Taking refugee rights seriously: A reply to Professor Hailbronner

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Reactions to the proposed "refugee swap" between the EU and Turkey have been predictably absolutist.

On the one hand, most advocates have opposed the draft arrangement, asserting some combination of the right of refugees to be protected where they choose and/or that a protection swap would clearly breach the ECHR's prohibition of "collective expulsion" of aliens. On the other hand, Professor Hailbronner argues against any right of refugees to make their own decisions about how to access protection, believes that refugees may be penalized if arriving in the EU "without the necessary documents," suggests that it does not matter that Turkey is not relevantly a party to the Refugee Convention, and confidently asserts that there is no basis to see the prohibition of "collective expulsion" as engaged here.

As usual, the truth is somewhere in the middle.

I think Hailbronner is correct to raise hard questions about whether a refugee swap would necessarily contravene Art. 4 of Protocol 4 of the ECHR. As I noted in my initial commentary here, the caselaw of the Court – while speaking in quite emphatic terms about the importance of individualized assessment – has not yet grappled with an honest regime the goal of which was to maximize protection. While the proverbial devil is of course in the details, it is at least *possible* that the proposed swap might be a means of providing asylum in the EU based on relative vulnerability and urgency of needs, rather than simply on the basis of who has the money for a smuggler and is prepared to take the risk of arriving by sea. And if the scrutiny of rights protection in Turkey is (as I believe it must be) part of the deal, then it could also be a means of enhancing the protection of the millions of refugees already in Turkey. In this context – and assuming some scrutiny of particular circumstances prior to removal – it is not clear to me that the Court would reach the same results as it did on the clearly deterrent-oriented facts of *Hirsi* and *Klaifa*. Indeed, it is not clear to me that the Court *should* reach that result, given the critical need for refugee responsibility-sharing if the global refugee regime is to survive.

But where I believe Hailbronner errs is with regard to the Refugee Convention's requirements for legality. True, there is no obligation affirmatively "to assist" a refugee to reach an asylum state's borders. But apart from the much maligned decision of the US Supreme Court in *Sale*, neither is there any authority for NATO or any particular state to take action to stop refugees from reaching whatever country they can get to in order to engage the protection system. Not only does the duty of *non-refoulement* apply wherever a state exercises jurisdiction (Hailbronner's "quasi-territorial jurisdiction" constraint is confusing or wrong or both), but the duty not to penalize refugees arriving without prior authorization (Art. 31) has not been interpreted by senior courts to require an immediate, non-stop journey from place of initial risk to the asylum country, as Hailbronner seems to suggest.

The core issue in the proposed refugee swap is, however, what protection is on offer in Turkey for those who would be sent there. I argued that removals would only be lawful under the Refugee Convention if three criteria are met: (1) Turkey must have obligations under the Refugee Convention; (2) Turkey must accurately assess (or acquiesce in) the refugee status of those to be returned; and (3) Turkey must in fact honor the Convention rights of the refugees who are sent there.

Professor Hailbronner does not contest the second of my proposed requirements. He seems also to agree with my third point, saying that "Turkey must meet in

substance the material standards of the Convention" – though he frighteningly suggests elsewhere that "[t]he only individual right is the right not to be *refouled*…" with no recognition of the critical role of Arts. 2-34. But the nub of his critique is that if practice on the ground in Turkey is good enough, the fact that Turkey presently has no refugee obligations towards non-European refugees (given its geographical limitation) is irrelevant.

Hailbronner justifies this position by reference to Art. 38 of the *Procedures Directive* which is admittedly (and in my view, unfortunately) drafted in ambiguous terms. But as the CJEU has been at pains to point out, regional EU refugee norms must be interpreted in consonance with the requirements of international refugee law – not the other way round (see eg. *HN v. Ireland*, at [27]).

The Preamble to the *Qualification Directive* (in line with *UNHCR Handbook* para. 28) correctly affirms that refugee status recognition is a purely declaratory act – it does not make a person a refugee, but merely affirms what already is. It follows that under the Refugee Convention's system of incremental attachment of rights, Syrian and other refugees who would be removed to Turkey are already provisional rights-holders of a significant bundle of rights at international law. If they cannot access an effective remedy for a threat to those accrued internationally guaranteed rights in Turkey, the EU will have engaged in unlawful rights-stripping by forcing them to Turkey – whatever vague promises Turkey may (be forced to) make about acting properly. As the Chief Justice of Australia made clear in the context of the challenge to Australian efforts to force refugees to go to Malaysia – like Turkey, a non-party state – "[t]he use of the terms 'provides access… to effective procedures,' 'protection,' and 'relevant human rights standards' are all indicative of enduring legal frameworks" (*M70/2011 v. MIC*, [2011] HCA 32 (Aus. HC, Aug. 31, 2011), at [66], per French C.J.).

In addition, as Michelle Foster and I explain in *The Law of Refugee Status* (at p.35 ff), a non-party state is under no duty to deliver to arriving refugees the more sophisticated rights due them under the Convention once they are lawfully staying or durably residing there (eg. the right to work) – inchoate rights that would have accrued under the Refugee Convention's default mechanism had they not been involuntarily transferred. This fundamentally undermines the Refugee Convention's commitment to the enfranchisement of refugees in their countries of asylum via the rights regime in Arts. 2-34.

Is it possible that a non-party state could both provide reliable access to a legal mechanism to enforce accrued rights and also reliably guarantee to grant the additional rights due refugees over time? In theory, yes. But the fact that Turkey has steadfastly refused to withdraw its anachronistic (and arguably discriminatory) position that only European refugees are international rights holders on its territory is surely reason for skepticism in this case.

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