease in number of deportations, Turkey's human rights records remained poor in 2000 with a number of refolument incidents reported during the year. In 2000, Turkish police conducted sweeps through immigrant neighborhoods in Istanbul and other Turkish cities during the year, arresting hundreds of undocumented immigrants, including asylum seekers. In July, Istanbul police arrested, detained, and deported more than 200 African immigrants of various nationalities. Turkish human rights advocates said that the authorities severely mistreated some of the Africans in detention, depriving them of food, clean water, and medical assistance. After several days, the authorities attempted to deport the group to Greece, but Greece refused them entry. Although Turkey eventually readmitted most of the Africans, three reportedly died and another three allegedly were raped while trapped in the border zone. As the crisis unfolded at the Greek-Turkish border, USCR called upon the Turkish government on July 25 to "demonstrate its commitment to human rights by immediately investigating the situation and taking whatever

[244] Information available to UNHCR BO Ankara, 2000.

steps are necessary to ensure the protection of these immigrants and refugees." The Turkish government did not respond.[245]

In addition to legal protection of asylum seekers and refugees in Turkey, it would be worth to provide a brief analysis of their social and economic related rights in the country in order to point out their impoverished living conditions in Turkey awaiting their resettlement to a third country.

3.2 The Social Situation of Refugees and Asylum Seekers in Turkey: The Reflection of Turkey's Asylum Dilemma on the daily life of refugees and asylum seekers

By the time of the writing of this study, Turkey has granted refugee status to 44 applicants so far, whereas there were 15562 non-European applications in progress (6 622 Iraqis, 5 449 Iranians, 1 260 Somalis, 1 279 Afghans among others). [246] Considering imbalanced number of European refugees and non-European asylum seekers in Turkey, Turkey's geographical limitation does not reflect asylum realities in the country. The fact that Turkey limits its protection of the 1951 Geneva Convention only to European asylum seekers, it provides protection to 44 applications while leaving aside 15562 asylum seekers out of the scope of its responsibilities. This imbalance allocation of protection, extending international protection to 44 applications out of 15 562 asylum seekers is the reflection of Turkey's asylum dilemma avoiding the needs of major asylum seeking non-European nationals but considering only applications of European asylum-seekers that constitute 0,02% of total asylum applications in Turkey. In this respect, it is worth to have a brief look to the situation of asylum seekers and refugees in Turkey in order to point out their vulnerabilities as an outcome of Turkey's asylum dilemma.

Asylum seekers and refugees who legally reside in Turkey are entitled to enjoy the same rights accorded to foreigners by the Turkish Law. Although the law with regard to foreigners does not specifically include asylum seekers and

[245] U.S. Committee for Refugees and Immigrants (2003), Country Report: Turkey, *World Refugee Survey.*

[246] European Commission (2008), *Regular Report on Turkey's Progress Towards Accession, Communication from the Communication from the Commission to the European Parliament and the Council, Enlargement Strategy and Main Challenges 2008-2009,* COM(2008)674.

refugees, asylum seekers and refugees are treated within the framework of the law applicable to foreigners. Until the enforcement of the 1994 Regulation, there was no legislation regulating rights of refugees and asylum seekers. Considering special status of asylum seekers, neither being a citizen nor a foreigner, lack of legislation was the major deficiency in asylum practices of the Republic of Turkey. It is worth to remind that, refugees coming from European countries were granted all rights stipulated under the 1951 Convention. Therefore, in this section, mainly rights granted to non-European asylum seekers and refugees will be analyzed. Despite of the lack of national legislations specifically addressed to the situation of asylum seekers in Turkey, with the 1994 Regulation, asylum seekers and refugees were granted special rights including protection from refoulement (Article 10), right to employment and education (Article 27), right to enjoy public health care services (Art.19). In this part of the study, rights accorded to asylum seekers and refugees will be analyzed under separate subtitles

Right to Earn a Livelihood The 1994 Regulation states that 'within the general provisions of the law, possibilities for education and work, limited to their period of residence in our country, are to be accorded to refugees and asylum seekers.' Employment related rights of asylum seekers are governed in respect to the Law concerning Residence and Travel of Foreigners in Turkey (Law no 5683, dated 15 July 1950) According to the 1950 Law on Residence and Travel of Foreigners in Turkey (Law on Residence and Travel), refugees possessing residence permits valid for at least six months could apply to the Ministry of Labour and Social Security for a work permit. In practice, however, the authorities granted few permits to asylum seekers due to bureaucratic delays and lack of awareness of the law and, in some cases, officials arbitrarily refused to issue them. The Ministry issued permits directly to employers. [247]

Refugees were unable to work in the provinces, and even informal work opportunities were limited. Officials were more apt to prosecute illegal work in the provinces. The vast majority of refugees and asylum seekers who worked in the informal sector did not enjoy the protection of labor laws and social security. Turkish law did not restrict foreigners from investing business capital, but the

[247] U.S. Committee for Refugees and Immigrants (2003), Country Report: Turkey, *World Refugee Survey.*

temporary nature of asylum that non-European refugees received precluded them from engaging in business.[248]

Freedom of Movement and Residence The 1950 Law on Residence and Travel stated that asylum seekers had to reside in places designated by the Ministry of Interior. Recognized refugees from Europe could reside anywhere in the country. Asylum applicants, documented or not, had to register with Turkish authorities within ten days of arrival, and reside in the town closest to their point of entry unless UNHCR recommended their transfer for security or other reasons. Asylum seekers also had to regularly present themselves to the local police, daily, weekly or monthly basis. Authorities in each city determined the terms of residence, and violators were subject to immediate deportation at the Government's discretion. [249]

The smaller satellite cities are not able to cope with the asylum applicants, who do not get either a work permit or financial support and housing. In smaller cities, it is also more difficult to earn money "unofficially" and the refugees cannot use their own supportive networks. The current redistribution system forces many people into illegality because they cannot survive otherwise. Health care and education facilities are insufficient in smaller cities. [250]

Accommodation A non European asylum seeker who is granted "temporary asylum seeker status," is given a six-month residence permit; sent to a satellite city; and directed to UNHCR to be considered for recognition, and resettlement to a third country. UNHCR has no direct involvement in sheltering refugees and asylum seekers. The government does not provide accommodation facilities for refugees and asylum seekers. Asylum seekers and refugees are expected to find a shelter in their satellite cities and afford from their own budget. UNHCR BO Ankara provides temporary accommodation in contracted hotels to refugees or asylum seekers only if they are exceptional cases or vulnerable asylum seekers who have no place to stay.

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[248] U.S. Committee for Refugees and Immigrants (2008), Country Report: Turkey, *World Refugee Survey.*
[249] U.S. Committee for Refugees and Immigrants (2003), Country Report: Turkey, *World Refugee Survey.*

[250] Refugees on their way through Turkey to the European Union and The protection of foreign refugees in Turkey, Report and documentation on a study trip to Turkey, 8th – 17th June 2005, p.18.

Financial assistance The Turkish Government does not provide financial assistance to refugees and asylum seekers. There are two types of financial assistance provided by UNHCR; one time special assistance (OTS) and monthly financial assistance (FA). One time special assistance was established as a financial assistance system in UNHCR BO Ankara in 1990. This assistance is only provided to asylum seekers whose legal officer had a positive opinion and who would be recognized in the future. The aim of this assistance was to reduce financial burden on asylum seekers during the decision making process. Later this assistance was extended to vulnerable individuals regardless of the positive opinion of legal officers, vulnerable cases include unaccompanied minors, female head of households with children, single woman, disabled, and elder people. [251] Monthly financial assistance is provided only to refugees who are in need of financial assistance. Financial assistance is not an automatic right granted to all asylum seekers and refugees, but is determined based on individual assessment. UNHCR provides financial assistance to recognized refugees in need or to asylum seekers who meet the refugee agency's assistance criteria. The UNHCR stresses, however, that there is only a very small budget for this kind of support. They can only help about 10% of refugees. ICMC, Caritas and national NGOs in Istanbul also try to give financial support in some individual cases of extreme hardship. They all stress, however, that financial support is never enough for asylum seekers and refugees to live on.[252]

Access to health care services The 1994 Regulation grants right to medical check-ups, in Article 19, only to refugees and asylum seekers who came to Turkish borders or entered to Turkey in groups. There was no provision regulating the right of individual asylum seekers and refugees to access health care services. In this regard, UNHCR BO Ankara provided limited health care assistance to asylum seekers and refugees. Every asylum seeker and refugee can be referred to the contracted clinic of UNHCR in Ankara and can be treated without any payment. Those who are in need of further treatment can be referred to state hospitals if they are likely to be recognized or are already

[251] UNHCR Guidelines for Assistance to Active Cases. 2000.
[252]Refugees on their way through Turkey to the European Union and The protection of foreign refugees in Turkey, Report and documentation on a study trip to Turkey, 8th – 17th June 2005, *Protestant Church in Baden and Social Service Agency (Diakonisches Werk) of Württemberg in cooperation with the Protestant Church in Germany (EKD) and Churches' Commission for Migrants in Europe,* p. 17.

granted refugee status; their medical expenses are covered by UNHCR BO Ankara. Asylum seekers who are in need of urgent medical treatment and who reside in satellite cities can contact to UNHCR and forward a medical report confirming urgency of their treatment. Those who were found to be in need of urgent medical treatment are provided with a hospital letter, which is sent to the satellite city state hospital, up to a limit of 250 YTL. If the treatment exceeds this amount, state hospital should get an authorization from UNHCR for further treatment expenses. Asylum seekers who are likely to be rejected or who were already rejected and whose case was closed can be assisted on humanitarian grounds if they are in need of urgent medical treatment. In emergency cases, the UNHCR pays 100% of doctors' fees and 80% of other expenses for individual asylum seekers. The same percentage is paid by the UNHCR for accepted refugees. In individual cases, help can also be obtained via the Turkish Red Crescent or the Social Aid Foundation. When the Turkish Red Crescent (Kizilay) has enough funds, it provides blankets and clothes for refugees. There are also controls and vaccinations in the context of epidemic hygiene.[253] The expenses of refugees who are recognized by the Turkish Government are covered by the government regarding the circular of 12 March 2002. [254]

Right to education The 1994 Regulation stated that right to education, limited to their period of residence, is to be accorded to refugees and asylum seekers within the general provisions of the law. Children of refugees and asylum seekers are allowed to attend primary school in Turkey. Although the Turkish Constitution and 1994 asylum regulation offered education to refugees and asylum seekers only those with legal residence permits could enroll in public schools. In practice, prohibitive school fees and language barriers made enrollment unrealistic for most asylum seekers.[255]

UNHCR, with the purpose of promoting the formal education among the refugee community, provides education assistance to the asylum seekers/refugees in order to cover the yearly classrooms supplies -including books, notebooks, stationary, uniforms, sportswear and shoes- of the school attendants. BO Ankara

[253] Refugees on their way through Turkey to the European Union and The protection of foreign refugees in Turkey, Report and documentation on a study trip to Turkey, 8th – 17th June 2005, p.19.
[254] UNHCR Guidelines for Assistance To Active Cases. 2000
[255] U.S. Committee for Refugees and Immigrants (2005), Country Report: Turkey, *World Refugee Survey.*

provides the aforementioned assistance on the basis of receiving official student attendance papers from the schools and verification of the certificates by Programme Assistants. The education assistance is YTL 135/child/term based on the list of "necessary items" received from the state schools. [256] UNHCR reported that 600 children received educational supplies and uniforms in 2003. Also, 85 asylum seekers and refugee children participated in the vocational training and recreational activities in Van[257]

As has been illustrated above, non-European asylum seekers and refugees are not able to enjoy social and financial rights in Turkey which prevents them leading well-established life during their stay in the country. Their inability to access social and financial rights is an outcome of Turkey's limited application of the 1951 Geneva Convention only covering nationals of European Countries. In other words, this strand is the reflection of Turkey's asylum dilemma, having thousands of non-European asylum seekers and refugees but failing to meet their legal, social, economic, and protection needs.

Turkey did not have national asylum legislation until 1994. Turkey's immigration policy was established on the maintenance of pure nation state and acquisition of immigrants of Turkish descents whose integration into society was perceived to be easy. Turkey was a signatory State to the 1951 Geneva Convention preserving optional geographical limitation restricting its international protection only to asylum seekers of European nationality or whose habitual residence was Europe. Turkey had a very limited application of the Geneva Convention; Turkey even avoided granting refugee status to Bosnians and Bulgarians, but instead hosted them as guests and facilitated their acquisition of Turkish nationality since they were perceived to be of Turkish descents. However, the feature of people seeking asylum in Turkey changed drastically in the end of 1980s when Turkey experienced large number of Iranians and Iraqi Kurds coming into its borders as a result of the Iranian Revolution, Iran-Iraq war, and Iraqi invasion of Kuwait. The change in the nature of asylum-seekers, a shift from European asylum seekers to a large number of non-European asylum seekers, necessitated introduction of a national legislation in order to cope with mass influx situations and to protect national security. In this respect, the 1994

[256] UNHCR Guidelines for Assistance To Active Cases. 2000
[257] U.S. Committee for Refugees and Immigrants (2003), Country Report: Turkey, *World Refugee Survey.*

Regulation was adopted which remarked a cornerstone for Turkey's asylum policy being the only legislation regulating situation of asylum seekers and refugees within the Turkish territory. With this legislation Turkish authorities undertook to conduct refugee status determination interviews with non-European asylum seekers with the conditions that UNHCR would resettle them at the earliest possible. With the 1994 Regulation, the MOI undertook for the first time responsibilities with regard to non-European asylum seekers. Although the 1994 Regulation was a major step for Turkey's asylum policy being the first and the only asylum legislation in the country, the Regulation was criticized on many aspects. The critics were mainly directed in term of '5 days time limitation', 'lack of right to appeal to judiciary reviewer' and 'deportation orders'. The Regulation did not bring improvements to social and economic rights of non-European asylum seekers. The 1994 Regulation was mainly to regulate situation of European refugees leaving aside those coming from outside of Europe. In other words, non-European asylum seekers were still left out of the responsibility area of Turkish government and were not provided any legal status in the country.

Despite of having been a target of critics during the first years of the Regulation, Turkey has made considerable progress in the field of asylum, owing to its harmonization process within the European Union, especially after its declaration as a candidate country in 1999. Turkey, as a candidate country to the EU is expected to adopt EU's asylum acquis into its national legislation as a prerequisite for its full-membership. Harmonization within the EU will be for the benefit of refugees and asylum seekers given that Turkey is required to lift its geographical limitation and extend its protection to non-European refugees and asylum seekers. However, lifting geographical limitation and harmonization of asylum policy is likely to be the most challenging topic during the membership process. In the following Chapter, the study aims to provide a brief background of Turkey-EU relations and then to focus on harmonization of Turkey's asylum policies within the EU acquis. Next Chapter aims to point out what progresses have been achieved by the Turkish government since the declaration of its candidate status and to analyze positive and negative effects of EU harmonization process into Turkey's asylum policy.

CHAPTER 4

HARMONIZATION OF TURKEY'S ASYLUM POLICY WITHIN THE EU ASYLUM ACQUIS

4.1 EU Harmonization process prior to the opening of accession negotiations with Turkey

Turkey's membership to the European Union has been a long process dating back to 1959 when Turkey made its application to join the European Economic Community. (EEC) The EEC's response was first to create an association between the EU and Turkey and then to consider Turkey's application when the circumstances allows its membership. This association took place with the signing of the Agreement Creating an Association between the Republic of Turkey and the European Economic Community (the Ankara Agreement) in September 1963 which was supplemented by an additional protocol in November 1970. The aim of Ankara Agreement was 'to promote the continuous and balanced strengthening of trade and economic relations between the Parties, while taking full account of the need to ensure an accelerated development of the Turkish economy and to improve the level of employment and living conditions of the Turkish people.' The Agreement required three phases of a Customs Union which would serve as an instrument to bring integration between the EEC and Turkey. In 1987, Turkey lodged its application for the full EU membership on the basis of the EEC Treaty's Article 237 which gave any European country the right to do so. Although the Commission underlined Turkey's eligibility for the membership, Turkey was not admitted to the EU owing to EC's current situation; establishment of Single Market prevented further EU enlargement.

In December 1997, the European Council in Luxembourg confirmed Turkey's eligibility for accession to the European Union and its judgments under the same criteria as the other applicant states. The Council further decided to draw up a strategy to prepare Turkey for the EU accession in the 'development of the possibilities afforded by the Ankara agreement; intensification of the Customs Union, implementation of financial cooperation; approximation of laws and

adoption of the Union acquis.' At the Helsinki European Council of December 1999, the European Council welcomed 'recent positive developments in Turkey as noted in the Commission's progress report, as well as its intention to continue its reforms towards complying with the Copenhagen criteria. [258] The Council also confirmed 'the importance of the enlargement process launched in Luxembourg in 1997 for the stability and prosperity for the entire European continent and officially declared Turkey as a candidate country on 'equal footing' with other candidate states. The Council reaffirmed the importance of compliance with the political criteria laid down at the Copenhagen Council as a prerequisite for the opening of accession negotiations and as the basis for accession to the EU. [259] During the accession process, Turk'ey, like other candidates, would benefit from a pre-accession strategy to stimulate and support its reforms, which would include enhance political dialogue, especially progress in political criteria with the emphasis on human rights. In the field of Justice and Home Affairs, the Council requires 'alignment of the acquis in the field of asylum including lifting geographical reservation to the 1951 Convention; strengthening the system for hearing and determining applications for asylum; developing accommodation facilities and social support for asylum seekers and refugees.' The European Council expressed the necessity to draw up an Accession Partnership containing priorities on which accession preparations must concentrate in the light of the political and economic criteria and obligations of a Candidate State.

On 8 March 2001, the EU has adopted the Accession Partnership for Turkey, which defined the principles, priorities, intermediate objectives and conditions decided by the European Council. The Accession Partnerships, which were based on the pre-accession strategy, were the main guidelines for Turkey in its preparations for accession. The purpose of the Accession Partnership was to set out in a single framework the priority areas for further work identified in the Commission's 2000 Regular Report on the progress made by Turkey towards membership of the European Union.[260]

The Accession Partnership Document expected Turkey to adopt a National Programme for the Adoption of the Acquis before the end of the year. This

[258] Helsinki European Council, *Presidency Conclusions*, 10- 11 December 1999, Para.12.
[259] Helsinki European Council, *Presidency Conclusions*, 10-11 December1999, Para 3-4.
[260] For further information please see the Council Decision of 8 March 2001 on the principles, priorities, intermediate objectives and conditions contained in the Accession Partnership with the Republic of Turkey (2001/235/EC)

Programme was expected to set out a timetable for achieving the priorities and intermediate objectives established in the Accession Partnership. The Accession Partnership divided priorities and intermediate objectives into two groups; short and medium term. Short term priorities and objectives were expected to be achieved by the end of 2001 whereas medium term priorities could take more than a year while a progress should begin on them by the end of 2001.

Short term priorities under the title of Justice and Home Affairs included 'development of information and awareness programmes on the legislation and practices in the European Union in the field of justice and home affairs and enhancement of the fight against organised crime, drugs trafficking and corruption and strengthen capacities to deal with money laundering.' There was no specific mention about the developments in the field of asylum. However, in medium term, Turkey is expected to align its asylum policy with the EU through accomplishment of the following objectives; developing and strengthening JHA institutions with a view in particular to ensuring the accountability of the police; adopting the EU *acquis* in the field of data protection so as to be able to fully participate in the Schengen information system and in Europol; strengthening border management and preparing for full implementation of the Schengen Convention; lifting the geographical reservation to the 1951 Geneva Convention in the field of asylum and develop accommodation facilities and social support for refugees.

On the basis of the Accession Partnership document, in 2001, Turkey has adopted its first National Program for the Adoption of the EU acquis (NPAA), which provided a timetable for the fulfilment of short and medium term priorities set out in the Accession Partnership Document. In the short term, Turkey undertook to adopt the EU acquis and practices on migration (admission, readmission, expulsion) in order to prevent illegal immigration; to align Turkish visa legislation and practices with the EU acquis; to adopt the EU acquis on the protection of individuals in the processing of personal data in order to fully participate in the Schengen Information System (SIS) and in Europol. [261] The most important objectives set out in the National Plan were lifting of geographical limitation and improvement of social support mechanisms and accommodation centers for refugees and asylum seekers. Turkey stated in the

[261] For Turkish and English versions of the National Programs on the Adoption of the Acquis, please see www.deltur.cec.eu.int or www.abgs.gov.tr.

National Programme that it would consider about lifting the geographical reservation on the 1951 United Nations Convention Relating to the Status of Refugees in a manner that would not encourage large scale refugee inflows from the East, when the necessary legislative and infra-structural measures are introduced, and in the light of the attitudes of the EU Member States on the issue of burden-sharing. The statement of the Turkish Republic was quite vague. It neither clarified the manners that would not encourage refugee influxes nor the content of necessary legislatives that would enable Turkey to lift its geographical limitation. In addition to lifting of geographical limitation Turkey has committed that 'Accommodation facilities and social support for refugees will be further developed with the assistance of the UNHCR, the International Organization for Migration (IOM), and NGOs, giving priority to single women, women as heads of household, orphans and separated or unaccompanied children, as well as other especially vulnerable individuals, such as the infirm or the victims of domestic violence'. With NPAA, lifting geographical limitation has been worded by the Turkish government for the first time in a legal document. In addition to that, Turkey undertook to adopt and implement the EU acquis that needs to be undertaken for accession. [262] Ministry of National Defence, Ministry of the Interior, Ministry of Foreign Affairs were assigned responsible bodies for the implementation of the EU acquis. In the NPAA Turkey's geographical limitation was emphasized including reference to Turkey's current legislative instruments as discussed in the previous Chapter. Turkey expressed its intention to undertake new and more comprehensive arrangements governing the duties and activities of the authorities responsible for determining the status of individual applicants, and to review the possibility of formally determining the roles that may be undertaken in practice by the UNHCR and Turkish NGOs in this context. In terms of financial assistance, Turkey stated that 'Governorships of provinces in which the majority of refugees and asylum-seekers are accommodated will continue to provide comprehensive support to refugees and asylum seekers with assistance such as food, lodging and health services through the Social Support and Solidarity Fund. Municipalities will continue to finance such services from their own budgets to the extent possible'. In the context of illegal migration Turkey would implement, in the medium term, the EU acquis related to the practices on admission, readmission and expulsion that needed to be adopted in the pre-accession period. The Turkish government

[262] For the list of EU acquis please see Appendix 1.

intended to initiate negotiations, in the short term, on readmission agreements with countries of destination and origin involving Turkish citizens, persons transiting Turkey illegally, and foreign nationals apprehended in Turkey, and envisages completing these negotiations in the medium term. In this context, Turkey aimed to conclude readmission agreements first with bordering countries to the East, to be followed by Readmission Agreements with countries located beyond these countries and finally with bordering countries to the West. With the NPAA of 2001, Turkey for the first time undertook commitments towards the EU in the field of asylum and immigration and set a framework for the harmonization of the EU acquis into its national law.

As mentioned above, Accession Partnership Documents were main guidelines for each candidate states for their preparation for accession. In Accession Partnership Documents each candidate country has been invited to adopt a National Programme for the Adoption of the *Acquis*. This programme set out methods of candidate countries to deal with the Accession Partnership through a timetable for implementing the Partnership priorities, and implications in terms of human and financial resources. Both the Accession Partnerships and the National Programmes for the Adoption of the *Acquis* are revised on a regular basis to assess which progresses have been made and to set out new priorities for the following terms.

Following the Accession Partnership Document of 2001, the Commission presented its **Regular Report in October 2002** and analyzed on what extend Turkey has accomplished its commitments under the National Programme for the Adoption of the *Acquis.* In the field of JHA the Commission concluded that 'information and awareness programmes on the legislation and the practices in the EU in the field of Justice and Home Affairs have been further developed, in particular in the areas of asylum and illegal migration. Accession Partnership priorities in the area of justice and home affairs have been partially met.' The Commission welcomed developments in regards of border management, control and readmission agreements with third countries. In the meantime, the EU expressed the utmost importance of signing Readmission Agreements with EU Member States. The Commission expressed its concern with regard to 10 days time limitation imposed on asylum seekers. [263] The Commission encouraged the

[263] For detailed analysis of the application of ten days limitation, please see Chapter II.

Turkish government for an improved and systematic application of the 1951 Convention, especially as regards work permits. The Commission advised Turkey to envisage new legislation on work permits for extending the right to work to persons entering Turkey from non- European countries who fulfill the criteria of the refugee definition according to the Geneva Convention. The Commission also advised that the new legislation could provide for the inclusion of minimum standards regarding the employment rights of refugees as set forth in the 1951 Convention. Commission's recommendations in terms of employment rights of refugees has a great importance for the improvement of refugees living conditions in Turkey given that extension of work permits to non-European nationals might be a solution for their vulnerabilities pending resettlement. An improvement to asylum seekers' social rights in Turkey was introduced through a circular of the Ministry of the Interior, in July 2002, related to the provision of health care to asylum seekers recognized as such by the Turkish authorities. Since July 2002 these asylum seekers have gradually been provided with green cards for medical expenses (diagnosis, treatment and medicine). In overall, the Commission encouraged Turkey to revise its National Programme in the light of the Commission's Regular Report in order to update it to the latest developments and strengthen its planning character, to ensure better prioritisation of actions including clear timetables and deadlines, as well as the establishment of budgets necessary for investments. Turkey should take into account the priorities of the Accession Partnership during the revision of the document.[264]

In this respect, **the Accession Partnership Document with Turkey was revised in May 2003**, with the view of setting out a new single framework of the priority areas for further work identified in the Commission's 2002 Regular Report on the progress made by Turkey towards accession.[265] In the revised Accession Partnership Document short and medium term priorities in the field of JHA were set in a more comprehensive manner. Signing of Readmission Agreements with the European Community was set as a short term priority. [266] In the medium term, Turkey had to start with the alignment of the *acquis* in the

[264]European Commission (2002), *Regular Report on Turkey's Progress Towards Accession*, SEC (2002)1412.
[265] European Council (2003), *Council Decision of 19 May 2003 on the principles, priorities, intermediate objectives and conditions contained in the Accession Partnership with Turkey*, 2003/398/EC.
[266] *Ibid*.

field of asylum including lifting the geographical reservation to the 1951 Geneva Convention; strengthen the system for hearing and determining applications for asylum; develop accommodation facilities and social support for asylum seekers and refugees; to continue alignment with the *acquis* and best practices concerning border management so as to prepare for full implementation of the Schengen *acquis*; to adopt the *acquis* in the field of data protection and exchange of personal data for law enforcement purposes and create the institutional capacity for its implementation including the creation of an independent supervisory authority so as to be able to fully participate in the Schengen information system and Europol; to pursue alignment of visa legislation and practice with the *acquis*. In the light of the Revised Accession Partnership Document, Turkey was required to present a revised National Programme for the Adoption of EU acquis considering the amendments introduced on the previous Accession Partnership Document.

In the meantime, there has been a development on the accession process of Turkey when the **Copenhagen European Council in December 2002** concluded that the EU will open accession negotiations with Turkey if the European Council in December 2004 decides that Turkey fulfils the Copenhagen political criteria.

On the basis of the revised Accession Partnership document, in 2003, Turkey adopted a revised **National Programme for the Adoption of the EU Acquis**. At first place, Turkey emphasized its limited application of refugee definition covering only foreigners coming from Europe and re-affirmed that it would 'address the lifting of geographical limitation during the progression of EU accession negotiations of Turkey on the condition that it should not encourage large scale refugee inflows to Turkey from East, upon the completion of the necessary legislative and infra-structural measures and in line with the sensitivity of the EU Member States on the issue of burden-sharing.' This statement clearly indicates Turkey's concerns with regard to possible large refugee inflows into its territory in case of lifting its geographical limitation.

The NPAA listed harmonization with the EU acquis in the area of asylum as a priority. Mid-term priorities in the field of asylum included 'development of accommodation facilities and support mechanisms for refugees and asylum seekers and enhancing administrative and technical capacities'. Turkey in its

National Program undertook to adopt the Draft Law on Asylum stating that 'following the entry into force of the Law on Asylum, the work on harmonization with the EU acquis will continue and administrative measures will be further developed.'

In terms of legislation, Turkey asserted that it would adopt a number of EU legislation under 'Draft Turkish Law on Asylum' by 2005. These legislations included Convention for determining the state responsible for processing asylum claims in Member States (date of signature: 15 June 1990, date of entry into force: 1 September 1997) - Dublin Convention, Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining asylum application lodged in one of the Member States by a third-country national, Council Directive 2001/55/EC of 20 July 2001 on the minimum standards for providing 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, Council Directive 2003/9/EC of 27 January 2003 laying down the minimum standards for the reception of asylum seekers. [267]

In addition to legislative changes, Turkey scheduled a timeline of 2005 for necessary institutional developments including; ''Identifying training needs of the personnel and developing training programmes based on the needs identified, establishing a single and centralized institution under the Ministry of Interior specialized in the determination of refugee status and fulfillment of the legislative; administrative and infrastructural needs for developing its operational capacity; establishing refugee guesthouses and refugee shelter centres; establishing reception centers for asylum seekers; developing social support mechanisms for refugees (education, heath, interpretation services and employment); social support mechanisms for vulnerable refugees; recruitment and training of personnel such as experts for psycho-social support, interpreters etc.'' These institutional developments would certainly help to solve daily vulnerabilities of refugees and asylum seekers and thereof their adoption into Turkey's asylum system would affect positively the inconclusive impoverished situation of asylum seekers and refugees awaiting in Turkey.

[267] For details please see Turkish and English versions of the National Programs on the Adoption of the Acquis at www.deltur.cec.eu.int or www.abgs.gov.tr.

As a part of harmonization process in JHA, Turkey expressed the continuation of the alignment with the EU Acquis on border management and preparation for the implementation of the Schengen Acquis. Turkey set a timetable for the adoption of Schengen Acquis until the end of 2005. [268] In terms of visa alignment, Turkey will abolish the issuance of visas at the border and will introduce airport transit visa practices. The implementation of transit visa practice is expected to facilitate the addressing of problems caused by persons who are sent back to Turkey after attempting illegal entry to EU Member States on flights via Turkish airports. Another objective in order to combat against illegal immigration was the signing of readmission and expulsion agreements. Turkey stated that it will continue to sign Readmission Agreements with neighbouring countries and countries of origin covering Turkish citizen, persons illegally transiting through Turkey, and foreign nationals caught during illegal residence in Turkey. Timeline for the legislative changes on Law on Foreigners was set as the end of 2005.

Following the NPAA, the Commission has presented its **Regular Report of 2003**. The Commission welcomed the strategy of establishment of a specialized, civilian unit for migration and asylum issues under the Ministry of Interior, which would be responsible for receiving and deciding on requests for residence permits of foreigners and asylum applications in the first instance. The strategy also included the establishment of a separate and independent higher board (the "Appeal Board") in order to assess the appeals lodged against the asylum decisions of the specialised unit. Another progress was the amendment made to the law regarding work permits for foreigners. The law enabled foreigners entering legally to Turkey to work as a domestic worker, which was not possible under previous law. This amendment aligned Turkey's policy towards asylum seekers and refugees with the provisions of the 1951 Convention.

The Commission has indicated an improvement in the social support provided to refugees and asylum seekers. According to its statistics; direct aid was provided to 1224 persons in 2002 under the coordination of provincial governors by the Turkish Red Crescent, state hospitals, municipalities and the Social Solidarity and Assistance Foundation in the form of cash money, food, clothing, health

[268] For the list of countries please see NPAA available at: www.deltur.cec.eu.int or www.abgs.gov.tr.

services and heating material. The schooling situation of children of refugees and asylum-seekers has improved. Of the currently 11 635 refugees and asylum-seekers registered in Turkey, 3.235 are under 18 years of age and 591 of them attended primary and secondary level schools in the last school year. The Commission also welcomed continuous training projects with UNHCR. Turkey's accession process to the EU has considerably improved state assistance allocated to refugees and asylum seekers when compared to the era before the declaration of Turkey's candidacy to the Community. Therefore, even before the completion of the harmonization process, this process in itself had positive effects in the improvement of asylum seekers and refugees status in Turkey.

The Commission indicated two main progresses of Turkey in **its Report in 2004**. In October 2003, Turkey ratified the Agreement on the legal status, privileges and immunities of the International Organisation for Migration (IOM) in Turkey, which grants the IOM legal status and facilitates its operations in Turkey. In 2004, Turkey has made a little progress in the application of Schengen requirements with the establishment of a national office which would act as a central authority in line with the Schengen Convention and as a contact point for Europol and OLAF within the Interpol Department of the Directorate General for Security. Another step in the harmonization of asylum policies was the implementation of a one-year Twinning Project, TRR02-JH-03, of 8th March 2004, which was called 'Support for the Development of an Action Plan to Implement Turkey's asylum and Migration Strategy', organized in cooperation with Danish-UK Consortium under the EU Cooperation programming of 2002. The purpose of the project was to align Turkish asylum and immigration strategy within the EU legislation using EU funds to the widest extend possible in support of operational capacity building of the authorities (coordination, human resources, materials) responsible for migration/asylum harmonization.

The Presidency Conclusions of the European Council meeting in Brussels on 16-17 December 2004 was a benchmark for the accession process of Turkey into European Union. In the Presidency Conclusions, the Council invited the Commission to present to the Council a proposal for a framework for negotiations with Turkey and requested the Council to agree on that framework with a view to opening negotiations on 3 October 2005. In other words, the EU leaders agreed on 16 December 2004 to start accession negotiations with Turkey from 3 October 2005. The negotiations would proceed on a number of chapters

each covering a specific policy area. The Commission will recommend the Council to open negotiations on each specific chapter once it considers Turkey to be sufficiently prepared. [269]

In 2005, Turkey had a poor record in the field of Justice and Home Affairs. In its Progress Report of 2005, the Commission affirmed that there has been no new development in the area of Schengen Agreements. The EU welcomed opening of readmission agreements with Turkey. Although the Commission stated that the non-reofulment principle was respected in Turkey in general means, it also pointed out breaches of the principle referring to some incidents. The Commission stated that there continued to be reports that some asylum seekers at the border are prosecuted for illegal entry and deported. Aliens who were apprehended away from the border were not always permitted to submit an application for asylum, as they were considered to have acted in bad faith; the UNHCR encountered considerable difficulty in gaining access to such persons while in detention. There were reports that asylum seekers of European origin who were not covered by the geographic limitation to the Geneva Convention, notably Chechens and Belarusians, encountered considerable difficulties in submitting asylum applications. The Commission encouraged Turkey to establish procedures for asylum seekers at international airports and to enhance efforts to improve reception conditions. [270]

According to the Commission's Report, in addition to UNHCR's material assistance, the Turkish authorities provided direct aid to non-European asylum seekers and refugees in forms of cash, food, clothing, health services and heating material. Non-European asylum applicants received medical assistance from the UNHCR while they were waiting for their application to be decided; if they were granted the status of temporary asylum seeker, they were then entitled to use state health care facilities. The children of applicants for asylum had the right to attend Turkish primary schools. Unaccompanied child asylum

[269] the substance of the negotiations, which will be conducted in an Intergovernmental Conference with the participation of all Member States on the one hand and the candidate State concerned on the other, where decisions require unanimity, will be broken down into a number of chapters, each covering a specific policy area. The Council, acting by unanimity on a proposal by the Commission, will lay down benchmarks for the provisional closure and, where appropriate, for the opening of each chapter; depending on the chapter concerned, these benchmarks will refer to legislative alignment and a satisfactory track record of implementation of the acquis as well as obligations deriving from contractual relations with the European Union.

[270] European Commission (2005), *Progress Report Turkey*, SEC (2005) 1426, 9 November 2005.

seekers were cared for by the Social Services Child Protection Agency. Turkey has continued to train officials on asylum issues. Turkey' accession to EU has improved situation of asylum seekers and refugees in terms of employment, health care services, education and material assistance. With the accession process, Turkey undertook responsibilities towards non-European asylum seekers and refugees although this category of people was out of the scope of Turkey's responsibility of the 1951 Geneva Convention.

Turkey, in the National Programme for the Adoption of EU Acquis, in 2003, set 2005 as the deadline for the adoption of EU acquis under the Draft Turkish Law on Asylum and for the accomplishment of necessary institutional developments. However, Turkey failed to fulfill its commitments as set out in the NPAA. By the end of 2005, there was no progress for the establishment of guesthouse and refugee shelter, development of social support mechanisms, establishment of a centralized, single institution for the determination of refugee status as well as the adoption of Turkish Law on Asylum. The major progress of the Republic of Turkey was the adoption of a Turkish **National Action Plan for the Adoption of the EU Acquis in the Field of Asylum and Migration (NAP) in March 2005**, for the alignment of EU asylum acquis into Turkish national law through a specific timeline and detailed framework. The purpose of the NAP was to align Turkish Legislation and System on Asylum, Migrants and Aliens with the EU Acquis and systems within the process of Turkey's accession negotiations with the EU. The NAP set out legal arrangements that should be put into force within the harmonization process and investments for the establishment of administrative institutions and physical infrastructure in order to align Turkish asylum/immigration legislation and system within the EU Acquis.

The NAP defined 'refugee' and 'asylum seeker' similar to the 1994 Regulation. Although geographical limitation was referred in the definition of a 'refugee', asylum seekers were left out of this geographical scope. [271] The NAP set out investment and Twinning Projects within the scope of EU Financial Assistance Programs in order to complete the required technical and physical infrastructure within the harmonization of asylum system. These technical and physical infrastructure needs were firstly, establishing a country of origin and asylum information system, which would enable decision makers to access information

[271] See previous chapter for detailed analysis of the term of 'refugee' defined in the 1994 Regulation.

on asylum seekers and countries of origin information on electronic database; secondly, establishing premises for the Asylum Unit in Ankara; thirdly establishing a Training Academy (Institute) under the body of the Ministry of Interior which would ensure continuity in the training of personnel in the field of asylum and immigration; fourthly, establishing return centers with the purpose of hosting aliens to be returned until relevant procedures are completed; fifthly, establishing reception and accommodation centers for the asylum-seekers and refugee guest houses.

In addition to physical and technical infrastructure objectives, social and political changes in law and policy making process was set as priority such as the establishment of a 'Unit' within the new 'Asylum System'. The purpose of this Unit would be identifying the need for capacity building in the field of asylum and migration with respect to the geographical conditions of Turkey; following and evaluating the changes and mass population movements in the region of Turkey; and following asylum policies developed in EU and to make policies. In addition to that, there should be close cooperation between universities, NGOs and other relevant national and international institutions and agencies.

In terms of budget allocation to Turkey, institutions in charge in implementing the National Action Plan on Asylum and Immigration are required to make budgetary preparations in order to identify the sources required for the implementation of the EU harmonization strategy. These sources should be identified with regard to required institutional and physical infrastructures, and depending on circumstances, with cooperation of national/international institutions, and NGOs. In terms of equal burden sharing mechanism Turkey requires the sharing of the followings; 'some asylum seekers admitted to the procedure in Turkey, some of the refugees, some of the aliens arriving in Turkey during mass population movements and receiving temporary protection. Furthermore, a portion of the food, accommodation and travel expenses of aliens of illegal status and cooperation should be enhanced and EU practices should be disseminated. In order to achieve implementation of the National Action Plan, international funds such as the funds of EU Commission, UNHCR, and IOM would be utilized. On national basis, establishment of an independent asylum budget within the budget of the Ministry of Interior was required.

The most tricky point in the National Action Plan was no doubly 'lifting the geographical limitation.' Turkey pronounced the legal basis of its geographical limitation in reference to the 1951 Convention stipulating that 'Each state may provide for limitations on any provision of the Convention other than Articles 1,2,4,16,33 and 36-46 at the stage of signing, ratification or accession' under Article 42 of the afore mentioned Convention. In this respect, Turkey published a declaration on the basis of Law No 359, asserting that 'she would admit only aliens coming from Europe and seeking asylum in Turkey due to the geographical region she is located in and by using her right to impose a limitation foreseen as to refugee status determination (on the ground of geographical limitation).' Turkey expressed its concern with regards to mass influxes occurred in 1980s and stressed the need to resolve geographical limitation in a manner not to harm the country's economical, social and cultural conditions. Turkey explained its concerns with regard to possible mass influxes referring to its past experiences and statistics. According to statistics Turkey granted 934,354 temporary residence permits as a result of mass influxes in different period of times to Turkey, this number included; 51, 542 people during the Iran-Iraq war of 1988; 20,000 people during the civil war, the disintegration of former Yugoslavia and the events which took place in Bosnia-Herzegovina between 1992 – 1997; a total of 345,000 people including 311,000 people deported from Bulgaria and 34,000 people arriving with visas between May – August 1989; 7,489 people between 2 August 1990 and 2 April 1991 before the Gulf Crisis and War, and 460,000 afterwards; 17,746 people after the events which took place in Kosovo in 1999; 32,577 Ahiska Turks on exile from their countries, who were dispersed to a large geographical area.

As a reflection of its concerns to mass influxes, Turkey overtly stated that lifting geographical limitation to the 1951 Convention would take place only in line with the completion of the EU accession negotiations. Turkey set preconditions for lifting geographical limitation and asserted that it would lift geographical limitation only if necessary amendment to the legislation and infrastructure is made in order to prevent the direct influx of refugees to Turkey during the accession phase, and if the EU countries demonstrate their sensitivity in burden sharing. In addition to that, Turkey addressed technical and physical infrastructures needs prior to the lifting of geographical limitation in support of Pre-Accession Financial Assistance Programs of EU. These priorities include, as afore mentioned; Establishing reception and accommodation facilities for asylum

seekers and founding refugee guest houses; operation of the mentioned centers; training personnel to be recruited at these centers; establishing a country of origin and asylum information system; establishing a Training Academy (Institute); establishing a service building for the asylum unit. Turkey affirmed that during the transitional period European Countries should continue to receive refugees from Turkey while UNHCR continues its resettlement operation for non-European refugees.

The main emphasis in the NAP was given to the establishment of equal and fair burden sharing mechanism between the EU and Turkey. Turkey highlightened its geographical situation and past experiences with intense population movements and overtly expressed that 'Turkey should not be expected to handle issues of asylum and irregular migration on its own' Turkey invited all EU Member States, UNHCR and other international organizational institutions to take necessary measure to enable equal burden sharing of the burden of Turkey, which is the first country of asylum, before the EU.

Turkey stated that she expected an increase in the number of refugees arriving to Turkey following the lifting of the geographical limitation. Therefore, Turkey expressed the need for the establishment of 'reception and accommodation centers for asylum seekers, refugee guest houses, accommodation centers and return centers; establishment of a permanent training academy for the regular training to be provided to personnel working in the field of asylum and migration; establishment of a costs of financing required for the integration of migrants and refugees in Turkey.'

Turkey envisaged submitting the proposal for lifting geographical limitation to TGNA at the earliest possible in 2012 in line with the completion of Turkey's negotiations for accession to the EU following of the completion abovementioned projects and fulfilment of the abovementioned conditions. Turkey overtly stated its unwillingness to lift geographical limitation before the completion of accession negotiations and fulfilment of above mentioned conditions covering technical, physical infrastructure and establishment of equal burden sharing mechanism. As Kirisci argues, Turkey set 2012 as a timeline since this is

considered as the date by which Turkey will understand genuineness of EU accession prospects. [272]

In addition to expressing its concern for mass influxes, Turkey undertook to introduce arrangements in asylum procedures. Multilingual brochures on the rights and responsibilities of asylum seekers, application procedures and processes, resources and services they can access in Turkey should be prepared by the Ministry of Interior and UNHCR and updated when necessary. Aliens reaching the Turkish border in person should be allowed to seek asylum. Being late in making the application should not prevent asylum seekers to exercise their rights to asylum. However, failure to lodge an application in the shortest reasonable time with no reason at all may adversely affect the decision about the asylum seeker. Persons having no IDs or documents should be allowed to access the full asylum procedure. The applicant should cooperate with the relevant authorities for identification purposes. Persons should not be punished because of failure to produce IDs or documents. In line with arrangements in asylum procedure the NAP contained objectives aiming to improve living standards of refugees and asylum seekers. In the previous Chapter, limited assistance allocated to asylum seekers and refugees was analyzed and their vulnerability in the country was pointed out. In this regard, it is worth to focus on the expected changes in refugees and asylum seekers' social and economic rights through the accomplishment of the NAP.

Establishing Reception and Accommodation Centers for the Asylum Seekers and Refugee Guest Houses. Turkey affirmed its responsibility to provide shelter and physical reception conditions to asylum seekers according to EU Council Directive on reception conditions. Turkey stated that reception and accommodation centers would mainly be established in the eastern region of Turkey with the view of implementing asylum strategy and providing effective and fair international protection to genuine refugees. Turkey expressed that accommodation centers with a capacity of approximately 750 people would be established in seven different provinces in Turkey. If the centers do not meet the number of asylum applications, then capacity of centers would be increased. Those who would benefit from these centers were defined as 'applicants who

[272] Kirisci, K. (2007), Border Management and EU-Turkish Relations: Convergence or Deadlock, Euro-Mediterranean *Consortium for Applied Research on International Migration, Research Report*, p.20.

have applied for asylum and who have not yet been granted the status or those who have been granted the refugee or asylum seeker status. But who cannot freely reside in Turkey, the free residence of whom are not deemed appropriate.' Establishment of reception centers will certainly provide a solution to asylum seekers' and refugees' vulnerabilities awaiting resettlement or a result given that they were expected to find a shelter on their own and were not provided any accommodation facilities except limited numbers settled in Yozgat Refugee Camp. [273]

Free Residence of Refugees. In the current asylum system, upon their registration with responsible governorates, asylum seekers are sent to satellite cities where they are asked to reside until their resettlement to another country. Asylum-seekers are not free to change their residence place and are mostly asked to present themselves to the police on daily or monthly basis. With the NAP, current system will entirely change. NAP states that 'People, who have been granted the refugee status, or found to be eligible for subsidiary or temporary protection, and have completed essential integration programs, shall be allowed to decide where to reside in order to ensure their full integration with the Turkish society. Article 17 of Law No. 5683 on Aliens should be rearranged within this framework.' In this respect, asylum seekers and refugees will be free to choose their place of residence and free to move within the country.

Health care services. As stated in the circular on health care services issued by the Ministry of Interior in 2002, persons granted the refugee/asylum seeker status should benefit from the health care services free of charge. Refugees and asylum seekers will be able to enjoy health care services free of charge for which asylum seekers were asked to pay prior to the harmonization process within the EU. [274]

Social Assistance. Asylum seekers, refugees and other aliens to be subject to integration should be financially self-sufficient and shall not be in conflict with the cultural life. Whether such people have the desire and will to adapt to the Turkish society should be studied.

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[273] Turkish National Action Plan for the Adoption of the EU Acquis in the field of Asylum and Migration, 2005. For details please see Turkish and English versions of the National Programs on the Adoption of the Acquis at www.deltur.cec.eu.int or www.abgs.gov.tr.
[274] Ibid.

Access to Labour Market. The local government or the provincial organizations of the central government (Directorates for Public Education Centers, etc.) shall provide the opportunity to the following individuals to take part in vocational courses (such as hairdressing, sewing, embroidery courses, etc.): those who have been issued long term residence permits in Turkey, family members of those individuals arriving to Turkey within the scope o family reunification, asylum seekers/refugees, and those enjoying subsidiary protection. Law No. 4817 on the Work Permits of Aliens should incorporate more facilitating provisions for asylum seekers and refugees than for other aliens having been issued residence permits in Turkey in order to guarantee the access of asylum seekers and refugees to the labor market. The definition in Article 8(d) of the Law should be updated within this framework and work permits should be issued by the institution which grants status.[275]

Access to Social, Economical and Cultural rights. Third country citizens should enjoy social, economical and cultural rights, except for the right to elect and to be elected, to the extent close that of the citizens of the country. Measures shall be taken for them to take part in social activities, and regulations shall be made for them to attain literacy in Turkish in order to benefit from social services.

Furthermore, naturalization procedures should be made easier for those, who are not of at least one nationality and willing to be naturalized, on the condition that they bear the prerequisites set forth in TCA No. 403.Such people should be integrated before naturalization. Within this scope, they should have a good command of Turkish, have at least a minimum knowledge about the laws, which establish the public order, the traditions and customs, be financially self sufficient, and not constitute a burden for the state. Therefore these people should be informed about the above-stated rules at introduction programs.[276]

In the light of foreseen developments, it is highly likely that life of asylum seekers and refugees will encounter significant improvements upon the completion of the objectives set out in the NAP. In terms of social and economic rights, the NAP would be for the benefit of refugees and asylum seekers and a solution to their vulnerabilities. Therefore, Turkey's accession to the EU will have

[275] Ibid
[276] Ibid.

positive effects on refugees and asylum seekers lives and enable them to enjoy international protection in a State where they would be able to live in freedom and dignity.

4.2 EU Harmonization following the opening of accession negotiations with Turkey

Relations between the EU and Turkey entered a new stage in October 2005 with the opening of accession negotiations. On 3 October 2005, in Luxembourg, the General Affairs and External Relations Council (GAERC) accepted negotiating accession framework and accession negotiations with Turkey started. Negotiations were opened based on the fact that Turkey sufficiently met political criteria set by the Copenhagen European Council in 1993. As agreed at the European Council in December 2004, negotiations were based on Article 49 of the Treaty on European Union. Accession negotiations entailed adoption of the rights and obligations attached to the Union system and its institutional frameworks, known as the acquis of the Union. Turkey during the accession negotiations was expected to apply this acquis. The acquis was comprised of legislation and decisions adopted pursuant to the Treaties, and the case law of the Court of Justice; other acts, legally binding or not, adopted within the Union framework, such as inter institutional agreements, resolutions, statements, recommendations, guidelines; joint actions, common positions, declarations, conclusions and other acts within the framework of the common foreign and security policy; joint actions, joint positions, conventions signed, resolutions, statements and other acts agreed within the framework of justice and home affairs; international agreements concluded by the Communities, the Communities jointly with their Member States, the Union, and those concluded by the Member States among themselves with regard to Union activities.[277]

The accession process implies harmonization of the Turkish legislation on the acquis communitaire in 33 Chapters and negotiation of these chapters. During the negotiations accession process, the Council based on the Commission's Regular Reports on Turkey's progress and in particular on information obtained by the Commission during screening will act by unanimity on a proposal by the Commission, and will lay down benchmarks for the provisional closure and,

[277] For full asylum acquis of the EU please see appendix.

where appropriate, for the opening of each chapter. The area of Justice Freedom and Security was analyzed under Chapter 24 of the negotiation framework.

Subsequent to the opening of accession negotiations and the decision of 'screening' process, in January 2006**, a new Accession Partnership Document** was adopted by the EU setting out the tasks that Turkey had to fulfill for its full membership to the EU. Short term priorities were expected to be accomplished in one or two years including; continuing efforts to implement the National Action Plan on Migration and Asylum, to combat illegal migration and to conclude urgently a readmission agreement with the EU; adopting and beginning implementation of the National Action Plan on Border Management, in particular through taking steps to establish a professional non-military border guard and through de-mining of the border. Medium term priorities were to be accomplished in three or four years including; continuing with alignment on the *acquis* in the field of asylum, through the lifting of the geographical limitation to the Geneva Convention; strengthening the system for hearing and determining applications for asylum and developing social support and integration measures for refugees; adopting and implementing the *acquis* and best practices on migration with a view to preventing illegal migration; continuing alignment on the *acquis* and best practices, in line with the national action plan on border management, so as to prepare for full alignment with the Schengen *acquis*.

According **to Regular Progress Report of 2006**, Turkey's achievements in the field of asylum remained low in the year of its publication. The main achievement in 2006 was the lifting of 10 days time limitation for lodging an asylum claim through the Regulation to amend the Regulation on the Procedures and Principles Related to Population Movements and Foreigners Arriving in Turkey either as Individuals or in Groups Wishing to Seek Asylum either from Turkey or Requesting Residence Permission in order to Seek Asylum from Another country. With this amendment asylum seekers were no longer subject to a time limitation for the submission of their asylum application. Other amendment to the 1994 Regulation was the possibility to empower selected Governorates to decide on asylum whereas before it was only under the Ministry of Interior's authority. In addition to that, the amendment required that a sufficient number of personnel shall be appointed at the Ministry and the Governorates by the Ministry of Interior for decision making on the cases of individual aliens and for assessment of appeals. Within this amendment the

requirement of personnel for appeal process was put forward. The article provided that temporary assignment of personnel should not exceed 15 days each time. Despite of these two amendments, Turkey did not have any progress in terms of implementing objectives of the NAP. The Commission criticized Turkey that no ad hoc forum was set up gathering all relevant stakeholders for an effective implementation of the Action Plan on Migration and Asylum. The Commission expressed the need of a new legislation in order to ensure that all asylum seekers have access to a fair procedure and to ensure uniform implementation on procedures at international airports.

In 2007 Turkey's progress in the field of asylum remained limited. Although there has been some progress it fell short of achieving its goals as set out in the NAP. The essential improvement in 2007 was the publication of new asylum brochures in seven languages English, Russian, French, Somali, Arabic, Persian and Kurdish. In these brochures the right of the legal representative and right to access to file have been included.

On 18 February 2008, the European Commission introduced a **Revised Accession Partnership for Turkey** indicating the priority areas for Turkey's membership preparations. In the field of asylum Turkey's short term priorities were set as continuing efforts to implement the National Action Plan on Asylum and Migration (including through the adoption of a roadmap); increasing capacity to combat illegal migration in line with international standards; making progress in the preparations for the adoption of a comprehensive asylum law in line with the *acquis* including the establishment of an asylum authority. Medium term priorities were to continue with alignment with the *acquis* in the field of asylum, in particular through the lifting of the geographical limitation to the Geneva Convention and through strengthening protection, social support and integration measures for refugees.

In line with the Accession Partnership Document, in August 2008, Turkey prepared a detailed **Draft National Programme for the adoption of the EU Acquis.** Under Chapter 24, Justice, Freedom and Security Affairs, Turkey established a new framework and timeline for the accomplishment of priorities set out in the Accession Partnership document. As a priority Turkey affirmed continuing efforts of Turkey to implement the National Action Plan on Asylum.

Turkey set out a schedule for the implementation of National Action Plan and adoption of an Asylum Law in line with the EU Acquis.

In terms of legislation, Turkey firstly undertook to align Amsterdam Treaty introducing a draft Law on Establishment of an Asylum and Immigration Unit under the Ministry of Interior. By doing this Turkey undertook to establish a new Asylum and Immigration Unit under the Ministry of Interior by 2009-2010. Secondly, Turkey expressed that she would harmonize the Turkish Legislation on Asylum, Immigration and Foreigners with the EU legislation while maintaining the existing geographical restrictions. The harmonization of legislations would occur under the Draft Asylum Law in 2009- 2010 and under supervision of the Ministry of Interior. [278] Thirdly, Turkey admitted that another set of EU legislation harmonization would take place by 2009-2010 in terms of visa applications and identification of procedural and legislative framework of the struggle against illegal immigration and employment. The institutions in charge were Ministry of Interior and Ministry of Foreign Affairs. [279] Lastly, Turkey undertook to introduce secondary legislation for the implementation of the Asylum Law. In this respect Turkey will introduce Implementing Regulation on the Implementation of the Asylum Law in 2010-2011 under the administration of the Ministry of Interior. [280]

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[278] EU Legislations in force were Directives No. 2001/55/EC 2003/09/EC; 2004/83/EC and 2005/85/EC- Resolutions of 30 November; and 1 December 1992 on a harmonized approach to matters with regard to host third-countries; Council Declaration No. 15067/02 regarding Safe Third-Countries; Conclusions of 30 November and 1 December 1992 on Countries in Which There is Generally no Serious Risk of Persecution; Resolutions of 30 November and 1 December 1992 on Manifestly Unfounded Applications for Asylum; Council Resolution on minimum guarantees for asylum procedures; Amsterdam Treaty: Protocol on the right of asylum for citizens of the EU member states; Resolutions No. 2000/596/EC, 2001/275/EC 2002/307/EC and 2002/46/EC; Regulation No.491/2004

[279] EU Legislations in force were Schengen Acquis SCH/Com-Ex (99) 13 - Decision of the Executive Committee of 28 April 1999 on the Definitive Versions of the Common Manual and Common Consular Instruction; Regulation No. 1091/2001/EC; Council Recommendation for harmonizing the means of struggle against illegal immigration and illegal employment, and developing the control procedures in relation to these; Resolutions of 20 June 1994 and 30 November 1994 on limitation of admission of third-country nationals to the territory of the Member States for employment; Articles 11, (1), (a) and 21 of the Schengen Convention; Part I, 2.1.3 of the Common Consular Instructions (CCI)

[280] EU legislations to be adopted are Directives No. 2001/55/EC 2003/09/EC, 2004/83/EC and 2005/85/EC; Resolution of 30 November and 1 December 1992 on a harmonized approach to matters with regard to host third-countries; Council Declaration No. 15067/02 regarding Safe Third-Countries; Conclusions of 30 November and 1 December 1992 on Countries in Which There is Generally no Serious Risk of Persecution; Resolution of 30 November and 1 December 1992 on Manifestly Unfounded Applications for Asylum; Council Resolution on minimum guarantees for asylum procedures; Amsterdam Treaty

Asylum Law under the assignment of Ministry of Interior and Ministry of Foreign Affairs In overall, Turkey admitted to harmonize EU legislations, by the end of 2010, through Draft.[281] EU legislations to be harmonized within the framework of NPAA of 2008 included currently debated legislations as such discussed in the previous Chapter. These legislations included application of 'safe third country', 'safe country of origin' and 'manifestly unfounded applications for asylum' principles. As discussed in the previous chapter these principles may put asylum seekers' life in danger unless they are implemented very cautiously and effectively.

On the other hand, harmonization of the Council Resolution on minimum guarantees for asylum procedures and Council Directive 2003/9/EC on minimun standards for the reception of asylum applications was as a good step for the betterment of asylum seekers' rights during their long waiting periods in Turkey. Turkey defined an asylum seeker as

> An alien who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. [282]

In the light of above definition, the Council Directive 2003/09/EC will be applicable to non-European asylum seekers given that Turkey's asylum seeker definition is not limited to European nationals.

As mentioned in previous Chapter, Council Directive 2003/09/EC sets ou minimum reception conditions for asylum seekers. These include information about any established benefits and of the obligations with which they must

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Protocol on the right of asylum for citizens of the EU member states; Resolutions No. 2000/596/EC, 2001/275/EC 2002/307/EC and 2002/46/EC; Regulation No.491/2004.

[281] For detailed list of EU legislations, please see Draft National Programme of Turkey for the Adoption of the EU Acquis (2008), available at www.abgs.gov.tr

[282] Regulation of 1994 on the Procedures and Principles Related to Population Movements and Foreigners Arriving in Turkey either as Individuals or in Groups Wishing to Seek Asylum either from Turkey or Requesting Residence Permission in order to Seek Asylum from Another country.

comply relating to the reception conditions within 15 days of applying for asylum (Article 5); documentation certifying the person as an asylum seeker within 3 days of an application being lodged (Article 6); freedom of movement within the territory of the host Member State or within an area assigned to them by the Member State (Article 7); family unity (Article 8); schooling and education of minors provided in either mainstream schools or in accommodation centres (Article 10); conditional access to the labour market after 12 months of waiting for a decision at first instance (Article 11); material reception conditions sufficient to ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence (Article 13); and emergency health care and essential treatment of illness (Article 15). Therefore, with the adoption of Council Directive 2003/09/EC asylum seekers will be granted extensive social and economic rights which in turn will provide them higher living standards.

Apart from legislative measures, another important harmonization objective was the establishment of an Asylum and Immigration Unit under the Ministry of Interior and employment of personnel to work in this field with an expertise status. In addition to that, establishment of Asylum Training Curriculum, establishment of translators Staff Groups for Asylum System and training Translators on the Asylum Law were set as Turkey's priorities until the end of 2010. The establishment of a 'Unit' to make policies in order to follow and evaluate the Mass Population Movements (Mass Influx) was to be accomplished in 2008-2010. Strengthening the capacity of "Asylum and Immigration Unit" aimed at following and evaluating the mass population movements (mass influx) in the framework of the 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.

Turkey expressed that she would accomplish some objectives set out in the Accession Partnership Document only within the perspective of full membership, and therefore did not set a timeline for their accomplishment. These objectives were; establishment of an "Appeal Evaluation Board' within the Asylum system for First Instance Decisions, establishment of a fingerprint database for effective application of the Dublin Convention in the framework of the Council Regulation (EC) No 343/2003 of 18 February 2003 (Dublin II Regulation) establishing the

criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.

In 2008, the Commission has presented Regular Progress Report. The report stated that "The Ministry of Interior continued to work with the UNHCR to train officials in preparation for decentralisation of decision-making. The department for foreigners, borders and asylum in the Turkish National Police has started to prepare to take over the country of origin information system. Extensive work is underway to improve administrative capacity and streamline asylum procedures. The Ministry of Interior has also initiated the internal administrative procedures to set up an asylum management unit, as the first step towards a dedicated authority able to manage both reception and integration issues." The Commission has emphasized importance of the revision of the Asylum Law and the establishment of the new asylum unit. The commission expressed the crucial need of fair, equal and consistent access for everyone to asylum procedures, to legal aid and, in particular, to UNHCR staff, especially at Turkey's international airports and detention centers. In addition to that, the Commission reminded Turkey's task to reduce the waiting time for asylum procedures and to eliminate disparities between cities' mechanism for referral to the social solidarity foundation. The Report stated that training for Turkish officials on refugee status determination procedures needed to continue and trained staff should work within the asylum and migration system. The Report expressed importance of the mobilisation of and cooperation with NGOs and local authorities as the keys to integration of asylum seekers. Another task of Turkey for the betterment of refugees living conditions was the facilitation of the self-reliance of refugees by reducing the fees for the six-month temporary residence permit.

As a summary of what has been mentioned above, harmonization of asylum process involved several issues to be tackled by the Turkish government. In order to facilitate harmonization process, the European Commission prepared Accession Partnership Documents drawing tasks of Turkey with a timeline to be followed and implemented. In response to these documents, Turkey prepared a National Programme for the Adoption of EU Acquis, a guideline setting out its priority areas and a timeline for their completion. In the field of asylum, Turkey has adopted the Turkish National Action Plan for the Adoption of the EU Acquis in

the Field of Asylum and Migration in 2005. In the NAP, Turkey undertook to introduce new legal arrangements that would improve living conditions of asylum seekers and refugees in the country by granting them higher economic and social rights. On the other hand, Turkey envisaged aligning its national legislation into the EU acquis under a Draft Asylum Law by the end of 2010. [283] Turkey overtly stated that it would not lift geographical limitation of the 1951 Geneva Convention without a full membership perspective. Turkey in the NAP expressed its concerns with regard to possible mass influxes giving reference to past experiences and statistical data.

There were number of countries that lifted geographical limitation during the accession process, these countries include Hungary, Latvia and Malta. However, unlikely to these countries, Turkey has great concerns with regard to the EU's commitment to Turkish full membership. The worst scenario for Turkey would be lifting geographical limitation without a full EU membership. A high level MOI officer expressed his concern over the EU full membership stating that 'his heart sank when his Hungarian counterpart simply said that lifting geographical limitation was never a major concern for them because they were always sure that they would become a member of the EU at the end.' [284]

Another concern for the Turkish officials was the lack of equal burden sharing mechanisms within the current EU asylum legislation. Owing to its geographical location Turkey risks of becoming a buffer zone between the EU and asylum producing countries, such as Iraq, Iran, and Afghanistan. In the light of EU asylum legislations, it is likely that, when Turkey becomes an EU Member State, or harmonize the EU asylum acquis and sign Readmission Agreements without full membership, she will be the country carrying highest burden of asylum applications owing to the implementation of 'first country of asylum' and 'safe third country' principles. As has been discussed in Chapter II, these two principles allow EU Member States to send an asylum seeker to a country where he could enjoy protection and seek asylum prior to entering Europe. Taking into consideration that Turkey has always been a transit country for asylum seekers to their way to Europe, Turkey will be the country carrying the highest burden of asylum applications since it would be considered as a safe country where asylum

[283] Draft National Programme of Turkey for the Adoption of the EU Acquis, August 2008
[284] Kirisci, K. (2007), *Ibid,* pg21.

seekers could seek asylum prior to their entry to Europe. In addition to that, the requirement of the Dublin Convention that asylum seekers should submit their asylum application in the country from which they entered to the EU territory will put a higher burden to Turkey upon the lifting of geographical limitation and harmonization of the EU acquis. Turkey will be the responsible country for the external border control of the EU and will be punished with higher asylum applications in case it fails to prevent illegal entry of asylum seekers in the EU through Turkish borders since it would be responsible of assessing asylum applications of those who entered the EU through Turkish territories. Given that Turkey has been a transit country laying down between Europe and asylum producing countries, it is highly likely that Turkey will be the county carrying the highest burden of asylum applications upon the harmonization of the EU Acquis.

Lack of trust into EU full membership prospect and unequal burden sharing mechanism among EU Members States were the main obstructions discouraging Turkey in aligning its national legislation within the EU acquis and lifting geographical limitation before the full membership of the EU. Although Turkey has valid reasons for not lifting geographical limitation without full membership and has no obligation to lift it with regards to international refugee legislation, Turkey has to extend its international protection to non-European nationals, from a humanitarian view, in order to meet needs of current asylum population in the country, having 44 European refugees out of 15 562 total application. (European and non-European) Turkey as a signatory State to International Human Rights Instruments can no longer ignore protection and social needs of non-European asylum seekers and refugees and ought to solve this problem providing them with international protection and adequate social and economic rights which would enable them to pursue a life in dignity and freedom.

Despite of the possible negative effects of the harmonization of the EU asylum acquis, such as the higher possibility of becoming a buffer zone between the EU and asylum producing countries and carrying the highest burden of asylum application, the harmonization process within the EU will have positive aspects on Turkey's asylum policy in terms of the improvement of social and economic rights of asylum seekers and refugees as well as the extension of refugee protection to non-European nationals which would qualify needs of current asylum population. Turkey is now in a position to decide whether to respond

protection needs of asylum seekers and refugees or to continue its policy of not lifting geographical limitation in order not to increase number of applicants seeking asylum into its territory.

CONCLUSION

The issue of refugee protection came into the agenda of European States following the both World Wars and was expected to be resolved within a short period of time leading to the short three year mandate of UNHCR from 1951 to 1954. However, States were mistaken in perceiving the refugee movement after the wars as a short term problem. Little known at the time that 54 years later, in 2008, refugee movements remained to be a permanent phenomenon in international politics.

The increasing number of gross human rights violations and resultant refugee flights in the post war era, attracted attention of West European States as the increasing number of asylum seekers coming to their countries were not only a humanitarian issue but also were perceived as a threat to national security and stability. Additionally, the unequal distribution of asylum seekers in each European country led to tensions between European governments due to the perception that the 'refugee burden' was not share equitably. These concerns brought the asylum and immigration issue to high-level politics throughout the Western States with the expressed need of common coping mechanism at European level.

The Dublin Convention adopted in 1990, was designed to determine the states responsible for examining applications for asylum lodged in one of the Member States of the European Union. The Convention compelled states bordering non-EU countries to be the primary assessors of refugee applications, simply because these countries are the most likely entry points for asylum seekers wishing to enter the EU. The concept of establishing a Common Asylum System was meant to address the concerns of unequal distribution of asylum applications. Instead of resolving this issue the Dublin Convention has instead exaggerated unequal distribution of asylum seekers within the EU by putting the highest burden to the countries with external borders. If the EU was indeed in view of establishing an equal burden sharing mechanism within the union, it would have established a mechanism in which total asylum applications would be equitably distributed within the Member States. This kind of mechanism would reflect the European Union's sincerity to burden sharing as well as its sincerity with regard to the

protection of refugees and assessment of asylum seeker cases. Instead, a conscious decision was taken to punish external border member states with disproportionately high number of asylum applications for their failure of preventing 'unwanted' asylum movements into European borders.

As reflected in Chapter II, the European States substantiated their restrictive application of asylum policies with the adoption of London Resolutions in 1992. The London Resolutions gave the Members States the right not to examine an asylum application based on 'safe third country', 'safe country of origin' and 'manifestly unfounded claims application' principles. Applications for asylum could be regarded as unfounded either because there is no substance to the applicant's claim to fear persecution in his own country or because he could obtain effective protection in another part of his own country; or because the claim is based on deliberate deception or is an abuse of asylum procedures (false identity, forged documents, false representations, application in another country using another identity, claim made to forestall an impending expulsion measure, etc.). In these cases, the states may consider these applications under accelerated procedures, without a full examination of the claim, or may reject very rapidly on objective grounds. While some may argue that such policies cut down on bureaucracy and speed up assessment of asylum cases, it is not a policy that this thesis advocates for. Assessing refugee claims deserves intensive attention of responsible officers since a wrong decision might put the life of asylum seekers at severe risks should they return to their country of origin. This policy endorses gross assumptions which can lead to disastrous individual consequences.

As discussed in Chapter II during the thesis study, another restrictive asylum measure of European Union was the adoption of 'safe third country' principle. This principle was applicable where the applicant has already been granted protection in the third country or has had an opportunity, at the border or within the territory of the third country, to make contact with that country's authorities in order to seek their protection, before approaching the Member State in which he has applied for asylum, or that there has been clear evidence of his admissibility to a third country. With the adoption of safe third country principle the European Member States were given the right to send an asylum seeker to the country where he stayed or transited before reaching European borders without assessing claims. 'Safe country of origin' principle allows Member

States to list countries which they considered safe for the return of asylum seekers and hold the right to send asylum seekers to this 'safe' country of origin. With these two Resolutions, expulsion of asylum seekers to a third country became a common rule rather than an exception. The European Union had thereby expressed its intention of keeping asylum seekers outside its borders and legitimizing expulsion of asylum seekers in any way possible. In 1994, Council Recommendation concerning a specimen bilateral readmission agreement between a Member State and a third country was introduced to facilitate the readmission of third-country nationals to their country of origin. Readmission Agreements are tools for controlling illegal migration and keeping asylum seekers outside the boundaries of the EU by transposing the burden to these third countries. Through 'safe country of origin', 'safe third country' principles, and 'Readmission Agreements', neighbouring countries to the EU and transit countries will play a role as a buffer zone that will have to all the work relating to assessing asylum seeker cases and protecting refugees that the EU refuses to do. As Lavanex stated, "the restrictive trend placed the Europeanization of refugee policies between two conflicting paradigms: The commitment to international human rights instruments on the one hand; and the pre-occupation with the safeguarding of internal security on the other"[285]

During the European Council meeting in Maastricht in December 1991, asylum and migration matters have been transferred to the Third Pillar of the Community. However under pillar structure, there were still no legally binding instruments that would oblige States to adopt identical practices. In 2000, the adaptation of the Amsterdam Treaty marked a cornerstone for the formation of Common European Asylum System transferring asylum policy from third pillar of intergovernmental cooperation to a matter of Justice and Home Affairs as the First Pillar of Community Law. However, just after the Treaty of Amsterdam, in 2000, there were several discrepancies in the determination of refugee status among Member States. For instance, some states like France, Germany and Spain awarded refugee status for persecution perpetrated by non state agents only when the authorities *tolerate* or *encourage* the persecution, but not when the same authorities *want to* but *cannot* offer protection. The same situation will however allow an asylum seeker to obtain refugee status in Austria, Belgium, Denmark, Finland, Ireland, Italy, the Netherlands, Sweden and the United

[285] Lavenex, S.(2001), *Europeanization of Refugee Policies: Between Human Rights and Internal Security*, Aldershot: Ashgate Publishing Ltd, p. 3

Kingdom. [286] Taking these discrepancies into account, the Tampere Conclusions set the approximation of rules on the recognition of refugee and the content of refugee status as a short term priority for the establishment of a Common European Asylum System.

As discussed in Chapter II, the Qualification Directive was adopted to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection, and to ensure a minimum level of benefits is available in all Member States. By doing this, the Directive aimed to prevent secondary movement of applicants for asylum between Member States, where such movement is purely caused by differences in legal frameworks. However, by 2007, the European States were far from applying the common criteria for the determination of refugee status as it was reflected in ECRE's report , *Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered* of 2008 ''While states try to assign responsibility, asylum seekers wait for many months with their claims unheard, and some claims are never heard. Vastly differing refugee recognition rates create an 'asylum lottery': for example, over 80% of Iraqi asylum claims succeed at first instance in some Member States, versus literally none in some others.'' The Qualification Directive further granted refugees and those in need of other forms of protection common standard of rights such as the right to: non-refoulement, access to asylum application information, maintain family unity, obtain travel documents, employment, education, health and social welfare similar to that provided to nationals. It also granted access to accommodation, freedom of movement within the Member States and access to integration facilities under the same conditions and restrictions as those provided for other third country nationals legally resident in their territories.

As referred during the thesis study, the Directive has been a good step for the approximation of national legislations and application of common standards in terms of reception of refugees in the European Member States. However, the Qualification Directive referred only to refugees of third country nationals and stateless persons excluding nationals of European Union. This kind of approach was not only discriminatory but also was the breach of Article 3 of the 1951

[286] European Parliament, (2003), Directorate-General for Research, Research Paper, *Asylum in the EU member States*, Civil Liberties Series, LIBE 108 EN.

Geneva Convention, which would have greater repercussions as the EU enlarges.[287] Although the EU was in view that EU Member States were respectful to human rights of 'EU citizens' and was fully implementing human rights instruments, the approach of excluding some nationals from the qualification of refugee status is contradictory to the intentions of the 1951 Geneva Convention given that the core principle is to afford refugee status to whomever that will be persecuted based on five criteria, including that of nationality (Article 1) and that it must be applied without discrimination (Article 3) In view of the Qualification Directive, when Turkey becomes a member of the EU, it would be considered as a safe country of origin and asylum applications of Turkish nationals would not be assessed with regard to this principle. However, considering that many Turkish nationals are asylum seekers in many countries[288], it is problematic how the EU will cope with this ambiguous situation. This constraint reflects one of the asylum dilemmas in EU-Turkey's harmonization process and the challenges awaiting Turkey during the EU pre-accession process.

As discussed in Chapter II, rights granted to asylum seekers vary between EU Member States. These kind of differences span across many rights such as that to freedom of movement, financial assistance, health care services, and education. These discrepancies were reflected in Chapter II in a detailed manner. As illustrated in Chapter II, the Member States were far from implementing common standards of rights to asylum seekers the overcome of these discrepancies required fully commitment to the Council Directives on the way to the establishment of CEAS.

Another Directive that has been discussed in Chapter II was the Directive on procedures in Member States for granting and withdrawing refugee status, which aimed to establish minimum standards on this issue. This Directive has been criticized on several aspects. As discussed above, the first criticism was with regard to its limited application of refugee definition covering only nationals of

[287] *ECRE Information Note on the Council Directive on minimum standards for the qualification of third country nationals and stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted*, 2004/83/EC, 29 April 2004, pg5.

[288] During the first half of 2008, Turkey was the tenth country, with 1,266 applications, on the list of Top-40 countries based on applications lodged in Europe Union by origin. Iraq retained the first rank with 5,964 applications. UNHCR (2008), *Asylum Levels and Trends in Industrialized Countries First Half 2008, Statistical Overview of Asylum Applications Lodged in 38 European and 6 Non-European Countries*, p.13.

third countries and stateless persons and excluding nationals of the European Union. This refugee definition was inconsistent with the definition of the 1951 Geneva Convention and reflected a dilemma of the Common European Asylum System since it was a breach of Article 1 and 3 of the 1951 Convention. Another critic has been raised with regard to the right to remain in Member States pending the examination of an application. The Directive allowed asylum seekers to remain in territory of Member States until the first instance decision has been taken. In other words, asylum seekers were not allowed to remain in Member States at appeal process. In view of this principle, the right to appeal becomes meaningless if it is to be granted to a refugee after he/she is sent to a country where they would be at risk of persecution. As discussed in Chapter II, asylum-seekers should be accorded the right to remain in the territory of the country of asylum until a final decision has been reached in order to prevent possible risks of non-refoulement and/or to torture or inhuman or degrading treatment. By adopting this principle, the European Union violates the main safeguard of asylum seekers, their right to non-refoulement which has been guaranteed under Article 33 of the 1951 Geneva Convention and Article 3 of ECHR. The Directive on procedures in Member States for granting and withdrawing refugee status transferred London Resolutions at the Community level and re-affirmed application of 'safe third country', 'safe country of origin', 'manifestly unfounded applications' principles. The Directive required accelerated procedures for the assessment of claims which fall under one of the above cited principles, in other words, allowed Member States to reject applications without a full assessment of claim on the basis of these three principles. As reflected above, 'safe third country' and 'safe country of origin' principles allow Member States to send an asylum seeker to a third country where he could seek asylum before reaching the borders of the EU or to the country of origin where it is believed that he would not face a risk of persecution. This thesis advocates that no country should be labeled as 'safe country' for all asylum seekers, since it is dangerous to assume that every individual would not face persecution or refoulement in a country which is labeled as safe. A decision on the safety of a country must always be reached with an individual assessment of claim and not generally accepted safety conditions. In addition to that, refugee law is applicable to individuals, not to what happens generally in a country. In addition, it is worth noting that human rights situations change rapidly and therefore listing 'safe country of origins' could have a misleading effect in the assessment of well-founded fear of persecution of asylum seekers. As illustrated above, European

Union have adopted several principles that can lead the refoulment of people in need of protection.

In the light of what has been discussed above, the 1951 Geneva Convention is far from being a guideline for the adaptation of EU wide refugee policies. Instead, it has been an impediment in the implementation of their restrictive asylum policies with immunity without the respect of asylum seekers' protection needs. The EU's asylum policy inclines to 'shift' its burden to third countries and countries of origin with the application of above cited principles. In addition to all above, the EU failed to introduce an effective burden sharing mechanism during its 15 years of asylum harmonization process. For instance in 2006, annual asylum applications lodged in Greece was 12,267 whereas number of asylum applications in Luxembourg was only 524.[289] Still, countries at external border of the EU carry the highest burden both in terms of asylum applications and border control.

Chapter II provided two conclusions with regard to 'so-called' European Union Common Asylum Policy. The first was that the EU did not have a common asylum policy since it was far from implementing common standards in terms of reception conditions and assessment of refugee claims. The second was the EU's strict position in keeping 'unwanted' asylum seekers and refugees outside the borders of the EU and adopting several principles in order to legitimize this position. Despite of these concerns, European Common Asylum System was an important step for the establishment of common standards for refugees and asylum seekers in the EU. These developments would benefit refugees and asylum seekers remaining in the European Member States but also benefit those remaining in the candidate countries to the EU. Candidate Countries to European Union are expected to adopt the EU Asylum Acquis into their national legislation as a prerequisite of full membership. Turkey as other candidate countries has to adopt the EU acquis into its legislation for full membership prospects.

As discussed in Chapter III, Turkey is one of the countries maintaining optional geographical limitation of the 1951 Geneva Convention. As an outcome of this geographical limitation Turkey provides international refugee protection only to

[289] UNHCR (2008), *Asylum Levels and Trends in Industrialized Countries, 2007, An Overview of Asylum Applications Lodged in Europe and Selected Non-European Countries*, p.15.

European nationals excluding non-European nationals from the scope of this protection. The Turkish government did not have asylum legislation until 1994 but was regulating the status of asylum seekers and refugees with the legislations applicable to foreigners. Asylum movements to Turkey until the end of 1980s were mainly comprised of European asylum-seekers. As reflected in Chapter III, Turkey's asylum policy prior to mid 1990s was to grant temporary residence to those perceived to be of Turkish descents and culture and to facilitate their naturalization instead of granting them refugee status. Turkey, by doing this, avoided its obligations deriving from the 1951 Convention and perceived these European asylum seekers as guests instead of refugees.

The 1994 Regulation marked a milestone in Turkey's asylum policy since for the first time the Turkish government undertook to conduct parallel 'refugee status determination interviews' with UNHCR. Although this was an important step for the Turkish government, local integration was still not a durable solution for refugees and UNHCR was responsible for their resettlement to a third country.

As an outcome of the limited application of the 1951 Geneva Convention, non-European refugees were not granted any social and economic rights provided in the Geneva Convention given that they were not considered as refugees by the Turkish government. In other words, although European refugees were able to enjoy social and economic rights stipulated in the 1951 Geneva Convention, non European refugees and asylum seekers were excluded from these rights and were dependant on UNHCR assistance. As illustrated in Chapter III, non-European refugees and asylum seekers were not allowed to work in Turkey, they were not granted any social or financial assistance as well as any accommodation opportunities. Their exclusion from these basic rights rendered them leading a life in miserable conditions during their stay in Turkey. In terms of employment related rights it is worth to note that although non-European refugees were granted *de facto* right to enjoy employment but in practice the majority of these asylum applications have been rejected. In respect to the 1950 Law on Residence and Travel, asylum seekers have to reside in places designated by the Ministry of Interior. Asylum seekers have to regularly present themselves to the local police, daily, weekly or monthly basis. In other terms, asylum seekers and refugees do not have the right to enjoy freedom of movement during their stay in Turkey. In addition, the Turkish government does

not provide any accommodation facilities to asylum seekers and refugees. The inability of non-European asylum seekers and refugees to enjoy social and economic rights in Turkey reflects Turkey's asylum dilemma. So far, Turkey had 44 European refugees whereas there were 15 562 non-European applications in progress (6 622 Iraqis, 5 449 Iranians, 1 260 Somalis, 1 279 Afghans among others). By maintaining geographical limitation Turkey provides international protection stemming from the 1951 Convention to only %0.2 of total asylum applications. In other words, despite of being a signatory state of the 1951 Convention, it has failed to implement the principles behind it.

This strand in Turkey's asylum policy is expected to be overcome with the EU harmonization process. As stated earlier, during the EU harmonization process, Turkey as any other candidate country will have to adopt EU acquis into its national legislation. The harmonization of EU asylum policy will set out minimum protection standards for asylum seekers and refugees so that none of the Member States and Candidate Countries can go below this threshold. The EU accession will lead Turkey to establish a working asylum system, expertise institutions responsible for Refugee Status Determination, reception and integration mechanisms for refugees.

Chapter IV provided objectives to be fulfilled by the Turkish government for the alignment of EU asylum acquis into Turkish national legislation. These objectives were presented in reference to the Accession Partnership Documents covering the period between 2001 and 2007. Chapter IV also provided Turkey's standpoint to the objectives set by the European Council giving reference to National Plan for the Adoption of the EU Acquis and the National Action Programme as the main guidelines. The European Union, in the medium term, asked Turkey to lift geographical limitation and to develop accommodation facilities and social support for refugee and asylum seekers. These two developments would be no doubly for the benefit of refugees and asylum seekers in Turkey given their aforementioned vulnerability.

Turkey stated in the National Programme for the Adoption of the EU Acquis that it would consider about lifting the geographical reservation on the 1951 United Nations Convention Relating to the Status of Refugees in a manner that would not encourage large scale refugee inflows from the East, when the necessary legislative and infra-structural measures are introduced, and in the light of the

attitudes of the EU Member States on the issue of burden-sharing. In addition to lifting of geographical limitation Turkey has committed that 'accommodation facilities and social support for refugees will be further developed with the assistance of the UNHCR, the International Organization for Migration (IOM), and NGOs, giving priority to single women, women as heads of household, orphans and separated or unaccompanied children, as well as other especially vulnerable individuals, such as the infirm or the victims of domestic violence.' In terms of financial assistance, Turkey stated that 'Governorships of provinces in which the majority of refugees and asylum-seekers are accommodated will continue to provide comprehensive support to refugees and asylum seekers with assistance such as food, lodging and health services through the Social Support and Solidarity Fund. Municipalities will continue to finance such services from their own budgets to the extent possible'. An improvement to asylum seekers' social rights in Turkey was introduced through a circular of the Ministry of the Interior, in July 2002, related to the provision of health care to asylum seekers recognized as such by the Turkish authorities. Since July 2002 these asylum seekers have gradually been provided with green cards for medical expenses (diagnosis, treatment and medicine)

Turkey scheduled a timeline of 2005 for necessary institutional developments including; ''Identifying training needs of the personnel and developing training programmes based on the needs identified, establishing a single and centralized institution under the Ministry of Interior specialized in the determination of refugee status and fulfillment of the legislative; administrative and infrastructural needs for developing its operational capacity; establishing refugee guesthouses and refugee shelter centres; establishing reception centers for asylum seekers; developing social support mechanisms for refugees (education, heath, interpretation services and employment); social support mechanisms for vulnerable refugees; recruitment and training of personnel such as experts for psycho-social support, interpreters etc.'' These institutional developments would certainly help to solve daily vulnerabilities of refugees and asylum seekers and thereof their adoption into Turkey's asylum system would affect positively the impoverished situation of asylum seekers and refugees awaiting their result and resettlement in Turkey.

In 2005, Turkey had a poor record in the field of Justice and Home Affairs. Although the Commission stated that the non-refoulment principle was

respected in Turkey in general, it also pointed out breaches of the principle in some incidents. The Commission stated that there continued to be reports that some asylum seekers at the border are prosecuted for illegal entry and deported summarily. Aliens who were apprehended away from the border were not always permitted to submit an application for asylum, as they were considered to have acted in bad faith; the UNHCR encountered considerable difficulty in gaining access to such persons while in detention. There were reports that asylum seekers of European origin who were not covered by the geographic limitation to the Geneva Convention, notably Chechens and Belarusians, encountered considerable difficulties in submitting asylum applications.

Turkey failed to fulfill its commitments as set out in the NPAA of 2003. By the end of 2005, there was no progress for the establishment of guesthouse and refugee shelter, development of social support mechanisms, establishment of a centralized, single institution for the determination of refugee status as well as the adoption of Turkish Law on Asylum. The major progress of the Republic of Turkey was the adoption of a Turkish National Action Plan for the Adoption of the EU Acquis in the Field of Asylum and Migration (NAP) in March 2005, for the alignment of EU asylum acquis into Turkish national law through a specific timeline and detailed framework. The purpose of the NAP was to align Turkish Legislation and System on Asylum, Migrants and Aliens with the EU Acquis and systems within the process of Turkey's accession negotiations with the EU. The NAP set out legal arrangements that should be put into force within the harmonization process and investments for the establishment of administrative institutions and physical infrastructure in order to align Turkish asylum/immigration legislation and system within the EU Acquis.

The NAP defined 'refugee' and 'asylum seeker' similar to the 1994 Regulation. Although geographical limitation was referred in the definition of a 'refugee', asylum seekers were left out of this geographical scope. As reflected in Chapter IV, the most tricky point in the National Action Plan was no doubly 'lifting of the geographical limitation.' Turkey pronounced the legal basis of its geographical limitation in reference to the 1951 Convention stipulating that 'Each state may provide for limitations on any provision of the Convention other than Articles 1,2,4,16,33 and 36-46 at the stage of signing, ratification or accession' under Article 42 of the afore mentioned Convention. In this respect, Turkey published a declaration on the basis of Law No 359, asserting that 'she would admit only

aliens coming from Europe and seeking asylum in Turkey due to the geographical region she is located in and by using her right to impose a limitation foreseen as to refugee status determination (on the ground of geographical limitation) due to its concerns of mass influx of asylum seekers. Turkey overtly stated that lifting geographical limitation to the 1951 Convention would take place only in line with the completion of the EU accession negotiations. Turkey set preconditions for lifting geographical limitation and asserted that it would lift geographical limitation only if necessary amendment to the legislation and infrastructure is made in order to prevent the direct influx of refugees to Turkey during the accession phase, and if the EU countries demonstrate their sensitivity in burden sharing. In terms of equal burden sharing mechanism Turkey requires burden sharing of 'some asylum seekers admitted to the procedure in Turkey, some of the refugees, some of the aliens arriving in Turkey during mass population movements and receiving temporary protection'. The main emphasis in the NAP was given to the establishment of equal and fair burden sharing mechanism between the EU and Turkey. Turkey stated that she expected an increase in the number of refugees arriving to Turkey following the lifting of the geographical limitation. Therefore, Turkey expressed the need for the establishment of 'reception and accommodation centers for asylum seekers, refugee guest houses, accommodation centers and return centers; establishment of a permanent training academy for the regular training to be provided to personnel working in the field of asylum and migration; establishment of a costs of financing required for the integration of migrants and refugees in Turkey.'

Turkey envisaged submitting the proposal for lifting geographical limitation to Turkish Grand National Assembly at the earliest possible in 2012 in line with the completion of Turkey's negotiations for accession to the EU following the completion of abovementioned projects and fulfillment of the abovementioned conditions. Turkey overtly stated its unwillingness to lift geographical limitation before the completion of accession negotiations and fulfillment of above mentioned conditions covering technical, physical infrastructure and establishment of equal burden sharing mechanism. As Kirisci argues, Turkey set

2012 as a timeline since this is considered as the date by which Turkey will understand genuineness of EU accession prospects. [290]

As illustrated in Chapter IV, harmonization of the EU asylum acquis is expected to bring improved human rights and social and financial assistance to asylum seekers and refugees during their stay in Turkey. For instance, in terms of freedom of movement, in the current asylum system, upon their registration with responsible governorates, asylum seekers are sent to satellite cities where they are asked to reside until their resettlement to another country. Asylum-seekers are not free to change their residence place and are mostly asked to present themselves to the police on daily or monthly basis. With the harmonization of the EU acquis, current system will change. National Action Plan requires that 'people, who have been granted the refugee status, or found to be eligible for subsidiary or temporary protection, and have completed essential integration programs, shall be allowed to decide where to reside in order to ensure their full integration with the Turkish society. Article 17 of Law No. 5683 on Aliens should be rearranged within this framework.' In this respect, asylum seekers and refugees will be free to choose their place of residence and free to move within the country. In terms of health care services, as stated in the circular on health care services issued by the Ministry of Interior in 2002, persons who are refugees or asylum seeker should benefit from the health care services free of charge. Refugees and asylum seekers will be able to enjoy health care services free of charge for which asylum seekers were asked to pay prior to the harmonization process within the EU. [291] In addition, the National Action Plan requires that asylum seekers, refugees and other aliens to be subject to integration should be financially self-sufficient and shall not be in conflict with the cultural life. Whether such people have the desire and will to adapt to the Turkish society should be studied. The local government or the provincial organizations of the central government (Directorates for Public Education Centers, etc.) shall provide the opportunity to the following individuals to take part in vocational courses (such as hairdressing, sewing, embroidery courses, etc.) those who have been issued long term residence permits in Turkey, family members of those individuals arriving to Turkey within the scope o family reunification, asylum seekers/refugees, and those enjoying subsidiary

[290] Kirisci, K. (2007), Border Management and EU-Turkish Relations: Convergence or Deadlock, Euro-Mediterranean *Consortium for Applied Research on International Migration, Research Report*, p.20.
[291] Ibid.

protection. The NAP also requires that Law No. 4817 on the Work Permits of Aliens should incorporate more facilitating provisions for asylum seekers and refugees than for other aliens having been issued residence permits in Turkey in order to guarantee the access of asylum seekers and refugees to the labor market.[292] Furthermore, third country citizens should enjoy social, economical and cultural rights, except for the right to elect and to be elected, to the extent close that of the citizens of the country. At last but not least, naturalization procedures should be made easier for those, who are not of at least one nationality and willing to be naturalized.

In the light of these future developments, it is highly likely that the life of asylum seekers and refugees will encounter significant improvements upon the completion of the objectives set out in the NAP. In terms of social and economic rights, the NAP would be for the benefit of refugees and asylum seekers and a solution to their vulnerabilities. Therefore, Turkey's accession to the EU will have positive effects on refugees and asylum seekers lives and enable them to enjoy international protection in a State where they would be able to live in freedom and dignity. Turkey's achievements of the objectives set in the NAP remained low in the year of the publication of this study. The main achievement in 2006 was the lifting of 10 days time limitation for lodging an asylum claim through the Regulation to amend the Regulation on the Procedures and Principles Related to Population Movements and Foreigners Arriving in Turkey either as Individuals or in Groups Wishing to Seek Asylum either from Turkey or Requesting Residence Permission in order to Seek Asylum from Another country. With this amendment asylum seekers were no longer subject to a time limitation for the submission of their asylum application. Another progress has been achieved in 2007 when Turkey published new asylum brochures in seven languages English, Russian, French, Somali, Arabic, Persian and Kurdish which provided explanation of asylum procedures in Turkey including the right of the legal representative and right to access to file.

Turkey's Draft National Programme for the adoption of the EU Acquis (2008) is prepared and waiting for ratification. Turkey in its Draft NPAA admitted to harmonize EU legislations, by the end of 2010, through Draft Asylum Law including the legislations that were discussed during the thesis study. The

[292] Ibid

legislations to be adopted by Turkey as a prerequisite for EU membership included Convention for determining the state responsible for processing asylum claims in Member States (date of signature: 15 June 1990, date of entry into force: 1 September 1997) Dublin Convention, Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining asylum application lodged in one of the Member States by a third-country national, Council Directive 2001/55/EC of 20 July 2001 on the minimum standards for providing 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, Council Directive 2003/9/EC of 27 January 2003 laying down the minimum standards for the reception of asylum seekers. [293] Despite of its commitment of adopting these legislations, Turkey overtly stated that it would not lift geographical limitation of the 1951 Geneva Convention without a full membership perspective. Turkey in the NAP re-expressed its concerns with regard to possible mass influxes giving reference to past experiences and statistical data.

There were number of countries that lifted geographical limitation during the accession process, these countries include Hungary, Latvia and Malta. However, unlikely to these countries, Turkey has great concerns with regard to the EU's commitment to Turkish full membership. The worst scenario for Turkey would be lifting geographical limitation without a full EU membership. A high level MOI officer expressed his concern over the EU full membership stating that 'his heart sank when his Hungarian counterpart simply said that lifting geographical limitation was never a major concern for them because they were always sure that they would become a member of the EU at the end.' [294]

Another concern for the Turkish officials was the lack of equal burden sharing mechanisms within the current EU asylum legislation. Owing to its geographical location Turkey risks of becoming a buffer zone between the EU and asylum producing countries, such as Iraq, Iran, and Afghanistan. In the light of EU asylum legislations, it is likely that, when Turkey becomes an EU Member State, or harmonize the EU asylum acquis and sign Readmission Agreements without

[293] For details please see Turkish and English versions of the National Programs on the Adoption of the Acquis at www.deltur.cec.eu.int or www.abgs.gov.tr.
[294] Kirisci, K. (2007), *Ibid,* pg21.

full membership, she will be the country carrying highest burden of asylum applications owing to the implementation of 'first country of asylum' and 'safe third country' principles. Taking into consideration that Turkey has always been a transit country for asylum seekers to their way to Europe, it is highly likely that without a full membership prospect, Turkey will become a country carrying the highest burden of asylum applications since it would be considered as a safe third country where asylum seekers could seek asylum prior to their entry to Europe. In addition to that, regarding to Dublin Convention, Turkey will be one of the countries carrying the highest burden of asylum applications given that asylum seekers are expected to submit their application in the country through which they entered Europe. Turkey will be the responsible country for the external border control of the EU and will be punished by assessing higher asylum applications in case it fails to prevent entry of asylum seekers in the EU through Turkish borders.

Lack of clarity into EU full membership prospect and unequal burden sharing mechanism among EU Members States were the main obstructions discouraging Turkey in aligning its national legislation within the EU acquis and lifting geographical limitation before the full membership of the EU. Although Turkey has valid reasons for not lifting geographical limitation without full membership and has no obligation to lift it with regards to international refugee legislation, from a humanitarian perspective, Turkey has to extend its international protection to non-European nationals in order to meet needs of current asylum population in the country. Turkey can no longer ignore protection, social and economical needs of non-European asylum seekers and refugees and ought to solve this problem providing them with international protection and adequate social and economic rights which would enable them to pursue a life in dignity and freedom.

Despite of the negative effects of the harmonization of the EU asylum acquis, such as the higher possibility of becoming a buffer zone between the EU and asylum producing countries, the harmonization process within the EU will have positive aspects on Turkey's asylum policy in terms of the improvement of social and economic rights of asylum seekers and refugees as well as the extension of refugee protection to non-European nationals which would meet the social and protection needs of current asylum population in Turkey. Turkey is now in a

position to decide whether to respond protection needs of asylum seekers and refugees in the country or to continue its current policy.

Turkey is now facing with two asylum dilemmas. One is the 'internal dilemma' deriving from its current asylum policy, limiting its refugee protection to European nationals and ignoring large number of non-European asylum seekers which reflects the reality of asylum population in the country. Another asylum dilemma of Turkey has external dimensions deriving from its harmonization process within the EU. Although Turkey puts its full EU membership as a prerequisite for the lifting geographical limitation the EU requires the opposite denying Turkey's full membership without lifting of geographical limitation of the 1951 Geneva Convention. In this respect, it is hard to say whether EU harmonization process would be a solution for Turkey's asylum dilemma given that EU harmonization is a dilemma in itself.

Overall, EU harmonization will benefit asylum seekers in Turkey but still fall short of the principles of the international framework. Instead, it is the EU principles that require re-visiting. While appreciating that they are a consequence of societal pressures on government of Western European states resulting from previous refugee flows, there should be an ethical rethink of them from a humanitarian perspective and the concept of burden sharing within the international framework. Only if European States revise their asylum policy with respect to human rights of asylum seekers and equal burden sharing mechanisms then harmonization of the EU asylum acquis into Turkish legislation would be a solution to Turkey's asylum dilemma.

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APPENDIX

EU ASYLUM ACQUIS

A. Legislative acts adopted after entry into force of the Amsterdam Treaty (1st May 1999)

Council Decision 2004/927/EC of 22 December 2004 providing for certain areas covered by Title IV of Part Three of the Treaty establishing the European Community to be governed by the procedure laid down in Article 251 of that Treaty OJ L 396 , 31 December 2004 p. 45;

Council Decision 2004/904/EC of 2 December 2004 establishing the European Refugee Fund for the period 2005 to 2010 OJ L 381 , 28 December 2004 p. 52;

Regulation (EC) No 491/2004 of the European Parliament and of the Council of 10 March 2004 establishing a programme for financial and technical assistance to third countries in the areas of migration and asylum (AENEAS), OJ L 80 of 18 March 2004, p. 1;

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 of 30 September 2004, page 12;

Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third country national, OJ L 50 of 25.02.2003, p.1;

Commission Regulation (EC) No 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L 222 of 05 September 2003, p. 1;

Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, OJ L 31 of 06 February 2003, p. 18;

Council Decision 2002/463/EC of 13 June 2002 adopting an action programme for administrative cooperation in the fields of external borders, visas, asylum and immigration (ARGO programme) OJ L 161, 19 June 2002 p. 11;

Council Decision 2004/867/EC of 13 December 2004 amending Decision 2002/463/EC adopting an action programme for administrative cooperation in the fields of external borders, visas, asylum and immigration
(ARGO programme) OJ L 371 , 18 December 2004 p. 48;

Council Decision 2002/817/EC of 23 September 2002 on the conclusion of the Convention between the European
Community and the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) concerning aid to refugees in the countries in the Near East (2002 to 2005) OJ L 281, 19 October 2002 p. 10;

Council Decision 2002/223/EC of 19 December 2001 on the conclusion of an Agreement in the form of an Exchange of Letters between the European Community and the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) concerning additional funding in 2001 under the current EC-UNRWA Convention for the years 1999 to 2001 OJ L 075 , 16 March 2002 p. 46;

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, OJ L 212 of 07.08.2001, p. 12;

Council Decision of 28 September 2000 establishing a European Refugee Fund; OJ L 252 of 6 October 2000, p.12;

Commission Decision 2002/307/EC of 18 December 2001 laying down detailed rules for the implementation of Council Decision 2000/596/EC as regards management and control systems and procedures for making financial corrections in the context of actions co-financed by the European Refugee Fund (notified under document number C(2001) 4372) OJ L 106 , 23/04/2002 p. 11;

Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention, OJ L 316 of 15 December 2000 p.1;

Council Regulation (EC) No 407/2002 of 28 February 2002 laying down certain rules to implement Regulation (EC) No 2725/2000 concerning the establishment of "Eurodac" for the comparison of fingerprints for the effective application of the Dublin Convention. OJ L 62 of 05.03.2002 p. 1.

B. International Agreements

Council Decision 2001/258 of 15 March 2001 concerning the conclusion of an 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 Iceland or Norway, OJ L 93 of 03 April 2001, p. 38;

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 93 of 03 April 2001, p. 40.

a) Indicative list of conventions and instruments to which the new Member States must accede in accordance with Article 3(4) of the Act of Accession (see annex)

[Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities, signed in Dublin on 15 June 1990, entry into force 1st September 1997, OJ N° C 254 of 19 August 1997, p. 1][295];
Measures taken for the application of the above Convention:

Decision No 1/97 of 9 September 1997 of the Committee set up by Article 18 of the Dublin Convention of 15 June 1990, concerning provisions for the implementation of the Convention, OJ N° L 281 of 14 October 1997, p. 1 to 25;

Decision No 2/97 of 9 September 1997 of the Committee set up by Article 18 of the Dublin Convention of 15 June 1990, establishing the Committee's Rules of Procedure, OJ N° L 281 of 14 October 1997, p. 26;

Decision 1/98 of the Article 18 Committee of the Dublin Convention, concerning provisions for the implementation of the Convention, OJ L196 of 14 July 1998;

Decision No 1/2000 of 31 October 2000 of the Committee set up by Article 18 of the Dublin Convention concerning the transfer of responsibility for family members in accordance with Article 3(4) and Article 9 of that Convention; OJ L 281 of 07 November 2000, p.1.

*b) Indicative list of agreements, conventions and protocols to which the new Member States must accede (obligations arising indirectly from Article 2 of the Act of Accession) (see annex)**2***

Convention relating to the Status of Refugees (Geneva, 28 July 1951);
Protocol relating to the Status of Refugees (New-York, 31 January 1967).

[295] This convention has been replaced by the Dublin II regulation. However, since this regulation is - as Title IV instrument - not applicable to
Denmark, the Dublin Convention still remains in place between Denmark and all other Member States until a specific agreement concerning Denmark's participation will be concluded. Such agreement will be signed and is expected to enter into force shortly.

C. Other acts adopted before entry into force of the Amsterdam Treaty (1st May 1999)

Council Resolution 97/C 221/03 of 26 June 1997 on unaccompanied minors who are nationals of third countries : OJ N° C 221 of 19 July 1997, p. 23 to 27;

Council Decision of 26 June 1997 on monitoring the implementation of instruments adopted concerning asylum, OJ N° L 178 of 7 July 1997, p. 6;

Joint Position of 4 March 1996 defined by the Council on the basis of Article K.3 of the Treaty on European Union on the harmonized application of the definition of the term 'refugee' in Article 1 of the Geneva Convention of 28 July 1951 relating to the status of refugees: OJ N° L 63 of 13 mars 1996;

Council Decision of 4 March 1996 on an alert and emergency procedure for burden-sharing with regard to the
admission and residence of displaced persons on a temporary basis OJ L 063 , 13/03/1996 p. 10;

Council Decision of 23 November 1995 on publication in the Official Journal of the European Communities of acts and other texts adopted by the Council in the field of asylum and immigration OJ C 274 , 19/09/1996 p.1;

Council Resolution of 25 September 1995 on burden- sharing with regard to the admission and residence of displaced persons on a temporary basis OJ C 262 , 07 October 1995 p. 1;

Council Resolution of 20 June 1995 on minimum guarantees for asylum procedures: OJ N°274 of 19 September 1996, p. 13;

Resolution adopted 30 November 1992 on a harmonised approach to questions concerning host third countries:
Document WG I 1283;

Resolution adopted 30 November 1992 on manifestly unfounded applications for asylum: Document WG I 1282 REV 1;

Conclusions adopted the 30 November 1992 concerning countries in which there is generally no serious risk of persecutions: Document WG I 1281.