

Three legal requirements for the EU-Turkey deal: An interview with JAMES HATHAWAY

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James C. Hathaway Mi 9 Mrz 2016

The EU and Turkey seem to be heading towards an agreement on how to manage the Syrian refugee issue between them, including Turkey taking back refugees who entered the EU by boat from Greece and a flexible quota of refugees eligible for legal resettlement to the EU. Is this good or bad news?

As such, a system under which place of arrival is divorced from place of protection could be both legal and a good thing — if it enables those to be resettled to be chosen on the basis of eg. relative urgency of need, rather than just on the basis of who can pay for a smuggler. And to the extent that smugglers are no longer needed to reach solid protection, that is also a positive thing.

Some decry that this „one in, one out“ model treats people like cattle. How would such an agreement fit in with a system of individual asylum rights?

An individual is entitled to decide for himself where to seek recognition of his refugee status. For this reason, undifferentiated efforts to deter groups known to include refugees — for example, NATO action “against smugglers”, to the extent it precludes refugees from reaching a state party — are in breach of the Refugee Convention. (And refugees are explicitly exempt from penalties for unlawful arrival). But the right to decide where to seek recognition of refugee status does not entail the right to choose where international refugee protection is to be enjoyed. States enjoy substantial latitude to require a refugee to benefit from protection in a state not of the refugee’s choosing.

Is Turkey with its dismal human rights track record and questionable refugee protection standards a legally possible candidate for such an agreement in the first place?

There are three requirements that must be met for a state lawfully to remove a refugee to accept protection in a country not of his choosing: First, the destination state must be a state party to the Refugee Convention.

Second, it must ensure that refugees are in fact recognized. And third, the destination state must in fact honor refugee rights (Arts. 2-34 of the Refugee Convention).

Let’s start with the Convention. Turkey is a member state, isn’t it?

On this front, Turkey — despite appearances to the contrary — does not yet comply. It has entered a geographical limitation on its accession to the Refugee Convention, under which it assumes no obligations to non-European refugees. Put simply, obligations cannot lawfully be shared with a state which has none — and in this case, Turkey has none towards relevant refugee populations. Turkey would have to withdraw its geographical limitation. And since it in fact receives millions of non-Europeans, this may be politically feasible — especially when 6 billion Euros are involved.

What about the refugee status? Would Turkey have to recognize those who are returned from Greece as refugees?

Turkey must either recognize the refugee status of those returned or have a fair and effective process in place. UNHCR involvement in the process or an EU support office overseeing the refugee status determination process might enable this requirement to be met. Or Turkey might simply agree — as many less developed countries do — to treat those returned from the EU as refugees without need of formal status assessment.

So, unless Turkey factually meets the standards of the Refugee Convention, legally there can’t be any removal of refugees to Turkey?

The destination state must in fact honor refugee rights (Arts. 2-34 of the Refugee Convention). As senior courts have made clear, this is a matter of enforceable facts on the ground — not promises. To date Turkey has a mixed, but largely positive record in this regard. A process of international oversight and effective remedies for breach would be a plausible answer to the concern.

The resettlement quota seems to be only for Syrians. What about the Afghans, Iraqi and Eritreans and others who might also be in need of asylum and, in fact, entitled to get it?

Art. 3 of the Refugee Convention prohibits “discrimination” between and among refugees on the basis of country of nationality. To the extent that all refugees are returned by the EU to Turkey but only Syrians — not eg. the many Iraqis and Afghans who also have solid refugee claims — can benefit from EU protection via resettlement, there is a potential issue of discrimination. But if shown to be “objective and reasonable,” the differentiation is not discrimination, and thus not unlawful — and this might be shown.

So, under international refugee law the path taken by Turkey and the EU is viable?

Not necessarily. The more critical challenge arises from the European Convention on Human Rights. While under the Refugee Convention there is no protection from “expulsion” that does not involve “refoulement” to the country of origin until an individual is admitted to a refugee status determination procedure (and hence is “lawfully present”), the ECHR disallows “collective expulsion of aliens.” Perhaps unwittingly (and perhaps unwisely) the jurisprudence under the ECHR has found that even if it might otherwise be thought objective and reasonable, a “collective” procedure to expel non-citizens that does not take account of individuated circumstances is in breach of the ECHR. My own view is that the jurisprudence to date did not consider systemic responsibility-sharing systems of the kind that meet the three criteria mentioned above, and might well have evolved differently had the cases involved a clearly protection-oriented scheme. But (perhaps regrettably) the language of the case law to date does indeed seem to require an individuated assessment before expulsion of aliens is lawful. In this sense, the ECHR seems to take away the flexibility that the Refugee Convention intended that states should enjoy in ensuring that all refugees get protection.

Questions: Maximilian Steinbeis

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