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What impact of the EU/Turkey Readmission Agreement¹ upon detention of irregular migrants?

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(summary of paper, not for quotation)

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1. Detention is a prickly matter while handling large flows of migrants. It tends to be naturally put in place until the identity of those who illegally pass State's borders and/or their need for international protection are proved. This obviously takes more time and requires particular care with regard to thousands of people, when the right of States to exercise control over their territory in connection with aliens' entry into it combines with their need to protect public order and public security. It is reported that detention is widely used and abused.² Yet it is a restriction of personal liberty, which is a civil right that States are bound to protect regardless of the nationality of individuals. Restriction of the right to personal liberty is indeed allowed in the Geneva Convention on Refugees as well as in relevant human rights agreements, such as the International Covenant on Civil and Political Rights (ICCPR) and the European Convention of Human Rights (ECHR); yet limitations are established, their extent having been pointed out by the United Nations High Commissioner for Refugees (UNHCR), the Human Rights Committee and the European Court of Human Rights (ECtHR) respectively. It is believed that detention of illegal migrants and asylum seekers make a difficult challenge for the rule of law in countries required to handle thousands of migrants altogether.

2. The European Union addresses the matter with regard to irregular migrants in the process of being repatriated (in Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, "Return Directive") and with regard to those who applied for international protection (very briefly in 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), "Recast Asylum Procedures Directive", and extensively in Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), "Recast Reception Conditions Directive").

Recital 16 of the Return Directive makes it clear that "[the] use of detention for the purpose of removal should be limited and subject to the principle of proportionality with regard to the means used and objectives pursued. Detention is justified only to prepare the return or carry out the removal process

¹ This title was submitted to UACES in January 2016, i.e. *before* the EU-Turkey Statement of 18 March 2016. Yet the present paper also covers the Statement, which is of utmost importance in the EU-Turkey cooperation in immigration. The Statement raises serious issues on its actual nature and on its validity as a treaty stipulated by the Union, which I will not address: see M. den Heijer and T. Spijkerboer, *Is the EU-Turkey refugee and migration deal a treaty?*, in *EULAVANALYSIS* (on-line); M. Gatti, *La Dichiarazione UE-Turchia sulla migrazione: un Trattato concluso in violazione delle prerogative del Parlamento?*, in *Eurojus* (on-line).

² In legal literature see J. Hughes and F. Liebaut (eds.), *Detention of Asylum Seekers in Europe: Analysis and Perspectives*, The Hague, 1998; F. Lenzerini, *Asilo e diritti umani*, Milano, 2009, pp. 445-455; G. Cornelisse, *Immigration Detention and Human Rights. Rethinking Territorial Sovereignty*, Leiden-Boston, 2010.

and if the application of less coercive measures would not be sufficient.” Accordingly, art. 15 sets out two (alternative) pre-requisites for detention; procedural requirements; periodical review of measures; termination; time-limits. Conditions of detention are also established (recital 17 and arts 16-17).

The Recast Asylum Procedures Directive rules out detention for the sole reason of being an applicant (art. 26). The Recast Reception Conditions Directive, after reiterating this principle, allows six specific grounds for detention, which are inspired by the idea of necessity (art. 8).³

3. International standards on detention of asylum seekers are acknowledged to be higher than the protection provided for in the ECHR, whose art. 5(1)(f) *does not* include necessity (explicitly in *Khlaifia* 2015, para. 62, and in *Nabil* 2015, para. 28) but requires non-arbitrariness (*Saadi* 2008, paras 67-74). Instead, necessity is required in the UNHCR Guidelines (Guideline no. 3, developed on the basis of art. 32(2) of the Geneva Convention). Moreover, if art. 9(2) of the ICCPR seems to have the same content as art. 5(1)(f) of the ECHR, the Human Rights Committee adopted a more restrictive and protective interpretation which includes necessity and rules out detention for reasons of mere opportunity within the asylum procedure.⁴

While the apparently less protective approach of the ECtHR is partly compensated by the requirement of “necessity in the particular circumstances of the case” added in *Khlaifia* (para. 65) and by the control over the compliance of detention with domestic legislation (*Nabil*, para. 41), the fact remains that art. 5(1)(f) of the ECHR allows detention of asylum seekers and irregular migrants merely in view of their deportation (*Nabil*, paras 37-38). The protection afforded in the Recast Reception Conditions Directive is more extensive, being it patterned after the Geneva Convention as interpreted by the UNHCR and the ICCPR.

Art. 15 of the Return Directive is also inspired by the principle of necessity, in combination with proportionality.

4. A number of factors call for a close cooperation between the EU and Turkey in the field of immigration. For its geographic position, Turkey is a natural refuge country for those who flee from Afghanistan, Iraq and Syria as well as their natural gateway to Europe. Co-operation with transit countries and re-admission of irregular migrants into their countries of origin or transit are staples in the EU immigration policy. The criteria for the allocation of asylum seekers between the EU MSs established in the Dublin regulation, place an unbearable burden to the main country of first arrival into the EU of Afghans, Iraqis and Syrians, i.e. Greece, which is also economically very vulnerable. The same applies regarding the responsibility for returning those who are not entitled to international protection (economic migrants), which often lies with the State of first entry since this is easily the State in whose territory an irregular migrant is present or it is where the person concerned should first be returned on the basis of a bilateral readmission agreement between two EU Member States. Yet most EU MSs are unwilling to change those rules (the ones concerning repatriation are not even in discussion) and are also quite reluctant to temporarily derogate them: this makes the return of migrants to transit countries and the rules on safe third country or first asylum country a very attractive option. Ultimately, should Turkey join the Union, it would find itself in the same situation as Greece at present

³ CJEU, case C-601/15 PPU, *J.N.*, 15 February 2015, para. 56.

⁴ E. Ocello, *La detenzione dei richiedenti asilo nel diritto comunitario alla luce della giurisprudenza della Corte di Strasburgo: il caso Saadi c. Regno Unito*, *Il Diritto dell'Unione europea*, 2009, p. 98.

times, i.e. it would qualify as country of first arrival for those who apply for international protection and it would most likely be responsible for repatriating those who are not entitled to the latter.

5. A main feature of the EU-Turkey cooperation is the possibility given to EU Member States to return to Turkey migrants who managed to enter into their territory via Turkey. This is achieved on the basis of either the EU-Turkey re-admission agreement (RA), which is key in the EU-Turkey Action Plan passed in November 2015, and the EU-Turkey Statement of March 2016. The RA and the Statement have a different scope of application: the former is mainly about irregular migrants (arts 1(l), 2(1) and 18(4) of the RA)⁵; the latter, while covering also irregular migrants,⁶ focuses on those who are entitled to international protection within the meaning of the Asylum Procedures Directive⁷. The EU-Turkey Statement is known for having put an end to the flow of migrants, mostly Syrians, towards the Greek islands across the Aegean sea, and to the Balkan route towards Central and Northern Europe.

6. Despite the fact that Turkey is a contracting party of the ECHR and it is not bound to the Geneva Convention as regards the treatment of individuals fleeing from Asian countries, the Turkish Law on Foreigners and International Protection allows detention of third-country nationals or stateless persons illegally staying in the country and of asylum seekers on grounds and under conditions which appear very similar to those established in relevant EU secondary law (arts. 57 and 68 respectively). However, international independent organizations occasionally reported about the unlawful detention of refugees in Turkey. For example, in December 2015, Amnesty International released a briefing entitled “Europe’s Gatekeeper. Unlawful Detention and Deportation of Refugees from Turkey”. It focuses on refugees and asylum-seekers in Turkey who had attempted to cross irregularly to the EU during the period leading up to and after the signing of the EU-Turkey Statement. Moreover, the “implementation gap” of the Law on Foreigners and International Protection is of great concern for the Union and other international actors.

7. The EU-Turkey Statement does not even mention detention of migrants returned to Turkey from an EU Member States.

The RA specifically addresses the matter in connection with a third-country national or of a stateless person who is subject to the readmission procedure: according to art. 11(2), that procedure should not adversely affect the time-limits of detention laid down in the legislation of the State (Turkey or an EU Member State) requesting readmission. However, there is no provision on the pre-requisites for detention, which are entirely left to the legislation of the requesting and of the requested State respectively. One could wonder whether the non-affectation clause laid down in art. 18 is helpful. The clause refers to the Geneva Convention, yet the RA is not understood to cover asylum seekers and

⁵ See the EU-Turkey joint action plan of 15 October 2015, Part II, point 2) of the “Turkey intends to” Section: “[Turkey intends to] [s]tep up cooperation and accelerate procedures in order to smoothly readmit irregular migrants *who are not in need of international protection* and were intercepted coming from the Turkish territory *in line with the established bilateral readmission procedures*” (emphasis added).

⁶ In the introduction: “Turkey ... agreed to accept the rapid return of all migrants not in need of international protection crossing from Turkey into Greece and to take back all irregular migrants intercepted in Turkish waters”. In Section 1): “Migrants not applying for asylum or whose application has been found unfounded or inadmissible in accordance with the [Asylum Procedures] Directive will be returned to Turkey”.

⁷ This clearly emerges from Section 1) of the Statement.

therefore the clause is apparently incapable of granting them protection against unnecessary detention. In any event, the reference to the Geneva Convention is of little help since it is only binding on Turkey in connection with those who flee from Europe. Art. 18 further lays down that the application of the RA should be without prejudice “to the rights ... of persons” laid down in the Return Directive (art. 18(3)) and in the Reception Conditions and in the Asylum Procedures Directive (art. 18(4)) respectively. May it be understood as preventing readmission of migrants to Turkey insofar as the latter fails to apply protection standards similar to those enshrined in the relevant directives of the EU? Such interpretation is doubtful as those Directives are pieces of EU (secondary) legislation and it is not reasonable that a third country should apply similar rules in order for a bilateral agreement between the two parties (the EU and such third country) to be effective. A more persuasive interpretation of the non-affected clause is that the application of the RA does not exempt an EU member State from acting in accordance with those directives. Moreover, the non-affected clause refers to the Return Directive “*in particular* with regard to [third-country nationals] access to legal advice, information, temporary suspension of the enforcement of a return decision and access to legal remedies” (art. 18(3)); as to the Reception Conditions Directive and to the Asylum Procedures Directive, the non-affected clause covers “*in particular* ... the right to remain in the Member State pending the examination of the application” (art. 18(4)).⁸ Should this wording be regarded as introducing an exhaustive list of rights and guarantees? In such case, the non-affected clause would not cover protection against detention. Consequently, art. 18 would *not* require EU Member States to abide by arts 15-16 of the Return Directive even when applying for readmission of an irregular migrant to Turkey in accordance with the RA. Not only would the RA determine the lowering of the degree of protection against detention as a result of the transfer of an irregular migrant to Turkey; its application would end up to such lowering of standards even in the EU.

8. The big question arising from the foregoing remarks is whether it is tolerable that the EU engages in international cooperation on immigration with the result of lowering the standards of protection carefully established in secondary law in connection with irregular migrants and applicants for international protection in the territory of the Member States. However, this is a political matter. In legal terms, it is noteworthy that an EU Member State, while applying an agreement between the Union and a third-country, is acting within the scope of the Charter (art. 51(1)) and is therefore bound to it. It follows that, should there be serious reasons to believe that an irregular migrant or an applicant for international protection whose application was declared inadmissible within the terms of art. 33(2) of the Recast Asylum Procedures Directive, will be subject to arbitrary detention while in Turkey, no transfer to Turkey should take place. In other words, the protection *par ricochet* first acknowledged by the ECtHR in connection with art. 3 of the ECHR should apply also with regard to art. 6 of the Charter (corresponding to art. 5 of the ECHR)⁹.

Moreover, art. 18 of the Charter and art. 78 TFEU are believed to have incorporated the Geneva Convention into EU primary law. It follows that the foregoing line of reasoning may rely also on the UNHCR Guidelines, i.e. in connection with the principle of necessity of asylum seekers' detention.

⁸ Emphasis added.

⁹ *Explanations relating to the Charter of Fundamental Rights*, 2007/C 303/02, *Explanation on Article 6 – Right to liberty and security*.