

Against All Odds: Turkey’s Response to “Undesirable but Unreturnable” Asylum-Seekers

Didem Doğar*

ABSTRACT

This article critically analyses Turkish legislation and practice regulating the status of “undesirable but unreturnable” asylum-seekers, who are suspected and/or convicted of criminality but cannot be removed from Turkey due to the principle of *non-refoulement*, questioning how the issue is tackled by the Turkish State. The current political situation in the region having forced it to change and update its legislation, it has created a temporary protection regimen to handle refugee influxes, a subsidiary protection regime, and other categories of staying permits for foreigners who cannot be removed from Turkish territory. Beyond the political situation, its legal and judicial initiatives are, however, affected by its international and regional legal obligations, as European Court of Human Rights case law demonstrates. There is limited information as to how many exclusion-triggered cases are processed and how many refugees are excluded and what happens to those who are excluded after this decision. Furthermore, Turkey’s situation might be untenable, as it is the main transit hub for foreign terrorist fighters and people fleeing the Syrian and Iraqi conflicts.

KEYWORDS: refugees, foreign (terrorist) fighters, Turkey, Middle East

1. INTRODUCTION

Turkey shares borders with the war-torn countries of Syria and Iraq. While hosting over 3,000,000 persons in need of international protection, the largest refugee population in the world,¹ Turkey simultaneously faces the security challenges of frontline States, including the presence of foreign fighters. This study examines one important

* Didem Doğar, LL.M. (McGill), Doctoral candidate at McGill University Faculty of Law. Email: didem.dogar@mail.mcgill.ca. I am very grateful to Nicolas Leistenschneider for reading and commenting on different versions of this article. I would also like to acknowledge the invaluable help of Dr David J. Cantor for his comments and his editing of this article. Finally, I would like to thank the anonymous reviewer(s) of the *Refugee Survey Quarterly* for their helpful comments. An earlier version of this article was presented at an international conference “Undesirable and Unreturnable? Policy Challenges around Excluded Asylum Seekers and Other Migrants Suspected of Serious Criminality but Who Can not be Removed” organised by the Institute of Advanced Legal Studies, University of London, 25 and 26 Jan. 2016.

1 World Bank, *Turkey’s Response to the Syrian Refugee Crisis and the Road Ahead*, Policy Note, Washington, World Bank, Dec. 2015, 2; Inter-agency Information Sharing Portal, *Syria Regional Refugee Response*, last updated 19 May 2016, available at: <http://data.unhcr.org/syrianrefugees/regional.php> (last visited 27 May 2016); DGMM, *Annual Statistics Showing International Protection Applications*, Ankara, DGMM, 2016, available at: http://www.goc.gov.tr/icerik6/uluslararasisikorumu_363_378_4712_icerik (last visited 12 Dec. 2016).

aspect of the overlap between these two issues, namely the situation of asylum-seekers who are “undesirable” in the eyes of the Turkish authorities due to their suspected serious criminality or security but who also cannot be removed from Turkey due to the principle of *non-refoulement*.²

The article begins by explaining its methodology, highlighting the particular challenges in gathering official data in this tense and highly politicised context. It then proceeds to outline the refugee situation in Turkey and the main features of Turkey’s asylum system, which was radically overhauled in 2014. Against this background, it then examines how Turkish law and policy both creates a problem of “undesirable but unreturnable” asylum-seekers and provides certain tools for addressing the situation of such persons. It concludes with a preliminary empirical analysis of the dimensions of the problem in Turkey and the main profiles for whom further policy measures may be required.

2. METHODOLOGY

Repeated efforts were undertaken by the author to obtain detailed empirical data from official sources. In particular, petitions by the author under the Right to Information Act No. 4982 for detailed statistical data from the Directorate General of Migration Management (DGMM) of the Turkish Ministry of the Interior containing specific questions concerning (1) exclusion from refugee status and post-exclusion measures, and (2) deportation and banning of foreign fighters were declined,³ as were requests to the Ministry of Justice concerning trials of asylum-seekers under the universal jurisdiction clause of the Turkish Criminal Code (TCC).⁴ Similar requests made by the author to the office of the United Nations High Commissioner for Refugees (UNHCR) in Turkey did not receive a response.

In this regard, it is important to emphasise that Syrian refugees are presently a highly sensitive political topic in Turkey, which complicates research on the topic. Indeed, on 10 April 2014, the Ministry of the Interior issued a directive to academics stating that prior approval from relevant ministries would be required in order to

2 Art. 33(1) of the Convention relating to the Status of Refugees, 189 UNTS 150, 28 Jul. 1951 (entry into force: 22 Apr. 1954) explains the principle of *non-refoulement*. Accordingly, States are obliged not to expel refugees to the frontiers of territories where their life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group, or political opinion. The principle of *non-refoulement* is also applicable to asylum-seekers before being granted refugee status. UNHCR, *UNHCR Note on the Principle of Non-Refoulement*, Geneva, UNHCR, 1997, available at: <http://www.refworld.org/docid/438c6d972.html> (last visited 12 Dec. 2016).

3 On the former point, the DGMM declined to share any general statistics about the excluded or excludable individuals in Turkey since my requests require further research. According to Art. 7 of the Right to Information Act No. 4982, the authorities can decline official requests requiring further research by the relevant institution. Correspondence with the DGMM dated 5 Jan. 2016 numbered 95104841-042-270. The DGMM declined to share any information on the latter point on the basis of confidentiality and State secrets. Arts. 6 and 16 of the Right to Information Act No. 4982. Correspondence with the DGMM dated 18 Jan. 2016 numbered 95104841-042-1860.

4 The Ministry of Justice declined my official requests for information on the grounds that they required further research. According to Art. 7 of the Right to Information Act No. 4982, the authorities can decline official requests requiring further research by the relevant institution. Information about the practice of Art. 13 was officially requested from the Ministry of Justice in Turkey, which is rejected by the Ministry. Correspondence with the Ministry of Justice dated 24 Dec. 2015 numbered 76608343-622-03-0344-2015-E.649/85877.

conduct any type of survey or fieldwork among Syrian refugees so as to protect their privacy in Turkey.⁵ This requirement was only lifted by the Superior Education Council in December 2015, although academics were not formally notified about this new decision.⁶

As a result, the present study is based principally upon doctrinal research into Turkish legislation, academic studies, reports of international or non-governmental organisations, and relevant cases from the European Court of Human Rights (ECtHR). Official statistical data concerning the number of foreigners in Turkey suspected of criminality is also cited where made publicly available by the Turkish authorities. These sources allow the broad outlines of the Turkish approach to “undesirable and unreturnable” asylum-seekers to be identified.

3. REFUGEES AND REFUGEE LAW IN TURKEY

The main refugee flows into Turkey come from the Middle East, with the vast majority of protection seekers from Syria, Iraq, and Afghanistan. Syrians are by far the largest refugee population in Turkey, with the Syrian conflict pushing 2,730,485 individuals into Turkey.⁷ As of June 2016, UNHCR statistics record Turkey as also hosting 271,466 asylum-seekers and refugees from countries other than Syria. After Syrians, Iraqis constitute the second largest asylum-seeking population in Turkey, with 123,584 registered Iraqi asylum-seekers and refugees, followed by Afghans and Iranians.⁸ The DGMM does not specify which nationals apply for international protection. In addition to Syrians, 64,232 foreigners applied to the DGMM for international protection in 2015.⁹ Of these, 3364 were accepted and 751 applications were rejected.¹⁰ As of 2015, there were a total of 216,349 applications for international protection.¹¹ However, the form of protection afforded to different categories of asylum-seekers under Turkish law varies according to their country of origin. This continues to be the case today, despite the fact that both the law and the institutional arrangements for refugee protection were significantly overhauled in 2014.

5 B. Kayaoğlu, “Turkey Restricts Academic Research on Syrian Refugees”, *Al Monitor*, 27 May 2015, available at: www.al-monitor.com/pulse/originals/2015/05/turkey-syria-government-restricts-academic-research.html#ixzz3wE1uxiCF (last visited 12 Dec. 2016); E.C. Dağlıoğlu, “Akademik özgürlüğe bir darbe de İçişleri Bakanlığı’ndan”, *Agos*, 21 May 2015, available at: www.agos.com.tr/tr/yazi/11641/akademik-ozgurluge-bir-darbe-de-icisleri-bakanligindan (last visited 12 Dec. 2015).

6 B. Karakaş, “2,5 milyon Suriyeli var, araştırma yok: Akademide fiili yasak sürüyor”, *Diken*, 25 Jan. 2016, available at: <http://www.diken.com.tr/25-milyon-suriyeli-var-arastirma-yok-akademide-fiili-yasak-suruyor/> (last visited 12 Dec. 2016).

7 DGMM, *Syrians under the Temporary Protection Regime*, Ankara, DGMM, 2016, available at: http://www.goc.gov.tr/icerik3/gecici-koruma_363_378_4713 (last visited 30 Jul. 2016).

8 Please see UNHCR monthly statistics for 2016; UNHCR, *UNHCR Turkey's Monthly Statistics as of January 2016*, Ankara, UNHCR, 2016, available at: [http://www.unhcr.org/turkey/uploads/root/tr\(49\).pdf](http://www.unhcr.org/turkey/uploads/root/tr(49).pdf) (last visited 30 Jul. 2016).

9 DGMM, *Annual Statistics Showing International Protection Applications*, Ankara, DGMM, 2016, available at: http://www.goc.gov.tr/icerik6/uluslararasıkoruma_363_378_4712_icerik (last visited 30 Jul. 2016).

10 *Ibid.*

11 *Ibid.*

3.1. Refugee law in Turkey

Turkey has ratified the 1951 Refugee Convention¹² and acceded to the 1967 Protocol relating to the Status of Refugees. However, since ratification, Turkey has maintained the geographical reservation¹³ to the application of these treaties, with the effect that “Turkey does not extend refugee status to persons fleeing conflicts or other situations outside Europe”.¹⁴ Since the majority of asylum-seekers arrive in Turkey from non-European countries and cannot receive refugee status due to the application of the geographical reservation,¹⁵ UNHCR has conducted refugee status determination (RSD) under its mandate for non-European asylum-seekers in Turkey for decades.¹⁶

Although certain decrees or circulars on refugees were issued by the Turkish Council of Ministers prior to 1994, the first general refugee policy in Turkey was created by Regulation No. 1994/6169 on the Procedures and Principles related to Population Movements and Aliens Arriving in Turkey (1994 Regulation).¹⁷ The 1994 Regulation provided the basis on which Turkey allowed persons in need of international protection to stay in Turkey on a temporary basis until their resettlement in a third country.¹⁸ The regulation also provided UNCHR with the authority to conduct RSD and facilitate resettlement for non-European refugees.¹⁹ It established the “parallel procedure” in Turkey,²⁰ according to which non-European asylum-seekers had to register on arrival with both the Ministry of the Interior and UNHCR,²¹ following which the ministry conducted its own RSD in order to grant refugees “temporary asylum status” in Turkey “while they wait for decisions from the UNHCR”.²²

12 The Convention was ratified by Turkey on 30 Mar. 1962.

13 “The instrument of accession stipulates that the Government of Turkey maintains the provisions of the declaration made under section B of article 1 of the Convention relating to the Status of Refugees, done at Geneva on 28 July 1951, according to which it applies the Convention only to persons who have become refugees as a result of events occurring in Europe, and also the reservation clause made upon ratification of the Convention to the effect that no provision of this Convention may be interpreted as granting to refugees greater rights than those accorded to Turkish citizens in Turkey.” Protocol relating to the Status of Refugees, 606 UNTS 267, 31 Jan. 1967 (entry into force: 4 Oct. 1967).

14 S. Bidinger, A. Lang, Y. Kuzmova, D. Hites, S.M. Akram & E. Noureddine, *Protecting Syrian Refugees: Laws, Policies, and Global Responsibility Sharing*, Boston, Boston University School of Law, 2015, 99 – 101.

15 *Ibid.*, 99.

16 Human Rights Watch (HRW), *Turkey Human Rights and the European Union Accession Partnership*, New York, HRW, September 2000, available at: <https://www.hrw.org/reports/2000/turkey2/index.htm#TopOfPage> (last visited 30 Dec. 2016).

17 Turkey, Regulation No. 1994/6169 on the Procedures and Principles related to Possible Population Movements and Aliens 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 (last amended 2006), 19 Jan. 1994, available at: www.refworld.org/docid/49746cc62.html (last visited 12 Dec. 2016) (1994 Regulation).

18 Bidinger, Lang, Kuzmova, Hites, Akram & Noureddine, *Protecting Syrian Refugees*, 101.

19 *Ibid.*

20 Mültecilerle Dayanışma Derneği, *Türkiye’de Mültecilerin Kabul Koşulları Hak ve Hizmetlere Erişimi-Uydu Kentler İzleme ve Raporlama Projesi*, İzmir, 2015, 16.

21 *Ibid.*

22 Helsinki Citizenship Assembly, *An Evaluation of UNHCR Turkey’s Compliance with UNHCR’s RSD Procedural Standard*, Istanbul, Helsinki Citizenship Assembly, Sep. 2007, 3.

After 20 years in operation, the 1994 Regulation was replaced by the Temporary Protection Regulation that came into force in October 2014, following the entry into force of the new Turkish Law on Foreigners and International Protection (Law No. 6458) in April 2014.²³ Despite Turkey's retention of the geographical reservation to the 1951 Refugee Convention, the new law represents a significant change in that it provides "protection and assistance for asylum-seekers and refugees, regardless of their country of origin".²⁴ The new law also designates DGMM as the sole institution responsible for asylum matters; and it has begun conducting RSD for all asylum-seekers regardless of their country of origin.²⁵ As such, "a phased handover of registration and RSD" from UNHCR is also envisaged.²⁶ However, to date, UNHCR in Turkey continues to conduct mandate RSD for Iraqi, Afghani, Iranian, and other non-European asylum-seekers.²⁷

The asylum framework in Turkey has also been shaped by its participation in the European Convention on Human Rights (ECHR) system, to which Turkey has been party since 1954. Indeed, European Court judgments against Turkey in cases concerning the compatibility of its international protection, expulsion, and administrative detention procedures paved the way to preparing the new Law No. 6458,²⁸ which redresses issues identified in those judgments.²⁹ For example, the Law No. 6458 provisions regulating *non-refoulement* and prohibiting the deportation of foreigners to a country where there are serious reasons to consider that they will be subjected to the death penalty, torture, inhuman or degrading treatment, or punishment are in line with the European Court's interpretation of Article 3 of the ECHR.³⁰

Another element shaping the asylum framework in Turkey has been the European Union (EU) accession negotiations between the EU and Turkey. The

- 23 Law on Foreigners and International Protection No. 6458 of 4 April 2013, Official Gazette No. 28615, 11 Apr. 2013. According to Art. 125 of Law No. 6458, "This Law shall enter into force as follows: a) Part Five of this Law, with the exception of Article 122, paragraphs one, two, five, and seven of Article 123, and Article 124, shall become effective upon the date of publication. b) The remaining provisions shall become effective one year following the publication date."
- 24 UNHCR, *UNHCR Global Appeal Turkey*, Geneva, UNHCR, 2014–2015, available at: <http://www.unhcr.org/528a0a34a.pdf> (last visited 12 Dec. 2016); UNHCR, *Turkey Operational Context*, UNHCR Global Focus, 2016, available at: http://reporting.unhcr.org/node/2544#_ga=1.144452149.124338079.1447695674 (last visited 12 Dec. 2016).
- 25 According to Arts. 61, 62, and 63 of Law No. 6458, there are three types of international protection; refugees, conditional refugees, and secondary protection.
- 26 UNHCR, *UNHCR Global Appeal Turkey 2015 Update*, Geneva, UNHCR, 2015, available at: <http://www.unhcr.org/5461e60c52.pdf> (last visited 12 Dec. 2016).
- 27 "At present, while the DGMM Headquarters are fully operational, Provincial DGMM Directorates are yet to take full charge of implementation at local level in provinces. Pending the finalisation of the transfer of migration and asylum processing functions from the National Police to DGMM, Provincial Foreigners Police branches continue to undertake processing of international protection applications on behalf of DGMM." Asylum Information Database (AIDA), *Country Report Turkey*, Brussels, AIDA, 2015, available at: www.refugeesolidaritynetwork.org/wp-content/uploads/2015/06/AIDA_turkey_final.pdf, 18, (last visited 12 Dec. 2016) (AIDA Report).
- 28 DGMM, *2015 Migration Report*, Ankara, DGMM, 2016, available at: www.goc.gov.tr/files/files/_2015_g%C3%B6%C3%A7_y%C4%B1ll%C4%B1k_rapor_18_04_16.pdf (last visited 12 Dec. 2016).
- 29 N. Ekşi, "İltica Talepleri Reddedilerek Türkiye'den Sınırdışı Edilmelerine Karar verilen Yabancılar İlişkin Aihm Kararlarının Yabancılar ve Uluslararası Koruma Kanunu'na Etkisi", *Türkiye Adalet Akademisi Dergisi*, 5(19), 2014, 58.
- 30 Art. 55 of Law No. 6458.

subsidiary protection scheme introduced with Law No. 6458 “fully replicates the subsidiary protection eligibility definition”³¹ provided by Article 15(c) of the EU Qualification Directive.³² As such, a foreigner or a stateless person, who could not be qualified as a refugee nor as a conditional refugee within the terms of Law No. 6458, shall nevertheless be granted subsidiary protection if returning the person to his/her country of origin he/she would be subjected to the death penalty, the execution of death penalty, torture, inhuman or degrading treatment, or punishment, or would face serious threat to himself or herself by reason of indiscriminate violence in situations of international or internal armed conflict.

3.2. Syrians and temporary protection in Turkey

Syrian asylum-seekers are subject to a special “temporary protection regime” and do not fall under the normal procedures established for non-European asylum-seekers.³³ As the Syrian refugee crisis is treated primarily as a concern of the Turkish State (rather than UNHCR), the response is managed ultimately by the Prime Minister’s office, together with the Ministry of the Interior.³⁴ This new special regime was created and regulated by the Temporary Protection Regulation issued by the Council of Ministers on 22 October 2014,³⁵ which applies to Syrian nationals, Palestinians, and stateless persons coming from Syria.³⁶ Its main elements include respect for the principle of *non-refoulement* and “registration with the Turkish authorities and support inside the borders of the camps”.³⁷

In essence, the new temporary protection regime amounts to “the granting, on prima facie basis, of a temporary residence status to all protection seekers originating

31 Refugee Rights Turkey, *Introduction to Asylum Context in Turkey*, Refugee Rights Turkey, undated, available at: www.asylumineurope.org/reports/country/turkey/introduction-asylum-context-turkey (last visited 12 Dec. 2016). According to the Turkish National Action Plan for the Adoption of the “EU acquis” in the Field of Asylum and Migration dated 2005, “subsidiary protection” in the draft bills should be established in line with the provisions in EU Qualifications Directive. This is confirmed by Peers and Roman “In Turkey, indeed, non-European asylum seekers can, at least theoretically, have access to an alternative form of protection: the so-called ‘conditional refugee’ [...] or the EU-inspired subsidiary protection.” S. Peers & E. Roman, *The EU, Turkey and the Refugee Crisis: What Could Possibly Go Wrong?*, EU Law Analysis, Feb. 2016, available at: eulawanalysis.blogspot.ca/2016/02/the-eu-turkey-and-refugee-crisis-what.html (last visited 12 Dec. 2016).

32 See Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ L 337/9, 20 Dec. 2011.

33 Ş. Özden, *Syrian Refugees in Turkey*, Migration Policy Center Research Report 2013/05, Robert Schuman Centre for Advanced Studies, San Domenico di Fiesole, European University Institute, 2013, 5.

34 Bidinger, Lang, Kuzmova, Hites, Akram & Noureddine, *Protecting Syrian Refugees*, 97.

35 The Regulation is available in Turkish, available at: www.resmigazete.gov.tr/eskiler/2014/10/20141022-15-1.pdf (last visited 12 Dec. 2016). The Regulation was issued on the basis of Art. 91 of the Law on Foreigners and International Protection. Before the Regulation came into force in 2014, there was a directive issued by the Turkish Government in April 2012 to “explain the substance and application of the Temporary Protection regime”. Bidinger, Lang, Kuzmova, Hites, Akram & Noureddine, *Protecting Syrian Refugees*, 102.

36 AIDA, *Country Report Turkey*; M. Ineli-Ciger, “Implications of the New Turkish Law on Foreigners and International Protection and Regulation No. 29153 on Temporary Protection for Syrians Seeking Protection in Turkey”, *Oxford Monitor of Forced Migration*, 4(2), 2014, 28–36, 30.

37 Özden, *Syrian Refugees in Turkey*, 5.

from Syria”, with the exception of those caught by the exclusion provision of the Temporary Protection Regulation.³⁸ However, persons from Syria are not considered to be refugees by the Turkish authorities and, as such, cannot access the ordinary RSD process available to other non-European asylum-seekers. Indeed, Syrians and other individuals falling within the scope of the temporary protection regime are specifically prohibited from “lodging an international protection application”.³⁹ As they are covered by the temporary protection regime, Syrians do not have access to the mandate RSD procedure of UNHCR in Turkey, either.⁴⁰ Furthermore, the DGMM has become the sole organisation making any decisions on foreigners who seek asylum in Turkey under the new asylum system established by Law No. 6458 and thus, UNHCR, *per se*, is not empowered to grant refugee and/or conditional refugee status.⁴¹

4. “UNDESIRABLE BUT UNRETURNABLE” ASYLUM-SEEKERS

Among the populations seeking asylum in Turkey, it is recognised that there may be individuals who will be considered “undesirable” by the Turkish authorities due to their suspected criminality or threat to national security or public order. This section sets out how such “undesirability” is constructed in Turkish law and policy through the clauses dealing with exclusion from international protection. It then argues that Turkish law and policy, while long “pro-deportation”, has now moved to recognise that some such individuals may be “unreturnable” on human rights grounds. At the same time, domestic legal measures have been created that help to address some of the implications of this situation. The section ends by assessing the empirical dimensions of this problem in Turkey presently and in the near future.

4.1. Exclusion and “undesirable” asylum-seekers in Turkey

Turkish law designates certain categories of asylum-seekers as “undesirable” and excludes them from protection under the refugee or temporary protection regimes. Like most other States, Turkey has incorporated Article 1F of the 1951 Refugee Convention as a means of excluding from refugee status those asylum applicants suspected of serious crimes.⁴² Law No. 6458 broadens the criteria for “Exclusion from International Protection” under Article 64 to include the following grounds:

1(c). There are serious reasons to consider that s/he is guilty of offences defined in Article 1 F of the 1951 Convention;

38 AIDA, *Country Report Turkey*, 11.

39 *Ibid.*, 21.

40 Bidinger, Lang, Kuzmova, Hites, Akram & Nouredine, *Protecting Syrian Refugees*, 113.

41 Correspondence with the DGMM dated 5 Jan. 2016 numbered 95104841-042-270.

42 Art. 1F of the 1951 Refugee Convention reads as follows: “The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.”

3. There are reasons to consider that s/he committed inhuman acts for any reason outside of Turkey prior to international protection claim⁴³;
4. The person instigated or participated in the commission of the crimes or acts mentioned above⁴⁴; or
5. There are serious indications of him/her posing a public order or public security threat, and the foreigner or stateless person has previously committed a crime for which imprisonment would have been ordered had it been committed in Turkey and has left his/her country of origin solely to avoid punishment for that crime.⁴⁵

Overall, though, it is the widened scope for exclusion from refugee status under the new Turkish refugee law that is pertinent here since, for asylum-seekers whose situation may prevent their return to the country of origin, it draws the legal boundaries of “undesirability” more widely than in international refugee law. This creates a potentially greater universe of “undesirable but unreturnable” persons whose situation may require the application of specific policy measures.

Asylum-seekers from Syria are subject to a special temporary protection regime in which the exclusion process equally deviates from the normal procedure for other non-European asylum-seekers in Turkey. Indeed, under the temporary protection regime, the range of acts deemed to be excludable is broader even than that for the exclusion from refugee status of non-Syrians in Article 64 of Law No. 6458. Thus, according to Article 8 of the Temporary Protection Regulation, a foreigner shall not be granted temporary protection where:

- a. there are serious reasons to consider that s/he is guilty of offences defined in Article 1 F of the 1951 Convention;
- b. there are reasons indicating that s/he has committed cruel acts outside of Turkey for any reason whatsoever;
- c. s/he participated in the commission of crimes or acts mentioned above or incited others to commit such crimes or acts;
- ç. s/he who took part in armed conflicts in his or her country and did not permanently cease such activities;
- d. s/he is identified as having committed, planned to commit or participated in acts of terrorism;
- e. s/he is considered to be a threat to the public due to being convicted of a serious crime or is considered to pose a danger to national security, public order, or public security;
- f. s/he has previously committed a crime or crimes for which imprisonment sentence would have been given had they been committed in Turkey and left his or her country of origin or country of residence in order to avoid punishment for that crime;
- g. s/he was convicted of crimes against humanity by international courts;

43 Art. 64(3) of Law No 6458 (author’s translation).

44 Art. 64(4) of Law No 6458 (author’s translation).

45 Art. 64(5) of Law No 6458 (author’s translation).

- ğ. s/he committed one of the crimes set forth in Chapter Seven of Section Four of the Turkish Penal Code No. 5237 (crimes against state's secrets and espionage).⁴⁶

Similar to Article 64 of Law No. 6458, Article 8 of the Temporary Protection Regulation encompasses excludable acts committed both prior to arrival and in Turkey. Although there is some degree of overlap between certain limbs of Article 8, the loose wording of others emphasises the highly discretionary character of legal protection under the temporary protection regime. A consequence of the relatively low bar set by Article 8 for denying access to temporary protection is the potential to create a relatively sizeable group of “undesirable but unreturnable” foreigners among Syrians seeking protection in Turkey.

4.2. Deportation practice and the emergence of “unreturnability”

Turkey has traditionally tended to deal with such “undesirable” foreigners, including asylum-seekers and refugees, through measures to ensure that such persons leave the country. In this sense, Turkish practice has long been “pro-deportation” although, in law, it was not specified to which country a person would be deported.⁴⁷ Indeed, prior to the entry into force of Law No. 6458, relatively few legal or policy provisions existed to regulate the situation of foreigners suspected of serious criminality and those few that did exist were mainly concerned with securing the person's removal. For example, pursuant to the now annulled Act on the Residence and Travel of Foreigners in Turkey (Law No. 5683), any foreigners whose stay in Turkey was considered to be incompatible with public safety and the political or administrative requirements of the Ministry of the Interior would be invited to leave Turkey within a fixed time limit.⁴⁸ Moreover, according to the 1994 Regulation, a refugee or an asylum-seeker could be deported under the conditions of the 1951 Refugee Convention including to respect the principle of *non-refoulement*⁴⁹ or for reasons of national security and public order.⁵⁰

Nonetheless, Turkey's apparently systematic practice of attempting to deport asylum-seekers and refugees suspected of criminality to countries where they might face violation of their human rights was repeatedly challenged by potential deportees

46 Art. 8 of the Temporary Protection Regulation, official translation, available at: www.goc.gov.tr/files/_dokuman28.pdf (last visited 12 Dec. 2016). Please note that there might be some insignificant changes in the official translation in the interest of clarity.

47 K.S. Sirmen, “Yabancıların Türkiye’den Sınırdışı Edilmesine İlişkin Temel Düzenlemeler ve Avrupa İnsan Hakları Mahkemesi’nin Türkiye Hakkında Verdiği Örnek Kararlar”, *Ankara Barosu Dergisi*, 67(3), 2009, 30–45, 35.

48 s. 19 of Law No. 5683. Other than Law No. 5683 and the 1994 Regulation, Art. 59 of the Turkish Criminal Law regulates the deportation of foreigners. Art. 59 reads as follows: “following being released on probation and the execution of his/her punishment, the situation of a foreigner who is imprisoned for a crime shall immediately be notified to the MoI in order to be assessed for the deportation procedure” (author's translation).

49 L.B. Tokuzlu, “Non-Refoulement Principle in a Changing European Legal Environment with Particular Emphasis on Turkey, a Candidate Country at the External Borders of the EU”, PhD Thesis, Marmara Üniversitesi, 2006, 409, 415, available at: www.goc.gov.tr/files/files/Structure_18_10_2006_tez_hard_copy.pdf (last visited 12 Dec. 2016).

50 Art. 29 of the 1994 Regulation.

before the ECtHR.⁵¹ In a line of cases dating from 2010, the European Court consistently held that the deportations of asylum-seekers suspected of serious criminality or posing a national security risk by Turkey to be in violation of Articles 2, 3, 5, 8, 13, or 14 of the ECHR.⁵² This culminated in the landmark decision in *Abdolkhani and Karimnia v. Turkey* of 27 June 2010, where the reasoning of the court is expounded most fully.⁵³ In *Abdolkhani and Karimnia v. Turkey*, the applicants were ex-members of People's Mojahedin Organisation in Iran (PMOI) and recognised as refugees by UNHCR. Turkey asserted that since the applicants were ex-members of the PMOI, a designated terrorist organisation in the US and the EU, their stay in Turkey would pose a risk to national security, public safety, and order.⁵⁴ In its judgment, the European Court reasserted the absolute nature of Article 3 of the ECHR, which it found would have been violated by the deportation had it taken place, rejecting the national security arguments put forward by Turkey.⁵⁵ Moreover, the applicants' lack of access to an effective and accessible remedy in relation to their complaints that deportation would violate Article 3 of the Convention equally constituted a violation of Article 13 of the ECHR.⁵⁶ The finding that no effective and accessible remedy for deportation decisions existed in Turkey "due to the lack of an automatic suspensive effect in the Turkish asylum procedure" was reiterated in a string of subsequent European Court judgments on similar cases.⁵⁷

This line of judgments by the ECtHR influenced the application of the law in Turkey. In 2006, the Turkish Ministry of the Interior issued a circular that established an exception to the general rule of deportation for rejected claims that requires assessment of whether the deportation would lead to the risk of serious harm under Article 3 of the ECHR such that the granting of subsidiary protection is

51 Ekşi, "İltica Talepleri Reddedilerek". Note that the analysis here is limited to cases of asylum-seekers in Turkey who were deported on the grounds of suspected serious criminality. Nonetheless, it is important to appreciate that a wider practice on the part of the Turkish authorities of deporting a much broader class of asylum applicants was also challenged before the European Court. A UNHCR intervention before the European Court in a case lodged in 2008 identified the following scenarios in which the Turkish authorities tended to refuse to grant a temporary residence permit to asylum-seekers, a situation that generally then led to the person's deportation (see ECtHR, *Abdolkhani and Karimnia v. Turkey*, Judgment, Appl. No. 50213/08, 27 Jul. 2010, 36): where a file was reopened after an initial rejection by UNHCR; applications by persons whose claims were considered by the authorities to be in "bad faith", such as those submitted when arrested for lack of legal status in Turkey; applications by persons applying for asylum at international airports; asylum claims by persons who had been recognised under UNHCR's mandate as refugees outside Turkey; and applications by those whose stay in Turkey was considered to be a threat to national security.

52 ECtHR, *Charahili v. Turkey*, Judgment, Appl. No. 46605/07, 13 Apr. 2010; ECtHR, *Abdolkhani and Karimnia v. Turkey*; ECtHR, *Tehrani and Others v. Turkey*, Judgment, Appl. Nos. 32940/08, 41626/08, 43616/08, 13 Apr. 2010; ECtHR, *A.D. and Others v. Turkey*, Judgment, Appl. No. 22681/09, 22 Jul. 2014; ECtHR, *Ghorbanov and Others v. Turkey*, Judgment, Appl. No. 28127/09, 3 Dec. 2013; ECtHR, *Asalya v. Turkey*, Judgment, Appl. No. 43875/09, 15 Apr. 2014; ECtHR, *Keshmiri v. Turkey*, Judgment, Appl. No. 36370/08, 13 Apr. 2010.

53 ECtHR, *Abdolkhani and Karimnia v. Turkey*.

54 *Ibid.*, 21.

55 *Ibid.*

56 *Ibid.*

57 ECtHR, *Charahili v. Turkey*; ECtHR, *Tehrani and Others v. Turkey*; ECtHR, *Dbouba v. Turkey*, Judgment, Appl. No. 15916/09, 13 Jul. 2010; ECtHR, *Keshmiri v. Turkey (No. 2)*, Judgment, Appl. No. 22426/10, 17 Jan. 2012.

necessary.⁵⁸ Moreover, in September 2012, provisions came into force allowing access by such individuals to the Constitutional Court of Turkey.⁵⁹ Since then, the Constitutional Court of Turkey has granted injunction decisions and ordered a stay of execution for foreigners whose deportation would expose them to torture, inhuman or degrading treatment, or punishment,⁶⁰ based on its adoption of the *non-refoulement* principle from the European Court case law.⁶¹ Likewise, from 2010, the Turkish Council of State also adopted the principle of *non-refoulement* in its case law.⁶²

The ECtHR judgments have also triggered changes in Turkish legislation, reflected in the new law on immigration and asylum. First, the principle of *non-refoulement* is expressly incorporated by Article 55 of Law No. 6458 in the following terms:

Removal decision shall not be issued in respect of those foreigners listed below

- 1(a) when there are serious indications to believe that they shall be subjected to the death penalty, torture, inhuman or degrading treatment or punishment in the country to which they shall be returned to;
- 1(b) who would face risk due to serious health condition, age or, pregnancy in case of travel;
- 1(c) who would not be able to receive treatment in the country to which they shall be returned while undergoing treatment for a life threatening health condition;
- 1(ç) victims of human trafficking, supported by the victim's assistance programme;
- 1(d) victims of serious psychological, physical or sexual violence, until their treatment is completed.⁶³

Secondly, in light of the ECtHR decisions,⁶⁴ Article 53(3) of Law No. 6458 explicitly provides for “automatic suspensive effect” by stipulating that removal decisions shall not be carried out during the judicial appeal period or until after the finalisation of the appeal proceedings. Finally, provisions were also introduced in Law No. 6458

58 On 22 Jun. 2006, the Ministry of the Interior issued Circular No. 57, Section 12 of which requires that the cases of applicants whose objections have been rejected by a final decision are assessed within the framework of the general provisions contained in Art. 6 of the 1994 Regulation concerning foreigners.

59 W. Zeldin, *Turkey: Individual Access to Constitutional Court*, Library of Congress, Global Legal Monitor, 12 Oct. 2012, available at: <http://www.loc.gov/law/foreign-news/article/turkey-individual-access-to-constitutional-court/> (last visited 12 Dec. 2016). I would like to thank Professor Ece Göztepe for bringing this point to my attention.

60 Constitutional Court of Turkey, *A.M.A.A. and J.A.A.A.*, Interim Decision, Appl. No. 2015/3941, 27 Mar. 2015; Constitutional Court of Turkey, *Mohammed Abdul Khaliq*, Interim Decision, Appl. No. 2015/6721, 14 May 2015; Constitutional Court of Turkey, *Farah Abdulhameed Mohammed Ali Al-Mudhafar*, Interim Decision, Appl. No. 2015/13854, 14 Aug. 2015.

61 See, for example, the judgment of the Constitutional Court of Turkey in the case of *Mohammed Abdul Khaliq*.

62 Decisions of the 10th Chamber of the Turkish Council of State dated 30 Jun. 2010 and 15 Dec. 2010. N. Ekşi, *Yabancılar ve Uluslararası Koruma Hukuku*, İstanbul, Beta Yayıncılık, 2015, 146.

63 Art. 55 of Law No. 6458, DGMM's translation, available at: www.goc.gov.tr/files/files/eng_minikanun_5_son.pdf (last visited 12 Dec. 2016).

64 Ekşi, *Yabancılar ve Uluslararası Koruma Hukuku*, 151.

and related policy tools regarding the situation of those foreigners who cannot be deported. It is to these and other measures that may be used to address the situation in Turkey of “undesirable but unreturnable” asylum-seekers to which we now turn.

4.3. Stay and residence for “undesirable and unreturnable” asylum-seekers

One positive advance in the new legal and policy framework adopted by Turkey is the fact that it contains provisions that can be used to regulate the stay or residency of persons who may be suspected of serious criminality or viewed as a security threat but who cannot be removed due to the application of the human rights-based *non-refoulement* principle or on other grounds. These provisions take two forms: first, a general “humanitarian residence permit”; and, secondly, a distinct form of temporary stay for persons from Syria who are not granted temporary protection.

4.3.1. Humanitarian residence permit

The new Law No. 6458 introduces a new type of residence permit for “unreturnable” foreigners. According to Article 46, a “humanitarian residence permit” may be issued and renewed by the governorates,⁶⁵ without requiring the conditions for other types of residence permits regulated under Law No. 6458,⁶⁶ subject to approval by the Ministry of the Interior.⁶⁷ Among the grounds on which Article 46 authorises the issuing of a humanitarian residence permit are:

- Foreigners cannot be removed from Turkey or their departure from Turkey is not reasonable or possible, notwithstanding a removal decision or ban on entering Turkey;
- A foreigner is non-removable pursuant to Article 55 of Law No. 6458;
- There is a judicial appeal against the actions carried out pursuant to Articles 53, 72 and 77 [...].⁶⁸

The permit can be issued with a maximum duration of 1 year at a time and must be cancelled when these “compelling conditions” are no longer applicable. Foreigners granted a humanitarian residence permit must register their address within 20 working days as of the issuance date.⁶⁹ The legislation does not explicitly regulate the rights and entitlements of humanitarian residence permit holders. As an example, there are unclear points concerning their employment conditions in Turkey. Article 4(1) of the Regulation on the Employment of International Protection Applicants and Beneficiaries⁷⁰ allows refugees and subsidiary protection beneficiaries to work in

65 *Valilik* (governorate) is the highest administrative division in a city. A *vali* (governor) of each city is appointed by the Government.

66 These are short-term and long-term residence permits, family residence permits, student resident permits, and residence permits for victims of human trafficking.

67 Art. 46(1) of Law No. 6458 (author’s translation).

68 These are removal decisions, inadmissible applications and decisions regarding applicants arriving from the first country of asylum.

69 Art. 46(2) of Law No. 6458. The second paragraph of Art. 55 also stipulates that individuals benefitting from the Art. 55 protection against *refoulement* may be asked to reside at a given address and report to authorities in form and periods as requested.

70 The Regulation on the Employment of International Protection Applicants and Beneficiaries, Official Gazette No. 29695, 26 Apr. 2016.

Turkey without requiring a work permit.⁷¹ The grounds to obtain subsidiary protection and be granted a humanitarian residence permit significantly overlap. Yet, considering that Article 64(5) of Law No. 6458 explicitly forbids granting subsidiary protection status to international protection applicants who are excluded from international protection on the grounds enumerated under Article 64 of Law No. 6458,⁷² it is unlikely to accept that a humanitarian residence permit holder can also be a subsidiary protection beneficiary. Consequently, humanitarian residence permit holders cannot benefit from the work permit exemption that is applied to refugees and subsidiary protection beneficiaries. One possible option is that humanitarian residence permit holders could apply for a work permit within the meaning of the Law on the Work Permit for Foreigners No. 4817.⁷³

The Implementing Regulation on the Law on Foreigners and International Protection, which came into force on 17 March 2016, elaborates the procedure to be implemented for foreigners who benefit from the *non-refoulement* protection in Article 55 of Law No. 6458.⁷⁴ Pursuant to Article 57 of the regulation, in cases where it is impossible to remove the foreigner to a third country, deportation decisions cannot be implemented and the foreigner must be issued a valid humanitarian residence permit. In cases where the obstacle to deportation no longer exists, the humanitarian residence permit must be cancelled and the deportation decision must be finalised without issuing a new decision.⁷⁵

This new humanitarian residence permit would appear to be of great relevance for “undesirable but unreturnable” asylum-seekers. Nonetheless, questions remain about its application in practice. For example, considering that non-removability is unlikely to be a temporary scenario in their cases, what form of “compelling conditions” would be sufficient to justify cancellation of the permit? Moreover, considering that humanitarian residence permit holders are not entitled to the right of transfer to a long-term residence permit as per Article 42(2) of Law No. 6458,⁷⁶ what would be the legal fate of humanitarian residence permit holders in the long term?

71 Pursuant to Art. 4(2) of the Regulation, identity documents of refugees and secondary protection beneficiaries substitute work permits.

72 Those include the following grounds: “1(c). There are serious reasons to consider that s/he is guilty of offences defined in Article 1 F of the 1951 Convention; 3. There are reasons to consider that s/he committed inhuman acts for any reason outside of Turkey prior to international protection claim; 4. The person instigated or participated in the commission of the crimes or acts mentioned above; or 5. There are serious indications of him/her posing a public order or public security threat, and the foreigner or stateless person has previously committed a crime for which imprisonment would have been ordered had it been committed in Turkey and has left his/her country of origin solely to avoid punishment for that crime” (author’s translation).

73 The Law on the Work Permit for Foreigners No. 4817 of 27 Feb. 2003, Official Gazette No. 25040, 6 Mar. 2003.

74 Art. 57 of the Implementing Regulation on the Law on Foreigners and International Protection.

75 Art. 57(2) of the Implementing Regulation on the Law on Foreigners and International Protection.

76 Art. 42(2) of Law No. 6458 reads as follows: “refugees, conditional refugees and subsidiary protection beneficiaries as well as persons under temporary protection or humanitarian residence permit holders are not entitled to the right of transfer to a long-term residence permit.” Translation by the DGMM available at: www.goc.gov.tr/files/files/eng_minikanun_5_son.pdf (last visited 12 Dec. 2016).

4.3.2. Syrians and temporary accommodation

The humanitarian residence permit created by Article 46 of Law No. 6458 of 2014 appears to be a measure that can be applied *inter alia* to benefit any “undesirable but unreturnable” foreigner, including asylum-seekers and refugees of any nationality. However, the 2014 Temporary Protection Regulation appears to suggest that a different measure may instead be applicable to those who are fleeing from Syria. Indeed, Article 8 of this regulation – which deals with exclusion from temporary protection on the basis of suspected criminality or security threats – stipulates in its third paragraph that individuals who are not granted temporary protection must be accommodated in a temporary accommodation centre until their “return to their country” is feasible. The emphasis on removal in this paragraph arguably creates a tension with the *non-refoulement* obligation articulated in Article 6 of the same regulation and in Article 55 of Law No. 6458.⁷⁷

However, it is unclear how this measure corresponds to other legal measures that might be available to such persons, especially given that the Temporary Protection Regulation’s “subordinate position in the legislative hierarchy as a piece of secondary legislation” means that it must be compatible with the general normative framework set out in Law No. 6458.⁷⁸ On the one hand, it seems possible that, once a Syrian asylum-seeker is excluded from temporary protection under Article 8 of the Temporary Protection Regulation, s/he might apply for a humanitarian residence permit according to Article 46 of Law No. 6458. On the other hand, since an excluded Syrian asylum-seeker will not be subjected to the Temporary Protection Regulation anymore, s/he might apply for subsidiary protection status pursuant to Article 63⁷⁹ of Law No. 6458. Overall, considering that the aim of the humanitarian residence permit is to legitimise non-removables’ stay in Turkey, the issuance of humanitarian residence permits might be a more reasonable measure to apply to excluded Syrian asylum-seekers. Finally, in the Temporary Protection Regulation, there is no reference to an appeal mechanism for persons whose applications for temporary protection are refused, leaving it unclear whether general appeal mechanisms and remedies under Law No. 6458 are applicable to this regime.⁸⁰

77 Art. 6 reads as follows: “No one within the scope of this Regulation shall be returned to a place where he or she may be subjected to torture, inhuman or degrading punishment or treatment or, where his/her life or freedom would be threatened on account of his/her race, religion, nationality, membership of a particular social group or political opinion.” Translation by the DGMM, available at: www.goc.gov.tr/files/_dokuman28.pdf (last visited 12 Dec. 2016).

78 AIDA, *Country Report Turkey*, 67.

79 Art. 63 reads as follows: “A foreigner or a stateless person, who neither could be qualified as a refugee nor as a conditional refugee, shall nevertheless be granted subsidiary protection upon the status determination because if returned to the country of origin or country of [former] habitual residence would: a) be sentenced to death or face the execution of the death penalty; b) face torture or inhuman or degrading treatment or punishment; c) face serious threat to himself or herself by reason of indiscriminate violence in situations of international or nationwide armed conflict; and therefore is unable or for the reason of such threat is unwilling, to avail himself or herself of the protection of his country of origin or country of [former] habitual residence.” Translation by the DGMM, available at: www.goc.gov.tr/files/files/eng_minika_nun_5_son.pdf (last visited 12 Dec. 2016).

80 AIDA, *Country Report Turkey*, 72.

4.4. Prosecution and extradition of “undesirable and unreturnable” asylum-seekers

Foreigners who are viewed as “undesirable” by the Turkish authorities based on the suspicion that they have committed a crime in Turkey can be prosecuted in the ordinary way. If the foreigner is convicted then, once s/he has served the sentence imposed or has been granted conditional release, Article 59 of the TCC states that the person’s file shall be transferred to the Ministry of the Interior in order to be considered for expulsion.⁸¹ Law No. 6458 provides that a removal decision for foreigners shall be issued pursuant to Article 59 of the TCC.⁸² Considering the strict wording of the provision, this provision does not appear to give any discretion to administrative authorities over whether to remove a foreigner but rather requires it.⁸³ Nevertheless, where the person falls under the protection of the *non-refoulement* provision in Article 55, then s/he can apply for a humanitarian residence permit and should not be deported.

For foreigners who have been convicted by a foreign country of a crime, or against whom prosecution proceedings have been initiated in a foreign country, Article 18 of the TCC equally permits their extradition for prosecution purposes or execution of the punishment. This procedure is “comprised of a combination of judicial and administrative actions”.⁸⁴ However, safeguards against extradition include the requirements (1) to reject any extradition request where there are substantial grounds for suspecting that, upon extradition, the person would be prosecuted or investigated or punished on account of his/her race, religion, nationality, membership of a particular social group or political opinion or shall be exposed to torture or ill-treatment⁸⁵; and (2) to take into account international conventions to which Turkey is a party, suggesting that “the Court must look into the matter from a human rights perspective assessing the risk of torture, inhuman or degrading treatment or punishment”.⁸⁶

In tandem, Turkey has given effect to its obligation under international law to extradite or prosecute foreigners suspected of committing certain crimes under international law, even though those crimes were committed outside its territory. For example, the 1949 Geneva Conventions,⁸⁷ the Convention against Torture and Other

81 Turkish Criminal Code No. 5237 of 26 Sep. 2004, Official Gazette No. 25611, 12 Oct. 2004.

82 Art. 54 of Law No 6458.

83 G. Bayraktaroğlu Özçelik, “Yabancılar Ve Uluslararası Koruma Kanunu Hükümleri Uyarınca Yabancıların Türkiye’den Sınır Dışı Edilmesi”, *Türkiye Barolar Birliği*, 108, 2013, 218.

84 Tokuzlu, “Non-Refoulement Principle”.

85 Art. 18, para. 3 of the Turkish Criminal Code No. 5237.

86 Tokuzlu, “Non-Refoulement Principle”.

87 Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 UNTS 31, 12 Aug. 1949 (entry into force: 21 Oct. 1950); Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 UNTS 85, 12 Aug. 1949 (entry into force: 21 Oct. 1950); Convention (III) Relative to the Treatment of Prisoners of War, 75 UNTS 135, 12 Aug. 1949 (entry into force: 21 Oct. 1950); Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287, 12 Aug. 1949 (entry into force: 21 Oct. 1950). Turkey ratified the 1949 Geneva Conventions on 10 Feb. 1954. However, Turkey has not signed the 1977 Additional Protocols.

Cruel, Inhuman or Degrading Treatment or Punishment,⁸⁸ and the International Convention against the Taking of Hostages⁸⁹ oblige Turkey to cooperate in an extradition request from a competent international or national authority and, if extradition is not possible, to submit the case to their own legal authorities for the purpose of prosecution. In this regard, Article 13 of the TCC permits public prosecutors to launch a criminal investigation into a range of extraterritorial crimes following a request by the Turkish Ministry of Justice, including genocide, crimes against humanity, and torture.⁹⁰

Although data concerning the application of measures such as Article 13 of the TCC to foreigners in Turkey has not been forthcoming from the Turkish authorities,⁹¹ it is clear that the Turkish legal and policy framework contains sufficient tools to ensure that asylum-seekers who have committed serious crimes in Turkey or prior to their arrival may be put on trial. Nonetheless, despite a superficial similarity between the “serious reasons to consider” standard for exclusion from refugee status and the “credible evidence” standard for initiating prosecutions in Turkish criminal law, the extraordinary breadth of the Turkish exclusion clauses mean that any assumed correlation between exclusion from international protection and a basis for criminal prosecution is likely to be misleading.⁹² Moreover, it is clear that removal of such individuals from Turkey’s territory – whether through extradition or post-punishment deportation – reasonably remains a strong focus of the legal approach.

4.5. Dimensions and future of “undesirable but unreturnable” problem in Turkey

For the large number of Syrians and persons of other nationalities presently seeking international protection in Turkey, the applicable legal frameworks elucidate a broad range of acts that render certain individuals “undesirable” on security or criminal grounds in the eyes of the Turkish State, even as the protracted conflicts in Syria and Iraq may make them unreturnable on human rights, practical, or other grounds. However, the absence of data relating to the exclusion of asylum-seekers from refugee status or temporary protection, and the measures applied to such persons, represents a real challenge in accurately describing the empirical dimensions and characteristics of the “undesirable but unreturnable” problem in Turkey.

88 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85, 10 Dec. 1984 (entry into force: 26 Jun. 1987). Turkey ratified the treaty on 2 Aug. 1988.

89 International Convention against the Taking of Hostages, 1316 UNTS 205, 17 Dec. 1979 (entry into force: 3 Jun. 1983). Turkey’s accession date to the Convention is 15 Aug. 1989.

90 According to Art. 13 of the TCC, following extraterritorial crimes can be prosecuted in Turkey: genocide, torture, crimes against humanity, human trafficking, felonious homicide, intentional environmental pollution, production and trade of drugs and stimulants, facilitating use of drugs and stimulants, manufacturing and trade of instruments used in production of money and valuable seals/stamps, bribery, whoredom, confiscation or hijacking of aircraft, vehicles or vessels or offences committed with the intention to give damage to these properties.

91 Information about the practice of Art. 13 was officially requested from the MoJ in Turkey, which is rejected by the Ministry. Correspondence with the MoJ dated 24 Dec. 2015 numbered 76608343-622-03-0344-2015-E.649/85877.

92 See Section 4.1. above.

At most, some preliminary observations may be drawn from the publicly available data concerning prosecutions of foreign criminals in Turkey. Thus, in 2015, official statistics from the Ministry of Justice recorded 55,807 foreigners awaiting trial or a final judgment in a criminal case in Turkey.⁹³ In the same year, the majority of the new criminal proceedings initiated against foreigners were reportedly for crimes against bodily integrity, crimes against property, and crimes against public confidence (which includes acts of counterfeiting money, seals, and official documents).⁹⁴ No cases concerning genocide or crimes against humanity were reported in 2015. Both the absolute number of suspected foreign criminals in Turkey and the relatively wide range of crimes for which they are being prosecuted are significant, suggesting a potentially broad spectrum of such cases (albeit one from which prosecutions for serious crimes under international law are absent).

The data discussed above sheds only a limited light on the “undesirable but unreturnable” issue in Turkey, especially in relation to those foreigners seeking international protection. First, the figures do not capture cases where a measure other than prosecution has been used to deal with the suspected criminality or security threat posed by the individual, such as deportation. Secondly, the figures do not include the cases of foreigners whose “undesirability” results from the commission of serious crimes prior to arrival in Turkey, i.e. the typical Article 1F exclusion from refugee status case. Thirdly, the statistics do not record nationality or any other status, such that it is impossible to determine the overlap between these cases and the existence of international protection needs or other factors leading to “unreturnability”.

Nonetheless, there are good reasons to infer that Turkey may face a substantial “undesirable but unreturnable” problem. On the one hand, “foreign terrorist fighters” involved in the conflicts in Syria and Iraq pose a security challenge to Turkey.⁹⁵ Turkey has established risk analysis centres at its borders and intercity bus terminals to identify potential foreign fighters, who can be detained and deported.⁹⁶ The scale of the problem is quite considerable: by May 2016, 48,631 foreign terrorist fighters of 142 different nationalities were banned from entering Turkey,⁹⁷ and 3444 fighters of 97 different nationalities had been deported.⁹⁸ Yet foreign terrorist fighters share a key characteristic with refugees: “both are on the move, although for different

93 The statistics showing the numbers of suspects in Turkey, available at: http://www.adlisicil.adalet.gov.tr/istatistik_2015/CEZA/25.pdf (last visited 12 Dec. 2016).

94 The statistics showing the types of crimes, available at: http://www.adlisicil.adalet.gov.tr/istatistik_2015/CEZA/33.pdf (last visited 12 Dec. 2016).

95 Turkey takes into consideration the definition stipulated in the United Nations (UN) Security Council’s Resolution 2178 in determining who is a foreign terrorist fighter and the deportation of foreign terrorist fighters are conducted within the framework of Law No. 6458. Correspondence with the DGMM dated 18 Jan. 2016 numbered 95104841-042-1860. According to the UN Security Council’s Resolution 2178, foreign terrorist fighters are “individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict”. UN Security Council, Resolution 2178 (2014), UN Doc. S/RES/2178, 24 Sep. 2014.

96 *Ibid.*, 27.

97 DGMM, the statistics showing the number of foreign fighters, available at: www.goc.gov.tr/icerik6/yabanci-savascilar_363_378_4742_icerik (last visited 31 May 2016).

98 *Ibid.*

reasons”.⁹⁹ As such, the Turkish risk analysis procedure “could discriminate against Iraqi and Syrian asylum seekers because they might correspond to the same profiles as jihadists or foreign terrorist fighters”.¹⁰⁰ Conversely, where impediments exist to the deportation of fighters, even if they are not within the formal asylum process, then the question of an appropriate policy response to such “undesirable but unreturnable” individuals also arises.

On the other hand, it is almost certain that there will be isolated individuals among the sizeable populations seeking or benefitting from international protection in Turkey who have been involved in serious criminal acts in the conflicts in Syria and Iraq. It is well documented that both government forces and non-State armed groups in Syria and Iraq have committed serious international crimes, including war crimes.¹⁰¹ Involvement in such acts is likely to lead to exclusion from international protection under Article 8 of the Temporary Protection Regulation for persons from Syria who are seeking international protection and Article 1F of the 1951 Convention and Article 64 of Law No. 6458 for other asylum-seekers. However, the potential impediments to returns to Syria and Iraq mean that some of these individuals may well require a specific policy response to their specific profile as “undesirable but unreturnable” foreigners in Turkey.

5. CONCLUSION

Turkey’s large refugee population and its proximity to some of the most brutal conflicts of today mean that the scale of the problem of “undesirable but unreturnable” asylum-seekers is potentially large. For many years, Turkey’s legal and policy response was markedly “pro-deportation”, often to the exclusion of human rights law considerations. Moreover, its national asylum system was relatively diffuse and the Government instead relied heavily upon the RSD and third-country resettlement functions exercised by UNHCR under its international mandate. While Turkey had long received asylum-seekers from Iraq and other countries in the Middle East, its asylum system was stretched to breaking point by the mass arrival of several million people fleeing the Syrian conflict.

The entry into force of the new Turkish legal framework on immigration and asylum in 2014 signalled radical changes to the approach to asylum and also has direct implications for those excluded from international protection. One fundamental aspect of the approach has been its creation of a special protection regime within the general asylum system to deal with the specific situation of persons – currently only applicable to the ones fleeing Syria. Equally, the express recognition and regulation of the *non-refoulement* principle in primary legislation represents an important safeguard for persons excluded from refugee status (or temporary protection). At the

99 F. Vietti & M. Bisi, “Caught in the Crossfire: The Impact of Foreign Fighters on Internally Displaced Persons, Asylum Seekers and Refugees from Syria and Iraq”, in A. De Guttry, F. Capone & C. Paulussen (eds.), *Foreign Fighters under International Law and Beyond*, The Hague, Springer, 2016, 501.

100 *Ibid.*

101 UN Human Rights Council, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/28/69, 5 Feb. 2015; UNHCR, *UNHCR Eligibility Guideline for Assessing the International Protection Needs of Asylum-Seekers from Iraq*, UN Doc. HCR/EG/IRQ/12/03, 31 May 2012, 143.

same time, new categories for stay have been created that may benefit persons who find themselves excluded from refugee or temporary protection status but unable to be removed. The major challenge now will be in assessing the extent to which the new framework is implemented in practice,¹⁰² especially in the current tense political climate affecting Turkey.

A major challenge for this study has been the lack of accessible data concerning both the numbers and profiles of asylum-seekers who are rendered “undesirable and unreturnable” by the new legal framework and the application of its novel “solutions” to their situation. Nonetheless, given the characteristics of the violence in Syria and Iraq, it seems clear that common profiles of individuals among the asylum-seeking populations who may find themselves in this situation will likely include: (1) alleged and actual perpetrators of crimes in these conflicts in respect of whom serious past criminality is the key concern; and (2) the so-called “foreign terrorist fighters” as a potential present security threat in Turkey. One major finding of this study is the importance of designing public policy to ensure that the profiles of each group are dealt with appropriately, with reference to any international protection risks, and without prejudicing the international protection in Turkey of other asylum-seekers. This should include proper consideration of the application of extradition and prosecution measures.

102 See, for example, Amnesty International, *Europe's Gatekeeper Unlawful Detention and Deportation of Refugees from Turkey*, London, Amnesty International, 2015, 2, available at: www.amnesty.org/en/documents/eur44/3022/2015/en/ (last visited 12 Dec. 2016).