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The final EU/Turkey refugee deal: a legal assessment



Steve Peers

The EU and Turkey have now reached an **agreement** on refugee issues, which has aroused considerable legal and political controversy. To examine the arguments about the deal, I present here the main text with my legal assessment of each point annotated. This builds upon my comments (together with Emanuela Roman) first of all in general on the relevant points last month, and then **secondly** on the leaked draft text of the final deal earlier this week (I have reused here some of the latter analysis where relevant). The agreement should be read alongside the **EU summit conclusions**, as well as the Commission communication on the deal. It incorporates the March 7 EU/Turkey statement which addressed the same issues in less detail.

The text of the deal is underlined below. The sections in bold have been added during negotiations, and the sections in strike-out have been removed. I have already discussed the legal status of the deal in the prior post earlier this week: it's a statement that is not subject to approval or legal challenge as such; but its implementation in the form of specific laws or their application to individual asylum-seekers can be challenged.

1. All new irregular migrants crossing from Turkey into Greek islands as from 20 March 2016 will be returned to Turkey. This will take place in full compliance with EU and international law, thus excluding any kind of collective expulsion. All migrants will be protected in accordance with the relevant international standards and in respect of the principle of non-refoulement. It will be a temporary and extraordinary measure which is necessary to end the human suffering and restore public order. Migrants arriving in the Greek islands will be duly registered and any application for asylum will be processed individually by the Greek authorities in accordance with the Asylum Procedures Directive 2013/32/EU, in cooperation with UNHCR. Migrants 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 any necessary bilateral arrangements, including the presence of

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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. The costs of the return operations of irregular migrants will be covered by the EU. Migrants having been returned to Turkey will be protected in accordance with the international standards concerning the treatment of refugees and respecting the principle of non-refoulement.

The newly added first sentence is a flagrant breach of EU and international law – but the rest of the paragraph then completely contradicts it. To be frank, anyone with a legal qualification who signed off on this first sentence should hang their head in shame. Returning ‘all’ persons who cross from Turkey to the Greek islands *would* contradict the ban on collective expulsion in the EU Charter and the ECHR, as well as EU asylum legislation. However, it does appear from the rest of the paragraph – including the newly added reference to *non-refoulement* (not sending people back to unsafe countries) – that this is not really the intention.

As for the rest of point 1, the first question is how ‘temporary’ this arrangement will be. Secondly, point 1 makes clear that the EU’s asylum procedure directive will apply to those who reach the Greek islands, as legally required. Note that the text does not refer to Greek *waters*: but the Directive explicitly applies to them too. It does not apply to international or Turkish waters. It is not clear what is planned as regards those intercepted before they reach the Greek islands.

As for ‘migrants not applying for asylum’ the crucial question is whether they will be given an *effective opportunity* to apply for asylum, as the Directive (and ECHR case law) requires. If an irregular migrant does not apply for asylum then in principle there is no legal obstacle to returning them to Turkey, subject to the conditions set out in the EU’s Returns Directive. Note that the Greek authorities will have to consider the applications, which is a significant administrative burden; this implicitly reiterates the closure of the route via the Western Balkans. The EU’s decisions on relocation of asylum-seekers from Greece and Italy (discussed here) will implicitly continue to apply, but they only commit to relocating a minority of those who arrive in Greece, and they are barely being applied in practice.

If an application is ‘unfounded’ that means it has been rejected on the merits. If it is ‘inadmissible’ that means it has *not* been rejected on the merits, but on the grounds that Turkey is either a ‘first country of asylum’ or ‘safe third country’ (there are other grounds for inadmissibility, but they wouldn’t be relevant). The Commission paper briefly suggests that Turkey could be a ‘first country of asylum’ (for more analysis on that, see the prior blog post). Most of the debate is on whether Turkey is a ‘safe third country’.

Is it? The commitments on treatment in Turkey have been moved from this statement to the separate **summit conclusions**. Treatment in Turkey will need to match EU rules in the procedures Directive, which define a ‘safe third country’ as a country where: the people concerned do not have their life or liberty threatened on ground of ‘race, religion, nationality, membership of a particular social group or political opinion’ (this test is taken from the Geneva Convention on refugee status); there is ‘no risk of serious harm’ in the sense of the EU definition of subsidiary protection (death penalty, torture et al, civilian risk in wartime); the people concerned won’t be sent to *another* country which is unsafe (the *non-refoulement* rule, referring specifically to the Geneva Convention, plus the ban on removal to face torture et al as laid down by ECHR case law); and ‘the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention’.

As set out in the previous blog post, the last point is questionable because Turkey does not apply the Geneva Convention to non-Europeans, and the best interpretation of this requirement is that it must do so in order for the clause to apply. However, this interpretation is not universally shared: the Commission, the Council, Greece and some academics take the view that it is sufficient that Turkey applies equivalent standards in practice. (Note that the

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ABOUT THE EDITOR



Steve Peers

I'm a Professor of EU and Human Rights Law at the University of Essex. Follow me on Twitter: @StevePeers See my academia.edu profile: <https://essex.academia.edu/StevePeers>

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Commission only selectively quotes the Directive to make this argument). Even if this latter interpretation is correct, whether Turkey *does* apply equivalent standards in practice might itself be open to question.

Furthermore, again as discussed in the previous post, many NGOs argue that refugees are not always safe from mistreatment in Turkey itself, although no one argues that *all* of them are mistreated there. Equally Turkey allegedly returns some people (but clearly not *all* of them) to unsafe countries, and the deal explicitly plans for a 'safe zone' in Syria. Such a zone is conceivable in theory, but whether it would indeed be safe would have to be judged when and if it happens; and it may become less (or more) safe in light of events. To address these issues the procedures Directive says that the asylum-seeker must be able to argue that 'the third country is not safe in his or her particular circumstances'. Everything will then turn on the assessment of an argument along these lines.

A critical here is whether the case can be fast-tracked. The procedures Directive contains lists of cases where the administrative procedure can be fast-tracked, and where the appeal against a negative decision to a court doesn't automatically entitle an asylum-seeker to stay. Note that those lists **don't refer to fast-tracking 'safe third country' cases**, although in practice it may be quicker to decide a case without examining the merits. It is possibly arguable that the lists aren't exhaustive. If Greece wants to take this view, the interpretation of these clauses will be crucial. If the cases can't be fast-tracked, it will obviously take longer to return people to Turkey in practice. Member States can set up special 'border procedures', but there is no reference to fast-tracking applications in this context. Furthermore, Member States can't apply fast-track or border procedures to 'vulnerable' applicants, as broadly defined, and can't apply border procedures to unaccompanied minors.

Odd as it might seem, the *general* state of human rights in Turkey (for example, as regards freedom of expression) is not directly legally relevant to returning refugees or other migrants there. The question is whether Turkey is unsafe, as defined in EU asylum law, *for refugees and migrants*. However, the general state of human rights in Turkey is relevant for a *different* reason: the Commission has separately proposed that Turkey be designated a 'safe country of origin', so that any refugee claims by *Turkish* citizens can be more easily rejected. I argued last September that this proposal was untenable in light of the human rights record of Turkey. In light of developments since, I'll update my assessment: the suggestion is now utterly preposterous. But this proposal is not part of the deal.

2. 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. On resettlement based on 1-for-1 principle: a) Priority will be given to migrants Syrians 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 honouring the commitments taken by Member States in the conclusions of Representatives of the Governments of Member States meeting within the Council on 22/7/2015, 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 within the limits and in accordance with the distribution set out in [relocation decision of 22/9/2015 to allow for any resettlement commitment undertaken in the framework of this arrangement to be offset from non-allocated places under the decision. —non-allocated places]. 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.

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Should the number of returns exceed the numbers provided for above, this mechanism will be discontinued. ~~the number of returns exceed the numbers provided for by these commitments, this agreement will be subject to review.~~

The idea of a ‘1-for-1’ swap of irregular migrants for resettled Syrians has been controversial, but does not raise legal issues as such. Resettlement of people who need protection from the countries they have fled to is common in practice, but is not a binding legal obligation under international or EU law. The legality of return of people to Turkey has to be judged separately (as discussed above) from the question of whatever trade-offs might be made in return for this. However, I certainly share the view of those who find a de facto ‘trade in human misery’ morally dubious. The ethos of resettlement is humanitarian; to demand a pay-off for one’s humanitarian actions contradicts their ethical foundations.

The final text makes clear that resettlement will focus on the most vulnerable people. Note that if all resettlement from now on takes place from Turkey, then no-one will be resettled by the EU from Lebanon and Jordan, which also host large numbers of Syrian refugees. On the ‘low priority’ cases, it is open to Member States to prioritise resettlement on whatever criteria they like. Obviously the intention here is to deter people from attempting unsafe journeys via smugglers; whether that would work depends on the numbers who might be resettled.

Overall, the EU has not increased the numbers of people that Member States are willing to accept: the first 18,000 are the remainder of the 23,000 people that the EU committed to resettle from non-EU countries last year, and the next 54,000 are the remainder of those who were going to be relocated from Hungary, before that state rejected the idea last September. However, unlike the mandatory quotas under the EU’s relocation decision, these numbers will be voluntary. The final deal makes clear that the maximum number of people who will be returned on this basis is 72,000: this part of the deal ends once the number of returned irregular migrants hits that number, or if the levels of irregular migration stop. In the latter case, the EU will move to a voluntary humanitarian admission scheme, discussed below. In the former case, it is not clear what will happen.

3) Turkey will take any necessary measures to prevent new sea or land routes for illegal migration opening ~~from up out of Turkey and into to the EU, and will cooperate with neighbouring states as well as the EU to this effect.~~

This refers to Bulgarian concerns that people might try to cross the Black Sea as a new entry route. Of course, if people do make to Bulgarian territory or waters, the EU asylum laws would apply, as they do for Greece.

4) Once ~~the~~ irregular crossings between Turkey and the EU ~~have come to an end~~ **are ending, or at least have been substantially and sustainably reduced, the Voluntary Humanitarian Admission Scheme will be activated. EU Member States will contribute on a voluntary basis to this scheme.**

This scheme is set out in a Commission Recommendation from December, as discussed in detail here. Note that the text was amended to make clear that irregular crossings would not have to stop entirely; that was an obvious fantasy.

5) The fulfilment of the visa liberalisation roadmap will be accelerated vis-à-vis all participating Member States with a view to lifting the visa requirements for Turkish citizens at the latest by the end of June 2016, provided that all benchmarks have been met. To this end Turkey will take the necessary steps to fulfil the remaining requirements to allow the Commission to make, following the required assessment of compliance with the benchmarks, an appropriate proposal by the end of April on the

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basis of which the European Parliament and the Council can make a final decision.

This commitment is transposed from the March 7 statement. The waiver of short-term visas only applies to the Schengen States, and applies for stays of three months. Under the EU/Turkey readmission agreement, Turkey will have to take back anyone who overstays. It will still be necessary for Turkey to meet the relevant criteria, and for the EU Council (by qualified majority vote) and the European Parliament to approve this change in EU law.

6) The EU, in close cooperation with and Turkey, will further speed up the disbursement of the initially allocated 3 billion euros under the Facility for Refugees in Turkey and ensure funding of additional further projects for persons under temporary protection identified with swift input from Turkey before the end of March. A first list of concrete projects for refugees, notably in the field of health, education, infrastructure, food and other living costs, that can be swiftly financed from the Facility, will be jointly identified within a week. Once these resources are about to be used to the full, and provided the above commitments are met, Furthermore, the EU will mobilise decide on additional funding for the Facility of an additional 3 billion euro up to the end of 2018. |X| billion for the period |Y| for the Turkey Refugee Facility.

The amount and timing of additional money from the EU and its Member States was agreed during negotiations. Details of the timing of disbursements and the nature of the spending projects have also been added. Note that this money is not, as is widely assumed, simply handed over to Turkey: legally speaking it can only be spent on projects that assist the Syrian refugee population. The Commission paper sets out further details of how the money will be spent, starting with a contract to provide food aid to over 700,000 Syrians.

7) The EU and Turkey welcomed the ongoing work on the upgrading of the Customs Union.

This refers to an intention to extend the existing customs union to cover services and investment issues.

8) The EU and Turkey reconfirmed their commitment to re-energise the accession process as set out in their joint statement of 29 November 2015. They welcomed the opening of Chapter 17 on 14 December 2015 and decided, as a next step, to open Chapter 33 during the Netherlands presidency. They welcomed that the Commission will put forward a proposal to this effect in April. Preparatory work for the opening of other Chapters will continue at an accelerated pace without prejudice to Member States' positions in accordance with the existing rules.

Ultimately the EU and Turkey agreed to open only one new chapter out of 35 which need to be agreed in order for Turkey to join the EU. Only one chapter has been closed so far in a decade of negotiation. There is no commitment to open or close any further chapters. Even if an accession deal is ever negotiated, there are many legal and political obstacles in the way of it being approved, as all Member States' parliaments would have to agree.

9) The EU and its Member States will work with Turkey in any joint endeavour to improve humanitarian conditions inside Syria, in particular in certain areas near the Turkish border which would allow for the local population and refugees to live in areas which will be more safe.

This refers to an intention (as noted above) to create a 'safe zone' within Syria. Whether this is viable or not remains to be seen. If there is any dispute about its safety, then

returning Syrians to Turkey would be problematic if Turkey intends to send them further on to the alleged safe zone.

Conclusions

Overall the final deal tries to address the two main legal concerns about the March 7 'deal'. It makes clear that the EU asylum laws will apply to those who reach Greece (subject to the caveat about what happens to those intercepted in Greek waters), and that Turkey will have to meet the relevant standards when taking people back. The intention to 'make the deal legal' is clearly undermined by the extraordinary statement that 'all' irregular migrants will be returned. The key legal question will be how these commitments are implemented in practice.

The main legal route to challenging what happens should be by asylum-seekers through the Greek courts. Those courts could refer questions to the CJEU about EU asylum law (the CJEU could fast-track its replies). Alternatively if the asylum-seekers have gone through the entire Greek court system, or cannot effectively access the Greek system they could complain to the European Court of Human Rights (which is separate from the EU), and claim that there is a breach of the European Convention of Human Rights. In practice, however, it may be that access to lawyers and courts is more theoretical than real.

It is unfortunate, to say the least, that the EU did not try to ensure beyond doubt that the deal was legal, by putting in place some sort of effective monitoring of Turkish commitments as regards the treatment of refugees and migrants, in particular asking Turkey to fully apply the Geneva Convention to all refugees as a condition of the deal. After all, the EU will now be meeting a significant proportion of the costs of housing refugees in that country. It is even more disturbing that some Member States want to arrange for expedited returns to Libya. Surely before too long, the CJEU will be asked to interpret the definition of 'safe third country' in EU asylum law. That finding will be crucial in determining whether it really is legal to return people to Serbia, Turkey, Libya and possibly other countries besides.

Barnard & Peers: chapter 26

JHA4: chapter I:5

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Posted by [Steve Peers](#) at 11:14

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53 comments:

Martin Baldwin-Edwards 18 March 2016 at 12:03

It is absolutely out of the question, at this time, to imagine that the Greeks can construct an asylum system in conformity with EU law and that could hear cases reasonably quickly, and also allow appeals. As I mentioned in a previous post, the country's legal system is now in chaos. Adding to that the burden of maybe 500,000 asylum applicants in a year (if all the Syrians, Afghans and Iraqis continue to reach Greece and are forced to apply for asylum in order not to be sent back to Turkey), and one can see only chaos and catastrophe.

Concerning interception at sea, is this not covered by Reg 656/2014?

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