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Divergent Duties: Complementarity and Crisis in the CJEU's and ECtHR's Approaches to "Safe Third Country" Legislation within the EU-Turkey Refugee Deal

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Abstract

This paper identifies differences in the European Court of Justice's (CJEU) and European Court of Human Rights's (ECtHR) recent interpretations of "safe third country" provisions within European asylum and refugee law. The paper then applies those interpretations to Greece's recent "safe third country" legislation, an integral part of the March 2016 EU-Turkey refugee deal. It notes that these differences might produce different legal outcomes for the same legal question, creating a rift in the two courts' current "gentleman's agreement" to respect one another's rulings on refugee law. The paper proposes that the CJEU accept EU accession to the ECHR according to the terms of the 2014 EU-Council of Europe agreement in order to create greater legal certainty during a refugee crisis plagued by geopolitical uncertainty.

This paper analyzes EU immigration and refugee law as of April 2016 and may not reflect legal or policy changes enacted after that date.

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LIST OF ABBREVIATIONS

APD I	Asylum Procedures Directive I, Dir. 2005/85/EC
APD II	Asylum Procedures Directive II, Dir. 2013/32/EU
CEAS	Common European Asylum System
CFR	EU Charter of Fundamental Rights
CJEU	Court of Justice of the European Union
Dublin I	Dublin Regulation I, EC Regulation No. 343/2003
Dublin II	Dublin Regulation II, EC Regulation No. 604/2013
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
Refugee Convention	Geneva Convention and Protocol Relating to the Status of Refugees
TFEU	Treaty on the Functioning of the European Union
UNHCR	Office of the United Nations High Commissioner on Refugees

I. INTRODUCTION

The European Union (EU)-Turkey refugee deal has been mired in controversy since it was announced on March 18, 2016. The deal's "refugee return" provision is both its most important and its most controversial: the EU would return 72,000 irregular migrants to Turkey and in exchange would accept 72,000 refugees, processed in accordance with Common European Asylum System (CEAS) requirements.[1] To satisfy CEAS requirements, Greece had to pass legislation characterizing Turkey as a "safe third country" before sending refugees back to Turkey.[2] It did so on April 2, 2016; the first shipments of irregular migrants arrived in Turkey two days later.

Deal-makers believe this arrangement will ease the refugee-related pressure on Greece, which faces mounting "bottleneck" pressure as northern European states close

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[1] EU-Turkey statement, Council of the European Union, Press Release 144/16, 18 March 2016, available at http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/. Paragraph Two of the statement (which this paper, and most commentators, term the "refugee return" provision) states that

> **"**For every Syrian being returned to Turkey from Greek islands, another Syrian will be resettled from Turkey to the EU taking into account the UN Vulnerability Criteria. A mechanism will be established, with the assistance of the Commission, EU agencies and other Member States, as well as the UNHCR, to ensure that this principle will be implemented as from the same day the returns start. Priority will be given to migrants who have not previously entered or tried to enter the EU irregularly. On the EU side, resettlement under this mechanism will take place, in the first instance, by honoring the commitments taken by Member States in the conclusions of Representatives of the Governments of Member States meeting within the Council on 20 July 2015, of which 18.000 places for resettlement remain. Any further need for resettlement will be carried out through a similar voluntary arrangement up to a limit of an additional 54.000 persons. The Members of the European Council welcome the Commission's intention to propose an amendment to the relocation decision of 22 September 2015 to allow for any resettlement commitment undertaken in the framework of this arrangement to be offset from non-allocated places under the decision. Should these arrangements not meet the objective of ending the irregular migration and the number of returns come close to the numbers provided for above, this mechanism will be reviewed. Should the number of returns exceed the numbers provided for above, this mechanism will be discontinued."

[2] "EU-Turkey Statement, 18 March 2016," para. 1, available at http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/. Paragraph 1 provides that "[m]igrants not applying for asylum or whose application has been found unfounded or inadmissible in accordance with the said directive will be returned to Turkey. Turkey and Greece, assisted by EU institutions and agencies, will take the necessary steps and agree steps and agree any necessary bilateral arrangements, including the presence of Turkish officials on Greek islands and Greek officials in Turkey as from 20 March 2016, to ensure liaison and thereby facilitate the smooth functioning of these arrangements." According to Article 18 of the EU Convention on Fundamental Rights and Article 35 of the EU Asylum Procedures Directive II, one of these "necessary steps" was passing Greek legislation qualifying Turkey as a safe third country.

their borders while refugee flows continue unabated.[3] And European Commission president Jean-Claude Jüncker assured EU Member States and international organizations that all parts of the EU-Turkey refugee deal, including the safe third country provision, "meets all EU and international law requirements…[i]t is in accordance with the law, there can be no doubt about that."[4]

But other groups disagree. In reaction to the EU-Turkey deal, John Dalhuisen, Amnesty International's director for Europe and Central Asia, said "any return predicated on [Turkey being a safe country for refugees] will be flawed, illegal and immoral."[5] Greece's choice to designate Turkey as a "safe third country" led the UN High Commission for Refugees (UNHCR) and Doctors Without Borders to close their operations at Greek refugee-processing hotspots, putting increased pressure on Greek immigration authorities to execute the refugee return provisions.[6] Tensions between international NGOs and the Greek and EU authorities and between irregular migrants and immigration authorities continue to mount over the refugee return provision, leading Vincent Cochetel, head of UNHCR's response to the European refugee crisis, to propose, "Let's see what the European courts has [*sic*] to say about this."[7]

The "European courts" – namely, the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR) – will likely have to say

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[3] To date, 126,166 refugees have already arrived from Turkey to Greece in 2016; 850,000 arrived in 2015, *see* European Commission, Humanitarian Aid and Civil Protection Division, available at http://ec.europa.eu/echo/files/aid/countries/factsheets/syria_en.pdf. *See also* Ian Traynor, "Europe braces for major 'humanitarian crisis' in Greece after row over refugees," *The Guardian*, 25 February 2016, available at http://www.theguardian.com/world/2016/feb/25/europe-braces-major-humanitarian-crisis-greece-row-refugees

[4] "EU and Turkey agree European response to refugee crisis," European Commission Press Release, 19 March 2016, available at http://ec.europa.eu/news/2016/03/20160319_en.htm

[5] "EU-Turkey Refugee Deal A Historic Blow to Rights," Amnesty International Press Release, 18 March 2016, available at https://www.amnesty.org/en/press-releases/2016/03/eu-turkey-refugee-deal-a-historic-blow-to-rights/

[6] *See, e.g.*, "UNHCR, MSF withdraw from Greece's refugee 'hotspots'," *Al-Jazeera*, 22 March 2016, available at http://www.aljazeera.com/news/2016/03/aid-groups-withdraw-greece-refugee-hotspots-160322202842234.html;

[7] Quoted in Duncan Robinson, "UN warns on legality of EU deal to return migrants to Turkey," *Financial Times*, March 6, 2016, available at http://www.ft.com/intl/cms/s/0/cf5c1c3a-e21d-11e5-9217-6ae3733a2cd1.html#axzz45ZjS1ZBL

something sooner, rather than later. Affected parties are likely to lodge complaints concerning, among other things, the "safe third country" provision before Greek courts within weeks, which when exhausted could be brought before the CJEU. They may also seek relief before the ECtHR in a matter of weeks. What will these courts say when presented with human rights arguments against Greece's "safe third country" legislation?

Given the deal's newness and unprecedented nature as well as European human rights law's complexity, legal commentators have not yet delved deeply into how the CJEU and ECtHR may differ when addressing complaints about Greece's "safe third country" legislation, especially given the different political pressures each court is likely to face.[8] And while previous scholarship has identified differences in CJEU and ECtHR approaches to "safe third country" provisions within Dublin Regulations I and II, the EU's unified asylum protocols, none have yet discussed how that case law might apply to the EU-Turkey refugee deal.[9] This paper attempts to address both questions. It identifies differences in the CJEU and ECtHR's recent case law on "safe third country" provisions. It then applies that case law to Greece's "safe third country"

[8] Commentators have begun analyzing the legal viability of EU-Turkey refugee deal claims before the CJEU and ECtHR, however. *See, e.g.,* Elizabeth Collett, "The Paradox of the EU-Turkey Refugee Deal," *Migration Policy Institute Commentary*, March 2016, available at http://www.migrationpolicy.org/news/paradox-eu-turkey-refugee-deal (hereinafter "Collett") (noting that Greece's "safe third country" designation would likely violate its *non-refoulement* duties, as it remains unclear whether Turkey has sufficient safeguards in place (in principle and in practice) to meet these needs to EU standards. Ensuring all returns are legal according to EU law and the 1951 Refugee Convention would thus likely lead to very few being returned."); Steve Peers, "The final EU/Turkey refugee deal: a legal assessment," *EU Law Analysis Blog*, March 18, 2016, available at http://eulawanalysis.blogspot.com/2016/03/the-final-euturkey-refugee-deal-legal.html (stating that Turkey might qualify as a "safe third country" because even though it does not give non-Western asylum seekers refugee status under the UN Refugee Convention, they can get an analogous status which could meet APD II requirements).

[9] For scholarship on CJEU and ECtHR approaches to "safe third country" status and sovereignty provisions under the Dublin system, *see* Daniela Vitiello, "The Jurisprudence of the CJEU on Refugee Law: Analysis and Perspectives," *AWR-Bulletin: Quarterly on Refugee Problems*, Vol. 50, No. 3-4, 2012 (hereinafter "Vitiello"); Christian Filzweiser, "The Dublin Regulation versus the European Convention of Human Rights – A Non-Issue or a Precarious Legal Balancing Act?" *Dublin Transnational Project*, 2014; Giulia Vicini, "The Dublin Regulation between Strasbourg and Luxembourg: Reshaping *non-refoulement* in the Name of Mutual Trust?" *European Journal of Legal Studies*, Vol 8, Issue 19 (2015).

legislation and notes that these differences might lead to different outcomes, creating an unprecedented rift in the two courts' otherwise cordial "gentleman's agreement" regarding refugee law. The paper concludes by proposing that the CJEU accept ECHR accession on less stringent terms than those in its December 2014 communiqué, allowing for greater legal certainty during a crisis plagued by geopolitical uncertainty.

II. HIERARCHY OF INTERNATIONAL AND EUROPEAN LEGAL NORMS REGARDING NON-REFOULEMENT AND SAFE THIRD COUNTRY STATUS

European refugee protections are complex but, to date, largely complementary. EU member states are bound by three overlapping legal regimes about treatment of refugees and asylum seekers – namely, the Geneva Convention and Protocol Relating to the Status of Refugees ("Refugee Convention," collectively), the European Convention on Human Rights (ECHR), and the body of EU law, including the EU Charter of Fundamental Rights (CFR) and the Common European Asylum System (CEAS).

The CFR is considered part of the "fundamental principles of EU law" that bind Member States when implementing EU law.[10] It therefore governs implementation of the CEAS, which consists of four directives and one regulation concerning refugee reception conditions,[11] asylum decision-making,[12] legal definitions of refugees,[13] allocation of refugee processing decisions between Member States,[14] and collection of

[10] Article 51 CFR; note that Poland and the UK have negotiated opt-outs that limit the CFR's ability to strike down their national legislation on purely human rights-related grounds.
[11] Directive 2013/33/EU laying down standards for the reception of applicants for international protection (hereinafter Reception Conditions Directive II or RCD II, revised 26 June 2013).
[12] Directive 2013/32/EU on common procedures for granting and withdrawing international protection (hereinafter Asylum Procedures Directive II or APD II, revised 26 June 2013).
[13] Directive 2011/95/EU 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 (hereinafter Qualification Directive II or QD II, revised 13 December 2011).
[14] Regulation No. 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member states by a third-country national or a stateless person (hereinafter Dublin III, revised 26 June 2013).

refugee biometric data for security purposes. The CFR sets the ECHR as its baseline for human rights protections but allows the EU itself to set out protections beyond the ECHR.[15]

The ECtHR is responsible for interpreting and applying the ECHR. As all EU Member States and Turkey are members of the Council of Europe and have acceded to the ECHR, any ECHR State Party or affected individual can bring any party to the EU-Turkey refugee deal before the ECtHR for ECHR violations.[16]

The CJEU is responsible for interpreting and ensuring the uniform enforcement of the CEAS. Member States may request preliminary rulings on interpretations of CEAS provisions; Member States and EU institutions may bring infringement proceedings against other Member States that infringe the CEAS; and Member States, EU institutions, and private individuals directly affected by an EU act like the EU-Turkey refugee deal may request actions for annulment on the grounds that the deal violates the CEAS or the CFR.

Currently, the ECtHR and CJEU formally operate as two separate judicial entities applying two separate bodies of law. However, the Treaty of Lisbon requires the EU as a collective unit to accede to the ECHR, thereby incorporating the ECHR into EU law.[17] To date, the CJEU has rejected all ECHR accession proposals to date due to concerns about creeping ECtHR jurisdiction.[18] Despite this rather hostile-seeming

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[15] Article 52(3) CFR: "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."

[16] Rule 47 of the Procedures of the European Court of Human Rights, amended 1 January 2016

[17] Arguably, Art 52 CFR has already done this by setting the ECHR as the baseline of EU human rights protections. It is likely that this Article was drafted in anticipation of the EU's subsequent accession to the EU by drafters who did not anticipate the CJEU's many objections. Certainly, the CJEU's unwillingness to apply the ECHR or, indeed, the CFR in its rulings indicates that it does not take Art 52 CFR as an implicit incorporation of or accession to the ECHR, as is consistent with its general position towards ECHR accession.

[18] More specifically, the CJEU worries that if the ECHR became EU law, the ECtHR, the authoritative interpreter of the ECHR, would have the ability to interpret EU law, something the Treaty on the

reason for opposing accession, however, the CJEU and ECtHR's refugee-related jurisprudence has to date been strikingly collegial and complementary. Indeed, the two courts have increasingly cited one another in the field of immigration and refugee law, with the CJEU in particular relying heavily on the ECtHR's more robust jurisprudence in the field as it begins to interpret the CFR.[19] Several commentators have expressed concerns that the two courts' Dublin II jurisprudence, discussed in greater detail in Section III(B) below, indicates growing division between the ECtHR and the CJEU, with the ECtHR taking a more progressive approach to CEAS regulations than the EU court.[20] Others worry that the courts' desire to preserve a cordial (if non-acceded) relationship might lead both courts to compromise the principle of *non-refoulement*, weakening the EU's historic commitment to human rights protections.[21] As discussed further below, either of these fears could be played out if both courts face challenges to the "safe third country" provisions in the EU-Turkey refugee deal at the same time, exposing rifts in European refugee law as well as in European refugee policy.

III. DOES GREECE'S QUALIFICATION OF TURKEY AS A SAFE THIRD COUNTRY VIOLATE THE REFUGEE CONVENTION, THE ECHR, OR EU LAW?

International NGOs and irregular migrations facing forcible return to Turkey will likely focus their challenges to Greece's "safe third country" provisions on Turkey's non-compliance with its duties of *non-refoulement*. They will likely argue that Turkey has been deporting Syrian refugees back to regions of Syria where they are likely to face cruel, inhuman, or degrading treatment in violation of Article 3 ECHR

Functioning of the EU exclusively reserves for the CJEU itself. In addition, the ECtHR's ability to determine its own jurisdictional limits might mean that it exercised exclusive review over cases concerning EU common security and foreign policy, which is excluded from CJEU review. *See* CJEU Opinion 2/13 of 18 December 2014.

[19] Grainne de Bursa, After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator? *Maastricht Journal of European Law*, Vol 20, No 2 (2013); Vitiello p. 187-89.

[20] *See, e.g.,* Vitiello, Filzweiser, *op cit n.* 9

[21] *See, e.g.,* Vicini, *op cit* n 9

and/or where they are likely to be persecuted for their social, political, religious, or ethnic identity in violation of Article 33 Refugee Convention and Article 18 CFR. They may also argue that Turkey's reservations to the Refugee Convention, discussed further below, automatically disqualifies it as a safe third country, as it bars Syrian asylum seekers from obtaining refugee status in Turkey, which leaves them legally and politically vulnerable. Finally, they may argue that private Turkish citizens' violence towards Syrian refugees on Turkish soil – and Turkish authorities' apathy towards prosecuting those citizens – should disqualify Turkey as a safe third country.

To assess the CJEU and ECtHR's approaches to these allegations, this section will consider A) which laws these courts will apply when considering these questions and 2) what these courts' case law says about similar issues.

A. Safe Third Country Norms and Duties in the Refugee Convention and EU Law: A Simple Extension of Non-Refoulement

Safe third country norms and duties arise out of countries' fundamental duty of *non-refoulement*, as defined by the Refugee Convention. Article 33 of the Refugee Convention requires States to not expel refugees to territories where their life or freedom are threatened because of race, religion, nationality, membership in a particular social group, or political opinion, subject to a narrow security exception.[22] This duty attaches from the moment that an asylum seeker meeting the definition of "refugee" found in Article 1A(2)[23] enters a State Party's territory (and not, for

[22] Article 33(1), Refugee Convention; the security exception in Article 33(2) reads:

> The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

[23] Article 1A(2) defines a refugee as

> 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 in 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."

example, once the State Party has adjudicated his/her case and granted refugee status according to its national laws).[24]

The duty of *non-refoulement* is customary international law[25] and thus likely applies to Turkey even though ratified the 1967 Protocol (which extended the Convention to all asylum seekers, regardless of nationality) with a reservation stating that it would only grant refugee status to those who had become asylum seekers "as a result of events occurring in Europe."[26] However, Turkey could follow the United States and Italy, among others, and argue that Article 33(2) of the Refugee Convention allows it to expel Syrian refugees due to increased security concerns, especially in light of its wave of terror attacks during the past few months.[27]

EU law incorporates the duty of *non-refoulement* in various ways. Article 78(1) TFEU states that any common European asylum policy must "ensure[] compliance with the principle of non-refoulement" and be in accordance with the 1951 Refugee Convention and 1967 Protocol.[28] Article 19(2) CFR provides that "[n]o one may be removed, expelled or extradited to a State where there is a serious risk that he or she

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[24] *See* UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and 1967 Protocol relating to the Status of Refugees*: "A person is a refugee within the meaning of the 1951 Convention as soon as he fulfills the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined…He does not become a refugee because of recognition, but is recognized because he is a refugee."

[25] *See, e.g.,* UNHCR, Executive Committee Programme, *Non-Refoulement*, Conclusion No. 6 (XXVIII) (1977); ("[T]he fundamental humanitarian principle of *non-refoulement* has found expression in various international instruments adopted at the universal and regional levels and is generally accepted by States."); Jean Allain, "The jus cogens nature of non-refoulement," *International Journal of Refugee Law*, Vol 13, No 4, p 533, 538 (2002) ("[I]t is clear that the norm prohibiting *refoulement* is part of customary international law, thus binding on all States whether or not they are party to the 1951 Convention."); *see also* Alice Farmer, "Non-Refoulement and *Jus Cogens*: Limiting Anti-Terror Measures that Threaten Refugee Protection," *Georgetown Immigration Law Journal*, Vol 23, No 1, 2008 (arguing that *non-refoulement* should be considered a *jus cogens* norm despite states' broad readings of Article 33(2) exceptions).

[26] Turkey, Reservation to the 1967 Protocol Relating to the Status of Refugees, available at http://www.unhcr.org/4dac37d79.html

[27] The United States justified its policy of expelling Haitian and Cuban asylum seekers in its territorial waters under Article 33(2) Refugee Convention; this was condemned by UNHCR but upheld by the U.S. Supreme Court in *Sale v. Haitian Centers Council*, 509 U.S. 155 (1993). Italy likewise used Article 33(2) to try to justify its policy of working with Libyan naval forces to push north African asylum seekers back to Libyan territory, but was condemned by the ECtHR as a violation of ECHR Article 3 and the principle of *non-refoulement* in *Hirsi Jamaa and Others v. Italy*, Case No. 27765/09, 23 February 2012.

[28] Article 78(1) TFEU

would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment"; Article 18 further provides that the right to asylum shall be provided in accordance with the Refugee Convention (including Article 33).

Article 38 of the EU's Asylum Procedures Directive (APD) II also incorporates *non-refoulement* into its definition of "safe third countries": Member State authorities must be satisfied that that third country will, among other things, respect *non-refoulement* in accordance with the Refugee Convention.[29] Interestingly, Article 37(1) APD II also mentions a separate prohibition on removing asylum seekers "in violation of the right to freedom from torture and cruel, in human, or degrading treatment as laid down in international law."[30] In safe third countries, the possibility must exist "to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention."[31]

Characterizing a country as a safe third country *ex ante* is largely left up to Member State discretion. During APD II negotiations, several Member States and EU institutions proposed that the APD I's common list of safe third countries, updated on a regular basis, be maintained.[32] Other Member States objected to this, leading to the current APD II regime, which allows Member States to set rules governing national administrative procedures for determining safe third countries and allows Member State legislatures to declare certain countries to be safe third countries "based on a range of sources of information" including, among other things, information from other Member States, the Council of Europe, and the UNHCR.[33]

[29] APD II, Art 37(1)(a)-(c)
[30] APD II, Art 37(1)(d)
[31] APD II, Art 37(1)(e)
[32] APD I, Art 29 and annex. For a summary of the debates over the recast APD, *see* Samantha Velluti, *Reforming the Common European Asylum System – Legislative Developments and Judicial Activism of the European Courts,* Heidelberg: Springer Briefs in Law, 2014, pp 59-61.
[33] APD II, Art 37(3)

Nor do Member States' safe country characterizations receive much *ex post* scrutiny. Once a country has been designated as a safe country of origin, asylum applicants bear the burden of rebutting the presumption of safety via "valid" indications.[34] This has led some commentators to decry the APD II procedures as "embody[ing] lowest common denominator law-making at its worse" that would "inevitably lead to refoulement as refugees are deported or refused access to proper procedures."[35] And while the Commission keeps a record of national designations of safe third countries,[36] it does not play any special harmonizing or oversight role in this process beyond its general ability to ensure Member State laws' compliance with EU directives via preliminary proceedings, something that seems unlikely in the context of the EU-Turkey deal.[37]

B. DIVERGING DUTIES: CJEU AND ECTHR INTERPRETATION OF SAFE THIRD COUNTRY PROVISIONS

The ECHR does not explicitly define the concept of a "safe third country" or the level of due diligence states must exercise to ensure that a country is in fact safe. However, ECtHR case *MSS v. Belgium* arguably defines a standard of scrutiny for national "safe country of origin" determinations in the Dublin II context that could be extended to the EU-Turkey refugee deal. In this case, the ECtHR condemned Belgium for returning an Afghan asylum-seeker to Greece because even though the return complied with Belgium's Dublin II obligations, Belgium *knew or should have known*

[34] Velluti, op. cit. n. 23, at 61.
[35] Cathryn Costello, "The asylum procedures directive and the proliferation of safe country practices: deterrence, deflection, and the dismantling of international protection?" *European Journal of Migration and Law*, Vol 7, No 1, 2005
[36] APD II, Art 37(4). It is interesting – and somewhat disheartening – to note that the EU's Implementation Communication characterizes this provision by stripping all reference to "refugee status" out of it. Instead, it describes Art 37(4) as requiring that "the third country can guarantee to the readmitted person effective access to the protection procedure on an individual basis and where found to be in need of protection effective access to treatment in accordance with the standards of the Geneva Refugee Convention." *See* Implementing the EU-Turkey Agreement, *op. cit.* n. 22 (emphasis added).
[37] As seen in the Commission (and other EU institutions') ability to bring preliminary procedures against Member States' designations of a safe third country as a violation of APD II, under TFEU Art 258.

that Greece's asylum procedure deficiencies risked returning the applicant to Afghanistan without proper examination of his case, in violation of Article 3 ECHR and the principle of *non-refoulement*.[38] As the ECtHR noted, "the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where, as in the present case, reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention."[39] Instead, the ECtHR stated, Belgium should have used the so-called "sovereignty clause" in Article 3(2) of Dublin II[40] to process the asylum application itself.

MSS v. Belgium marked the first time that the ECtHR actively interpreted EU law, including both the CFR and CEAS directives. Indeed, commentators have argued that the ECtHR transformed Dublin II/III's sovereignty clause from a defense, allowing Member States to refuse transfer on human rights grounds, to a duty, requiring Member States to refuse transfer if they knew or should have known that violations would take place.[41]

In keeping with their gentleman's agreement, the CJEU seemed to have accepted the ECtHR's duty-interpretation: in joined cases *N.S. v. U.K. and M.E. v. Ireland*, the CJEU stated that Member States violated Article 4 CFR (prohibiting inhuman or degrading treatment) if they transferred asylum applicants when they "could not be

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[38] Decision of 21 January 2011, Case No. 30696/09, *M.S.S. v. Belgium and Greece*, para 346.
[39] *Id.*
[40] Article 3(2) Dublin II reads, in relevant part, "Where it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systematic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union, the determining Member State shall continue to examine the criteria set out in Chapter III in order to establish whether another Member State can be designated as responsible." Failing that, "the determining Member State shall become the Member State responsible." The same text appears in Article 3(2) Dublin III.
[41] *See, e.g.* Vitiello pp 190; Helene Lambert, "'Safe third country' in the European Union: An evolving concept in international law and implications for the UK," *Journal of Immigration, Asylum and Nationality Law*, Vol 26, No 4, 2012, p. 332.

unaware" that the Dublin-designated Member State had "systemic abuses" amounting to CFR violations.[42] In determining this, Member States must examine whether there were "substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants…resulting in inhuman or degrading treatment," paying particular attention to reports by international organizations and the European Commission.[43] Given Greece's deteriorating asylum conditions and the applicants' family situation (including young children), the CJEU determined that the UK and Ireland could not have been unaware of an Article 4 CFR violation when those applicants returned to Greece.[44]

Despite their superficial similarities, however, these two decisions are not identical. The ECtHR in *MSS v. Belgium* focused not only on the asylum applicant's risk of detention and inhumane treatment in Greece (which would itself violate Article 3 ECHR), but also on the risk that Greece's poor asylum procedural protections might incorrectly return the applicant to Afghanistan, where he likely risked even greater inhumane treatment, a violation of both Article 3 ECHR and the principle of *non-refoulement* that, according to the ECtHR, hides in Article 3's heart. In contrast, the CJEU in *N.S. and M.E.* focused narrowly on the possible Article 4 CFR violations arising from detention and inhumane treatment within Greece itself; the CJEU made little reference to Greece's procedural protections (or lack thereof) and no reference to violations of Art 18 and 19 CFR, Art 78(1) TFEU, or the principle of *non-refoulement* arising from conditions in the applicants' countries of origin.

Likewise, the ECtHR's standard of scrutiny for countries' duty under Article 3(2) Dublin II is likely stricter than that laid out by the CJEU. In *MSS v. Belgium*, the

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[42] *N.S. v. Secretary of State for the Home Department and M.E. et al v. Refugee Applications Commissioner, Minister for Justice, Equality, and Law Reform,* Joint Cases C-411/10 and C-493/10, Judgment of 21 December 2011 (not yet published), para. 194.
[43] *Id.*, para. 192
[44] *Id.*

ECtHR stated that the duty is triggered when Member States knew or should have known of "reliable sources [that] reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of [the ECHR]."[45] In contrast, the CJEU in *N.S. and M.E.* stated that the sovereignty clause duty was triggered when Member States "could not be unaware" of "substantial grounds" showing "systemic flaws in the asylum procedure and reception conditions for asylum applicants…resulting in inhuman or degrading treatment." The ECtHR thus triggers the sovereignty clause duty if a receiving Member State exhibits practices (which could be isolated, and not systemic) or even *tolerates* practices (possibly even by nonstate actors) that violate *any* ECHR provision. The CJEU instead narrowly triggers the duty when there are systemic flaws in the State's asylum procedure and reception conditions; and then possibly only when Article 4 CFR is violated. Likewise, it is possible that the CJEU's "could not have been unaware" standard, especially when combined with its mention of European Commission and UNHCR reports, creates a higher threshold for Member States' actual knowledge before the sovereignty clause duty is triggered (versus the ECtHR's "knew – or should have known – based on "reliable (and unspecified) sources").

IV. DIVERGING OUTCOMES? APPLICATION OF SAFE THIRD COUNTRY PROVISIONS TO THE EU-TURKEY DEAL'S "REFUGEE RETURN" PROVISION

It is possible that the ECtHR and CJEU will cabin both the *MSS v. Belgium* and *NS and ME* decisions to allocation of EU Member State responsibilities within the Dublin system, declining to extend any new doctrine of Member State responsibility for safe third party characterizations beyond the CEAS. However, both cases' reasoning relied not only on the sovereignty provision of the Dublin II regulation but also on safe third

[45] *Id.*

country provisions in the APD II. These courts might therefore consider applying their reasoning in *MSS v. Belgium* and *NS and ME* to cases concerning the EU-Turkey refugee deal's safe third country provisions, which cite Articles 35 and 38 APD II.[46]

Applying these two cases to the EU-Turkey deal may not yield identical results, however. The ECtHR is likely to invalidate the "safe third country" provision of the EU-Turkey refugee deal and find both Turkey and the EU in violation of the principle of *non*-refoulement. As a threshold matter, the ECtHR will likely find Turkey in violation of Article 3 ECHR (and thus, by extension, of the duty of *non-refoulement* it has read into Article 3). As a member of the Council of Europe and a party to the ECHR, Turkey is bound by Article 3. Unlike Article 33 Refugee Convention, Turkey has not limited Article 3 ECHR to Western Europeans. It could therefore condemn Turkey's increasing refusal to accept Syrian refugees fleeing social and political persecution that threatens their refugees' life and liberty. Article 3 ECHR also does not have a security exception like that found in Article 33(2). As a result, the ECtHR could also condemn Turkey's deportation of Syrian refugees back across the Syrian border for "security reasons" as a violation of Article 3 ECHR.

The ECtHR will also likely find Greece's decision to characterize Turkey as a "safe third country" as a violation of Article 3 ECHR as well as Article 35 APD II. Applying its reasoning in *MSS v. Belgium*, it seems likely that Greece knew (or should have known) about Turkish abuses at the Syrian border at least as much as Belgium knew about Greek asylum procedural deficiencies, especially since the ECtHR expects

[46] *See* n. 4 and n. 5, *op. cit.* Note that this analysis is limited to suits brought by individuals against Greece's legislation as in violation of 1) the ECHR, before the ECtHR or 2) the CEAS and CFR, before the CJEU. This is a possible (and perhaps likely) scenario, and is most directly analogous to the procedural posture of *MSS v. Belgium* and *NS and ME* cases. Furthermore, while it is possible that Greece might refer its questions about its "safe third country" legislation to the CJEU for a preliminary ruling re: CFR and CEAS compliance, it is unlikely that an EU institution would bring an enforcement action against Greece for non-compliance with EU law, since the EU required Greece to pass the legislation in the first place. Greece could conceivably proactively bring an enforcement action against the EU Commission for failing to respect EU law when passing the EU-Turkey refugee deal, but this exceeds the scope of this paper's analysis.

Member States to inform themselves using "all reliable sources." Reliable sources including Human Rights Watch and Amnesty International have been reporting on Turkish violations of the principle of *non-refoulement* for over a year. Turkish border abuses almost certainly exceed the procedural deficiencies of the Greek asylum system: where Greece's asylum system *may* have wrongfully returned asylum-seekers to dangerous regions without properly examining their applications, Turkish border policies almost certainly do return qualified refugees back to dangerous situations. Given the language in *MSS v. Belgium*, the ECtHR would also likely condemn Greece for qualifying Turkey as a safe third country even if Greece or Turkey could show that these border policies were not an affirmative Turkish state action but instead a series of omissions by Turkish immigration and border authorities.

The CJEU may not find Greece's "safe third country" legislation in breach of Article 35 APD II or the CFR. First, a note about political context: as the binding arbiter of EU legal interpretations, the CJEU finds itself in a privileged but politically sensitive position. The fate of the Schengen zone and the EU itself is becoming precarious as the refugee crisis worsens; as a result, the CJEU may feel political pressure from other EU institutions to uphold a refugee deal as the lesser of two evils (the alternative being increased pressure on Greece, a worsening EU security situation, and increased fragmentation within the Schengen zone). This could lead the CJEU to retreat from its emerging role as a human rights court (since the incorporation of the CFR into EU law in 2009) into a role as arbiter of predominantly economic rights in the EU.

Does the CEAS and CFR allow the CJEU to do this? The CJEU's standard for Member State duties regarding designating other countries as "safe third countries" within the CEAS, as defined in *NE and MS*, is possibly lower than the ECtHR's in *MSS v. Belgium*: the CJEU may require that Greece "could not be unaware" of

"systemic flaws" in Turkey's asylum and reception conditions. As Syrian refugees are not fleeing a European crisis, Turkey's reservations to the Refugee Convention do not allow Syrian refugees to apply for official refugee status recognition. This could be considered a "systemic flaw," but absent additional evidence showing that Turkey is actually sending Syrians back into Syria/turning them away at the border, it looks less like Greece's systematic asylum application processing flaws and more like a legitimate sovereign treaty reservation. In addition, while NGO reports have increasingly reported on Turkish deportations and border refusals, *NE and MS* mention that Member States should consult UN and EU reports when determining "safe third country" status. It is unclear what credit, if any, either Member States or the CJEU should/would give to NGO reports. The UNHCR has only recently begun reporting on quasi-systematic Turkish border pushbacks, while EU reports have not (likely for diplomatic reasons) mentioned these pushbacks at all. Thus, the CJEU might be able under *NS and ME* to find that Greece's possible knowledge of Turkey's *non-refoulement* violations did not meet the "could not have been unaware" standard in that case and thus did not have an affirmative duty to refrain from exercising its sovereignty to qualify it as a "safe third country." Given these sources and these requirements, the CJEU could credibly find that Greece could have been unaware of these systemic flaws, and thus did not violate its CEAS duties in characterizing Turkey as a safe third country (especially since it did so upon the EU's express recommendation).

Article 18 CFR relies on the Refugee Convention for its definition of *non-refoulement*; EU law thus allows for a security exception to *non-refoulement*. Article 35 APD II in turn incorporates Article 18 CFR's definition of *non-refoulement*, therefore likely importing the security exception into the "safe third country" provision-making process (and, given the lack of EU oversight of that process, giving

states wide leeway to interpret the security provision as they wish). Given Greece's lack of processing capability, the EU's relative lack of solidarity in reinforcing Greece's processing or resettlement capabilities, and the EU's increasing security concerns, the CJEU could probably credibly determine that the EU-Turkey deal falls within this exception, allowing it to rule that Greece's "safe third country" provision falls within Article 35 APD II's scope. Similarly, given the CFR's broader receptivity to security exceptions than Article 3 ECHR, the CJEU may be more receptive to Turkey's arguments that refugee groups are inciting civil violence, economic hardship, and retaliatory attacks on Turkish soil than their Strasbourg counterparts. Thus, unless and until the ECHR becomes EU law, the CJEU might come out differently on how to interpret both state duties under a "safe third country" provision of CEAS and whether and to what extent a security exception exempts states from *non-refoulement* duties. This could lead to them upholding Greece's legislation while the ECtHR condemns it, breaking the "gentlemen's agreement" of mutual respect that the CJEU and ECtHR have to date had for each other's asylum and refugee related decisions.

Such disparity in outcomes before the ECtHR and CJEU reveals how fragmented the European asylum and refugee rights protection system currently is. The incorporation of the CFR into EU law coupled with the EU's failure to accede to the ECHR has created concurrent, and potentially contradictory, judicial sources of European human rights law. To date, the two courts have shown mutual respect for each other's decisions in the asylum law field. However, as political pressure on the CJEU increases as the refugee crisis worsens, this could change. The CJEU could use differences between ECtHR and CJEU case law and between the CFR/CEAS[47] and the

[47] To date, the only sources of EU refugee law (absent EU accession to the ECHR). The CJEU is currently considering whether it can independently interpret the Refugee Convention, to which all 28 Member States are parties but the EU itself is not. *See* Case C-481/31, Mohammed Ferooz Qurbani. No decision has yet been reached in the case.

ECHR, to uphold EU refugee and asylum policies over objections about *non-refoulement* violations. This may contribute to the current confusion about European refugee law and policy, as European legal advisers may not be able to predict whether the ECtHR and CJEU will respect one another's decisions on refugee provisions or rely on gaps in case law and statutory authority to interpret them differently for political ends. This in turn may lead to plaintiff forum-shopping and further weakening of European human rights law's legal authority and political impact.

V. CONCLUSION: TOWARDS A MORE UNIFIED EUROPEAN HUMAN RIGHTS SYSTEM?

One possible – if somewhat politically improbable – solution to this European asylum law quandary might come from the CJEU allowing the EU to accede to the ECHR. The TFEU requires accession to the ECHR. The CJEU's objections about creeping ECtHR jurisdiction are somewhat unfounded and alarmist – after all, as seen in *MSS v. Belgium*, the ECtHR already interprets EU common asylum and refugee policy when it affects a non-derogable right such as Article 3 ECHR's prohibition on torture and inhumane punishment. Indeed, in acceding to the ECHR – at least under the terms of the 2014 accession agreement – the CJEU might have more ability to curb the ECtHR's jurisdiction over elements of CEAS because any case brought before the CJEU first would be precluded from ECtHR consideration (possibly precluding a situation like the one sketched above, in which the same or similar plaintiffs challenge the same law in both courts simultaneously). Concerns about the ECtHR exercising jurisdiction over areas of law where the CJEU has no jurisdiction (common security and foreign policy, for example) are ungrounded; it is in those areas, where the CJEU has no review with direct effect, that the ECtHR's binding review is so vital, especially given the disproportionate impact new security policies will likely have on minority rights. Acceding to the ECHR would also allow the CJEU to reinforce and "gap fill"

both the CFR and the CEAS, ensuring that the Article 33(2) "security exception" to the *non-refoulement* principle is widened so far that it virtually renders the principle meaningless. This would reinforce the CJEU's ability to retain a robust, directly effective human rights check on EU asylum legislation and refugee deals, something that seems likely to be increasingly important as the refugee crisis continues. This could provide legal certainty, accountability, and conceptual clarity to Member States and EU institutions, ensuring that while policy solutions may remain mired in political debate, legal protections for fundamental rights remain crystal clear.