



INSIGHT

THE EU-TURKEY AGREEMENT: A CONTROVERSIAL ATTEMPT AT PATCHING UP A MAJOR PROBLEM

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ABSTRACT: On 18 March 2016 the European Union and Turkey reached an agreement aimed at solving the issue of the high numbers of migrants crossing the Mediterranean Sea from Turkey to Greece. This agreement intended to close the people-smuggling routes and reduce the number of migrants entering the EU. It focused principally on the following issues: returning to Turkey any migrant entering Greece from Turkey irregularly; and resettling, for every migrant readmitted by Turkey, another Syrian from Turkey. In order to compensate Turkey, the EU committed to accelerating the visa liberalisation roadmap and allocating six billion euros to Turkey to deal with the refugee crisis. Finally, both the EU and Turkey agreed to improve humanitarian conditions in Syria to allow Syrians to remain in the country. This agreement has been heavily criticised by humanitarian organisations and by the European population, and its consistency with international human rights and European laws on refugees is questionable. The agreement comprises nine action points. This paper will analyse five of those points in order to establish whether it respects EU and international law.

KEYWORDS: refugees – EU-Turkey agreement – resettlement – *non-refoulement* – return – asylum.

I. INTRODUCTION

The EU has proposed a number of different solutions in order to address the refugee crisis. The EU-Turkey agreement is probably the most controversial of those.

On 18 March 2016, the EU and Turkey released a joint statement of nine action points that aimed to reduce smuggling and irregular migration from Turkey to the EU.¹

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¹ EU-Turkey Statement of 18 March 2016, in European Council Press Release 144/16 of 18 March 2016. Regarding this “agreement” see C. COSTELLO, *It need not be like this*, in *Forced Migration Review*, 2016, p. 12 *et seq.*; S. PEERS, *The final EU/Turkey refugee deal: a legal assessment*, in *EU Law Analysis*, 18 March 2016, eulawanalysis.blogspot.com; P. LISA, *The EU-Turkey Agreement: a turning point in the EU's policy approach to*

This was part of the Joint Action Plan adopted in October 2015, whose aim was to manage mainly the Syrian migration crisis, with the goal of reducing the number of irregular migrants entering Greece from Turkey. This was in order to implement, once the objective of reduction had been achieved, a voluntary humanitarian admission scheme with Turkey.²

We must first highlight that this is not an international agreement. Therefore, there are no binding obligations for any of the counterparts. As a consequence, a breach of the agreement would have political consequences only.³

II. RETURNING IRREGULAR MIGRANTS TO TURKEY AND TURKEY AS A NON-SAFE COUNTRY

With regard to the statement's content, the first action point establishes that "all new irregular migrants crossing from Turkey into Greece islands as from 20 March 2016 will be returned to Turkey". This is undoubtedly the most controversial point, since it concerns international refugee law, EU law and human rights law. Specifically, the statement refers to the prohibition of collective expulsions and the respect of the *non-refoulement* principle.

In a previous Communication to the European Parliament, the European Council and the Council,⁴ the European Commission established that the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union required an individual treatment of any case, which would avoid collective expulsions. The European Commission of Human Rights states that a collective expulsion means "compelling aliens as a group to leave the country, except where such a measure is taken after and on the basis of a reasonable and objective examination of the particular

the refugee crisis but with the devil lurking in the detail, in *Elcano Royal Institute*, 8 April 2016, www.realinstitutoelcano.org.

² Commission Recommendation C (2015) 9490 of 15 December 2015 for a voluntary humanitarian admission scheme with Turkey. See G. FERNÁNDEZ ARRIBAS, *Again in the Hands of States: A New EU Unfeasible Plan to Face Refugee Crisis? Commission Recommendation for a Voluntary Humanitarian Admission Scheme with Turkey*, in *European Papers*, www.europeanpapers.eu, pp. 343-345.

³ Contrary to this, Spijkerboer has stated that it can be considered an agreement regarding, among other reasons, the changes in EU legislation in order to implement the agreement. There are multiple examples of the EU modifying its legislation in order to comply with non-binding instruments. It is, however, difficult to consider the President of the Council, that negotiated the agreement, or the European Council, that concluded it, can express the will of the EU in order to engage the organisation: T. SPIJKERBOER, *Minimalist reflection on Europe. Refugees and Law*, in *European Papers*, 2016, www.europeanpapers.eu, p. 551 *et seq.* See also E. CANNIZZARO, *Disintegration Through Law?*, in *European Papers*, 2016, www.europeanpapers.eu, p. 3 *et seq.*

⁴ Communication COM(2016) 166 final of 16 March 2016 from the Commission to the European Parliament, the European Council and the Council on next operational steps in EU-Turkey cooperation in the field of migration.

cases of each individual alien of the group”.⁵ The problem here is thus how to guarantee a “reasonable and objective examination” of each case, when the Greek system seems to be overloaded.⁶

The *non-refoulement* principle can be analysed together with the consideration of Turkey as a first country of asylum or safe third country according to the Asylum Procedures Directive.⁷ Before examining these concepts, we need to point out that the legal basis for returning irregular migrants to Turkey is Art. 33 of the Asylum Procedures Directive. This allows an application to be considered inadmissible, and therefore removes the need to examine whether the applicant qualifies for international protection if “a country which is not a Member State is considered as a first country of asylum for the applicant”, or “a country which is not a Member State is considered as a safe third country for the applicant”.

It is worth mentioning here that, in case of a declaration of first country of asylum, the appeal procedure may not give the applicant the right to remain on the territory.⁸ This may also be contrary to European Court of Human Rights case law, since this Court has stated on multiple occasions that “given the irreversible nature of the harm that might occur if the risk of torture or ill-treatment alleged materialized and the importance which it attaches to Article 3, the notion of an effective remedy under Article 13 requires independent and rigorous scrutiny of a claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 and the possibility of suspending the implementation of the measure impugned”.⁹ Also, in the *Gebremedhin* case, the European Court mentioned that the French National Advisory Committee on Human Rights had recognised that “any decision refusing admission which entail[ed] the removal of the asylum-seeker concerned must be open to a suspensive appeal lodged with the administrative courts within a reasonable time”.¹⁰

Regarding the return to Turkey, we will refer to the succinct and precise definition of *non-refoulement* formulated by Goodwin-Gill: “the obligation on states not to send individuals to territories in which they may be persecuted, or in which they are at risk of

⁵ European Commission of Human Rights, judgment of 3 October 1975, no. 7011/75, *Henning Becker v. Denmark*, p. 216.

⁶ The month before the “entry into force” of the agreement, 56.335 persons arrived into Greece, to which it has to be added the financial crisis and the previous condemnation by the European Court in the *MSS* case (European Court of Human Rights, judgment of 21 January 2011, no. 30696/09, *MSS v. Belgium and Greece*). Besides this, in response to the European Asylum Support Office’s call for 472 asylum officers to be deployed in Greece, in May only 63 experts had been deployed: see Commission, *Implementing the EU-Turkey Agreement – Questions and Answers*, 4 May 2016.

⁷ Arts 35 and 38 of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection.

⁸ Art. 46, para. 6, of Directive 2013/32/EU, cit.

⁹ European Court of Human Rights, judgment of 11 July 2000, no. 40035/98, *Jabari v. Turkey*.

¹⁰ *Jabari v. Turkey*, cit., para. 58.

torture or other serious harm”.¹¹ This may be connected with the requirements of the Asylum Procedures Directive to qualify a country as a first country of asylum or safe third country. Again, the problem is whether Turkey can be considered a safe country for refugees and whether Greece would be violating the principle of *non-refoulement* by returning refugees to Turkey.

It must be noted that the return policy affects not only Syrian refugees, but all irregular migrants, regardless of where they are from. As a consequence, the appropriate protection and *non-refoulement* policy implemented by Turkey should apply to every migrant returned from Greece. In any case, with specific regard to the influx of Syrian refugees, which has been at the origin of the crisis, it is relevant to mention the reports released by various NGOs regarding the risk of Syrians being returned to Syria once they have been returned to Turkey. International Amnesty has stated that “It seems highly likely that Turkey has returned several thousand refugees to Syria in the last seven to nine weeks. If the agreement proceeds as planned, there is a very real risk that some of those the EU sends back to Turkey will suffer the same fate”.¹² In addition, the International Amnesty Annual Report on Turkey 2015/2016 referred to the pressure on refugees to agree to a “voluntary” return to Syria and Iraq.¹³ According to Art. 35, let. b), of the Asylum Procedures Directive, in order for a country to be considered a first country of asylum the applicant must enjoy “sufficient protection in that country, including benefiting from the principle of *non-refoulement*”. The same rule is applied, according to Art. 38, para. 1, in order for a country to be considered a third safe country. This information suggests that Turkey cannot be considered a first country of asylum or safe third country.

There are other factors that cast doubts on Turkey's position as a safe country for refugees. With regard to the Syrian-Kurdish refugees in Turkey, the International Amnesty Annual Report on Turkey 2015/2016 reports that “by late August it was estimated that more than 2,000 people had been detained for alleged links to the PKK, while over 260 were remanded in pre-trial detention. Prosecutions were commenced of individuals accused of membership of the ‘Fethullah Gülen Terrorist Organization’”. There have also been reports of attacks being carried out on the Kurdish by the general public and mass trials held against them. It is thus difficult to consider Turkey as a third safe country for the Syrian-Kurdish, given that Art. 38, para. 1, let. a), of the Procedures Directive establishes that proof is needed that “life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion”.

¹¹ G.S. GOODWIN-GILL, *The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement*, in *International Journal of Refugee Law*, 2007, p. 444 et seq.

¹² Amnesty International, *Turkey: Illegal Mass Returns of Syrian Refugees Expose Fatal Flaws in EU-Turkey Deal*, 1 April 2016, www.amnesty.org.

¹³ Amnesty International, *Annual Report, Turkey 2015/2016*, www.amnesty.org.

Regarding the Procedures Directive, Art. 38, para. 1, let. *b*), must also be taken into account in conjunction with European Court case law. This provision establishes there must be “no risk of serious harm as defined in Directive 2011/95/EU” in order for a country to qualify as a third safe country. The “serious harm” in Directive 2011/95 includes torture and cruel, inhuman or degrading treatment. In the *Sufi and Elmi* case, the Court considered that degrading treatment took place in Kenyan refugee camps, since they were overcrowded and “in addition, many refugees complain that the allocation of water is insufficient as the water infrastructure was only designed for one third of the number of people currently living in the camps (...) There were also reports of insecurity within the camps, with high levels of theft and sexual violence”.¹⁴ Therefore, the situation in Turkish refugee camps should be considered.

Furthermore, the changes introduced into the Dublin Regulation as a result of the *MSS* judgment must be taken into account. These stated that an asylum seeker could not be transferred from one EU Member State to another if there was substantial reason to believe that the asylum procedure in the destination country did not fulfil the corresponding guarantees regarding prohibition of inhuman or degrading treatment according to Art. 4 of the EU Charter, and that the reception system may entail inhuman or degrading treatment.¹⁵ It is also worth mentioning that this change has not been introduced into the Asylum Procedures Directive in cases of *refoulement*, especially as far as returning individuals to the first country of asylum is concerned. Thus, we propose that the principles established by the European Court in case of *refoulement* from one EU Member State toward another EU Member State are also considered with regard to *refoulement* toward non-EU States who are party to the European Convention.

Finally, the refusal to process asylum applications from non-Syrians has also been reported.¹⁶ This entails a breach of the requirement included in Art. 38, para. 1, let. *e*), of the Procedures Directive which establishes that “the possibility exists to request refugee status and, if (an asylum seeker is) found to be a refugee, to receive protection in accordance with the Geneva Convention”.¹⁷

Given these factors, it is difficult to consider Turkey a first country of asylum or safe third country.¹⁸ That said, the return of refugees from Greece to Turkey could entail a

¹⁴ European Court of Human Rights, judgment of 28 November 2011, nos 8319/07 and 11449/07, *Sufi and Elmi v. the United Kingdom*, para. 156.

¹⁵ *MSS v. Belgium and Greece*, cit., para. 340.

¹⁶ Amnesty International, *Annual Report*, cit.

¹⁷ There is a geographic limitation to Turkey's ratification of the Geneva Convention, which applies only to those fleeing events that have occurred in Europe. To make up for the lack of international protection that this geographical limitation entails, Turkey has created conditional refugee status for those who meet the requirements of the Geneva Convention but are being threatened by events outside Europe. In any case, Syrian refugees are granted temporary protection.

¹⁸ It is also relevant that in 2014, 23 per cent of asylum applications by Turkish nationals were considered well-founded: see Commission, *An EU 'Safe Countries of Origin' List*, 9 September 2014.

breach of the Procedures Directive as well as the breach of principle of *non-refoulement*; both directly, because Turkey cannot be considered a safe country for refugees, and indirectly, because Turkey could return refugees to Syria.

III. RESETTLING SYRIAN REFUGEES INTO EUROPE

The second point in the agreement establishes that “for every Syrian being returned to Turkey from Greek islands, another Syrian will be resettled from Turkey to the EU”. This is called the 1:1 Scheme.

One of the main problems of this provision is that, as has been said before, it has been reported that Turkey does not process applications from non-Syrian refugees. As a consequence, namely those from Afghanistan, Iraq or Pakistan will not have many opportunities to gain international protection in Turkey or Europe. This discrimination regarding nationality is also worthy of note, because through this agreement the EU has chosen grant protection to people on grounds of their nationality and not on the basis of their real necessities.

Also worth highlighting is the fact that Syrians who have tried to enter Greece irregularly have been banned from benefitting from the 1.1 Scheme. This means that, along with their return to Turkey, another penalty is imposed: the impossibility of gaining international protection in Europe through this system, despite complying with the criteria established by EU Law. Together with this requirement, the agreement establishes that with regard to eligibility, the EU will take into account the UN's vulnerability criteria, which aims to give priority to vulnerable groups such as women or children or those in situations of severe poverty.

Given these eligibility criteria, the number of places available is also important. Here we need to differentiate between two systems. Firstly, the relocation system has the objective of relocating refugees from a European country (Italy and Greece) into another European country.¹⁹ For this plan, 120,000 places have been allocated. The second system is the European Resettlement Scheme,²⁰ which resettles refugees from non-EU countries into EU countries, for which there are around 18,000 places left.²¹ These will be used to apply the 1:1 Scheme.

At the moment both systems, which depend on the good will of the States, have shown themselves to be unfeasible. In its First Report on Relocation and Resettlement

¹⁹ Council Decision (EU) 2015/1601 of 22 September 2015 on establishing provisional measures in the area of international protection for the benefit of Italy and Greece. See B. NASCIBENE, *Refugees, the European Union and the “Dublin System”. The reasons for a crisis*, in *European Papers*, 2016, www.europeanpapers.eu, p. 106 *et seq.*

²⁰ Commission Recommendation C (2015) 3560 final of 8 June 2015 on a European resettlement scheme.

²¹ Communication COM(2016) 166, *cit.*

of 16 March 2016, the European Commission stated that only 937 asylum applicants had relocated from Greece and Italy as of 15 March.²² With regard to the resettlement scheme, while the number of resettled persons is higher, with 5,677 displaced people having been resettled at time of the report, the numbers are far from the goal of 20,000 persons in two years.²³

Turning our attention to the 1.1 Scheme, the last report from the Commission on the implementation of the statement established that the total number of resettlements from Turkey is 511 Syrians.²⁴ Although this number is certainly higher than the number of Syrian refugees returned to Turkey, which was 462 at the time of publication, the total number of people returned to Turkey under this agreement is 1,546, including Iraqis and Afghans,²⁵ whose applications were not assessed by applying Art. 33, para. 2, let. b) or c), of the Asylum Procedures Directive. In any case, with the decrease in the number of people crossing from Turkey to Greece, this system will cease to guarantee resettlement, meaning that applicants will need to appeal to the European Resettlement Scheme described above.

IV. SOME CONCLUDING REMARKS

Regarding the global refugee crisis, Hathaway clearly described the challenge that the international community faces today: “to ensure that refugees can access meaningful protection in a way that both addresses the legitimate concerns of States and which harnesses the refugees’ own ability to contribute to the viability of the protection regime”.²⁶

The EU-Turkey Agreement has achieved its goal of reducing the entry of irregular migrants into Greece from Turkey, but it has not provided a solution to the refugee crisis. The relocation plan has not achieved this either.

Implementing the agreement will entail the breach of the principle of *non-refoulement*, as well as the Procedures Directive regarding the concept of first country of

²² Commission, *Relocation and Resettlement: EU Member States urgently need to deliver*, Press Release IP/16/829 of 16 March 2016.

²³ Of “the roughly 14 million refugees in the world last year, only about 100,000 were resettled, with just two countries, the United States and Canada, providing the lion’s share of this woefully inadequate contribution”: J.C. HATHAWAY, *A Global Solution to a Global Refugee Crisis*, in *European Papers*, 2016, www.europeanpapers.eu, p. 96 *et seq.*

²⁴ Communication COM(2016) 349 final of 15 June 2016 from the Commission to the European Parliament, the European Council and the Council, Second Report on the progress made in the implementation of the EU-Turkey Statement.

²⁵ During April 2016, 48 per cent of applications for international protection made by Afghans and 64 per cent of those made by Iraqis were given a positive response (European Asylum Support Office, *Latest Asylum Trends – May 2016*). This illustrates the risk they face if returned to Turkey, where there is no guarantee that their applications would be analysed.

²⁶ J.C. HATHAWAY, *A Global Solution to a Global Refugee Crisis*, cit., p. 96 *et seq.*

asylum and third safe country. This is because, as it has been stated, refugees in Turkey risk being returned to their country of origin, or suffering degrading treatment. Furthermore, implementing this plan could entail condemnatory judgements by the European Court regarding the violation of Arts 3 and 13 of the European Convention.

In addition, the resettlement system seems to present shortcomings, since it entails discrimination on ground of the nationality of the refugees that may benefit from it. The system has also shown its weakness since, at the present time, the objective of the number of resettlements is far from being achieved.

Finally, due to this EU-Turkey agreement, refugees will move to other routes and find other ways of entering the EU. It will thus be necessary to look for solutions inside the EU, bearing in mind that, as long as people's lives are being threatened in neighbouring countries, they will seek protection in Europe. Therefore, if the EU wants to respect and preserve its values, it needs to look for an effective solution within its borders.