



UNHCR

United Nations High Commissioner for Refugees
Haut Commissariat des Nations Unies pour les réfugiés

Note on Legal Considerations for Cooperation between the European Union and Turkey on the Return of Asylum-Seekers and Migrants

Introduction

- The purpose of this note is to set out legal considerations derived from international and European law, which, in UNHCR's view, are relevant to proposed cooperation and actions referred to in the Statement of the EU Heads of State or Government ("statement") of 7 March 2016 in relation to the return of people from Greece to Turkey.
- UNHCR acknowledges that states face serious challenges in responding to the movement of refugees, asylum-seekers, and migrants on a large scale, travelling by dangerous and irregular means, facilitated in many cases by criminal smugglers. The numbers of those arriving have overwhelmed the capacity of some EU Member States, including Greece, and limited their ability to respond to the needs of those seeking or likely to need international protection. In 2015, some 800,000 people arrived by sea in Greece from Turkey, of whom nearly half originated from Syria. At the same time, countries in the region around Syria, which have been particularly affected by large-scale displacement caused by that country's devastating conflict, face far greater pressures. Among those, Turkey is the largest refugee-hosting country in the world, with 2.7 million Syrian refugees (10 per cent in 23 camps, 90 per cent out of camps), as well as almost 258,000 refugees and asylum-seekers of other nationalities, including nearly 121,000 Iraqis and almost 98,000 Afghans.
- UNHCR understands the determination of states to respond robustly to people smuggling, to dissuade people from undertaking dangerous travel by sea, to prevent further loss of life at sea, as well as to stabilize large-scale arrivals. Such responses should be predicated on the need to address the compelling protection needs of the individuals affected. International cooperation, based on solidarity and sharing of responsibility, is essential to meet these challenges in sustainable and effective ways.¹
- As UNHCR is not a party to the negotiations between the EU and Turkey, its endorsement is neither called for nor given. The negotiations, however, involve issues that are at the core of UNHCR's mandate. UNHCR is appreciative of the intent for the outcome of the negotiations to be in compliance with international law, and it is in this spirit that this note is offered. UNHCR is moreover ready to engage in a constructive manner on the practical modalities of cooperation.

General considerations around return of people who may be in need of international protection

- Any arrangement that involves the blanket return of irregular migrants and people who may be in need of international protection from one country to another, without key refugee protection safeguards in place, would be at variance with international and European legal standards.²

¹ See 1951 Convention, Preamble, Recital 4; Executive Committee Conclusion No. 52(XXXIX) 1998 on *International Solidarity and Refugee Protection*, para. 2 et seq.

² See also European Convention on Human Rights, Protocol 4, Article 4; *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, Council of Europe: European Court of Human Rights, 23 February 2012.

- The transfer of asylum-seekers from one state to another is most effectively governed by a multilateral or bilateral agreement, clearly stipulating, in accordance with international and regional standards, the rights and obligations of participating states and the rights and duties of asylum-seekers.³ Such arrangements would be aimed at enhancing the sharing, rather than shifting, of burdens and responsibilities.⁴
- It is essential that the receiving state takes responsibility for providing asylum-seekers access to the asylum system; assessing asylum claims in substance in a fair and efficient procedure; protecting asylum-seekers from *refoulement*;⁵ and, if the asylum-seekers are recognized, ensuring that they will be able to enjoy asylum in accordance with accepted international standards.
- As for the responsibilities of the transferring state, the transfer of people who may be in need of international protection requires an individual assessment of their profile and circumstances.⁶ In such a procedure, a transferring state may decline to undertake a substantive assessment of the asylum claim only when key legal safeguards are guaranteed for the individual in the receiving state.
- In deciding on the transfer of any individual, important procedural safeguards need to be maintained by the transferring state.⁷ These include allowing the individual to present her or his views on elements, such as specific needs, heightened risks, and other factors which may preclude the proposed transfer, and to appeal the decision to transfer while remaining in the country.⁸ In addition, family unity needs to be maintained, and any family links mitigating against transfer need to be respected. In the same vein, the best interests of the child must be a primary consideration in any transfer process, particularly when it comes to the circumstances of unaccompanied or separated children.⁹

³ UN High Commissioner for Refugees (UNHCR), *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, May 2013, available at: <http://www.refworld.org/docid/51af82794.html>.

⁴ UNHCR, *Expert Meeting on International Cooperation to Share Burdens and Responsibilities*, 28 June 2011, para. 8, available at: <http://www.unhcr.org/refworld/docid/4e9fed232.html>.

⁵ 1951 Convention relating to the Status of Refugees, Article 33; UNHCR Executive Committee Conclusion No. 6(XXVIII) (1977); see also UNHCR, *UNHCR Note on the Principle of Non-Refoulement*, November 1997, available at: <http://www.refworld.org/docid/438c6d972.html>.

⁶ UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, EC/GC/01/12, para. 13, available at: <http://www.unhcr.org/refworld/docid/3b36f2fca.html>.

⁷ Recommendations to enhance appeal, judicial review, and the identification of vulnerable applicants were recommended by the European Commission on 2 February 2016. COMMISSION RECOMMENDATION of 10.2.2016 addressed to the Hellenic Republic on the urgent measures to be taken by Greece in view of the resumption of transfers under Regulation (EU) No. 604/2013, available at:

http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/commission_recommendation_addressed_to_the_hellenic_republic_20160210_en.pdf.

⁸ See in particular European Union: Council of the European Union, *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 (recast)*, 29 June 2013, OJ L 180/60 -180/95; 29.6.2013, 2013/32/EU, Art. 38(2)(c), available at: <http://www.refworld.org/docid/51d29b224.html> ["Asylum Procedures Directive"].

⁹ Convention on the Rights of the Child, 1577 U.N.T.S 3, entry into force 2 September 1990, Article 3; UNHCR, *UNHCR Guidelines on Determining the Best Interests of the Child*, May 2008, available at: <http://www.unhcr.org/refworld/docid/48480c342.html>. See also, e.g., UN Committee on the Rights of the Child (CRC), *CRC General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6.

- Moreover, UNHCR is working to support governments to end the detention of children, ensure that alternatives to detention are available and that, where detention is used – which should only be a measure of last resort – conditions meet international standards.¹⁰

Progress in Turkey

- Significant progress has been made in Turkey in recent years in the development of its international protection framework.¹¹ Further cooperation with and support from the European Union would enable Turkey to take further steps towards completing that framework and bringing it into full operation in line with international standards and best practice. This would include the application of existing asylum legislation, and adoption and implementation of further provisions where necessary, to ensure compliance with the 1951 Convention relating to the Status of Refugees, including the principle of *non-refoulement*. Rights and standards defined in such legislation, as relevant, need to be applied in practice to all people seeking and potentially in need of international protection, regardless of nationality.
- Efforts need to continue to ensure that all people seeking international protection can have a fair and efficient determination of their claims by a competent authority within a reasonable time, in line with basic procedural safeguards, including the right to an effective remedy.¹² Reception arrangements need to ensure that those who have sought international protection are treated in line with relevant standards. Those recognized as being in need of international protection would need to be able to enjoy asylum, without discrimination, in accordance with accepted international standards, including effective access to work, health care, education for children, and, as necessary, social assistance.¹³

Resettlement and other forms of admission

- UNHCR welcomes any initiative that promotes regular pathways for refugees to safety in significant numbers from all neighbouring countries in the region to third countries. This cannot be limited to only one nationality or one country, which would otherwise create pull factors and challenges to the stability of the refugee populations in the region.
- Easing family reunification is another important avenue to be pursued and needs to be actively facilitated and supported. UNHCR and its partners are ready to support such endeavours.

¹⁰ See UNHCR, *Beyond Detention: A Global Strategy to support governments to end the detention of asylum-seeker and refugees, 2014-2019*, 2014, available at: <http://www.refworld.org/docid/536b564d4.html>.

¹¹ See Republic of Turkey, Ministry of Interior, Directorate General of Migration Management [DGMM], Law on foreigners and international protection, accepted 4/4/2013, Law number 6458, O.J. Publication 11/4/2013, O.J number 28615, available at: http://www.goc.gov.tr/files/files/eng_minikanun_5_son.pdf; and Republic of Turkey, Council of Ministers, Temporary protection regulation, accepted 13/10/2014, Council of Ministers Decision Number: 2014/6883, O.J. Publication 22/10/2014, O.J. number: 29153, available at: <http://www.goc.gov.tr/files/files/temptemp.pdf>. On the establishment of DGMM, see Arts. 103-120 of the aforementioned Law on foreigners and international protection, available at: http://www.goc.gov.tr/icerik3/directorate-general_911_925_926.

¹² UNHCR Executive Committee Conclusion No. 8 (XXVIII) (Determination of Refugee Status) (1977); UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, EC/GC/01/12.

¹³ UNHCR Executive Committee Conclusion No. 85 (XLIX) (Conclusion on International Protection) (1998), para. (a); UNHCR Executive Committee Conclusion No. 58 (XL) (Problem of Refugees and Asylum-Seekers who move in an irregular manner from a country in which they had already found protection) (1989), para. (f); UNHCR, *Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers (Lisbon Expert Roundtable, 9-10 December 2002)*, February 2003, available at: <http://www.unhcr.org/refworld/docid/3fe9981e4.html>.

- UNHCR hopes that individuals returned to Turkey who have specific resettlement needs would be considered for the resettlement/admission programme to the EU.
- Resettlement/humanitarian admission needs to be in addition to existing commitments, which are low at the moment relative to the needs. The current 22,504 places within two years on a voluntary basis for the EU would likely not be commensurate with the numbers readmitted.
- UNHCR's primary role would be in supporting the identification of cases for resettlement. The responsibility for the distribution of individual cases and determination of quotas would lie with the EU Member States and relevant EU institutions. UNHCR would welcome the opportunity to engage in discussions on the modalities of such a programme.
- The *High-level meeting on international responsibility sharing through pathways for admission of Syrian refugees*, which will be convened by UNHCR on 30 March 2016, is a good opportunity to put the spotlight on this important aspect of responsibility sharing, and UNHCR hopes for concrete pledges.

Conditions inside Syria

- Regarding proposals to "improve humanitarian conditions inside Syria which would allow for the local population and refugees to live in areas which would be more safe", any safe areas within Syria would need to be established in accordance with international humanitarian law. They must not undermine the right to seek asylum or create a situation where displaced persons may be placed at greater risk of harm or be used for purposes of return under adverse conditions.

Conclusion

- Appreciating the complex and large-scale pressures facing some EU Member States, as well as Turkey, UNHCR acknowledges the importance of reinforcing cooperation among states to address the smuggling of persons and overwhelming demands on national systems and resources. Such responses need to be guided and framed by international and regional obligations, to ensure their sustainability and respect for the rights of affected individuals, including refugees and others in need of international protection, and in the interest of the international protection system as a whole.
- UNHCR is prepared to offer additional advice to facilitate the rapid development and operationalization of such responses. Building on its existing cooperation with the EU, Turkey and Greece, it is also prepared to consider further support and engagement as may be useful, consistent with its mandate and resources.

UNHCR, 10 March 2016