



ON THE AGENDA: THE REFUGEE CRISIS AND EUROPEAN INTEGRATION

MINIMALIST REFLECTIONS ON EUROPE, REFUGEES AND LAW

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ABSTRACT: It is hard to understand the current developments in European refugee law without the benefit of hindsight. This paper refrains from trying to make a comprehensive analysis, and investigates fragments small enough to allow for analysis. We will look at the political and legal processes which turned the influx of a small number of people into the European Union (EU) into a crisis; at the tunnel vision of European policy makers; at the legal aspects of the EU's and NATO's intervention in the Aegean Sea; and at the processes resulting in the acceptance of mass deaths as a daily routine.

KEYWORDS: refugees – Syrians – EU-Turkey Agreement – border deaths – jurisdiction – Art. 216 TFEU.

I. *STILO ANTICO*

At an academic conference on European asylum law at the Université Libre de Bruxelles in February 2016, for a day and a half we discussed law. The meaning of the term solidarity in Art. 80 TFEU, the interpretation of Arts 26 and 26*bis* of the Schengen Borders Code – the discussions were clearly responding to the current situation in Europe. But for one reason or another, we apparently felt we had to remain faithful technicians, and that this was not the time or the place to ask bigger questions about Europe, refugees and law. Only a few days later, European police forces were shooting at refugees simultaneously in two places on the continent.¹ People were being shot at (with tear gas grenades, for the time being) not because of misdemeanour, but because they were on a particular location – for being there. During the conference, several speakers compared

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¹ E. SMITH, M. TRAN, *Teargas Fired As Refugees Try to Breach Greek-Macedonian Border*, 29 February 2016, www.theguardian.com (Idomeni); A. CHRISAFIS, P. WALKER, B. QUINN, *Calais 'Jungle' Camp: Clashes As Authorities Demolish Homes*, 1° March 2016, www.theguardian.com (Calais).

themselves to the proverbial orchestra on the Titanic. During a private conversation we wondered about parallels to the members of the Central Committee of the East German Communist Party on, let's say, 5 November 1989.

The Italian musician Francesco Rognoni published his *Selva de' varii passaggi* in Milan in 1620.² The book (music scores with a little bit of text) is a treatise on vocal and violin technique, and consists of hundreds of examples of how a very simple melody can be ornamented into insane complexity. This book is one of the latest in a genre that came into existence during the simultaneous vernacularization of printing and the rising importance of music as an indicator of social prestige. Earlier examples are Sylvestro Ganassi's *Fontegara* (Venice, 1535), Diego Ortiz's *Trattado de glosas* (Rome, 1553), Giovanni Bassano's *Ricercate, passage et cadentie* (Venice, 1585), and Antonio Brunelli's *Varii exercitii* (Florence, 1614). Rognoni's book is one of the most extended in its genre, and one of the most complicated to play. What Rognoni did was to codify a practice. The practice consisted of playing tunes that everyone knew, and that other musicians and composers had worked with before, but to embellish them and thereby dazzle the audience. A very similar practice today exists in jazz.

Rognoni codified a practice that was dead. Composers and audiences with a better feeling for the pulse of the times had moved on. Claudio Monteverdi and his contemporaries were creating a new style and doing more exciting stuff – the first sonata had been published in Milan in 1610 (Gian Paolo Cima's *Sei sonate*), and composers like Dario Castello, Tarquinio Merula and Giovanni Battista Fontana were developing this new genre into a vehicle for instrumentalists to display their virtuosity. Rognoni was a conservative who – at least in his published books – did not adopt these novelties, but insisted on the correct application of rules for making music that were becoming something of the past. The length of his treatise, and the level of complication he creates, can easily be interpreted as signs of the fanaticism of someone who is losing the battle and knows it. He was codifying a practice that was a living general practice half a century earlier, but now would be gone unless it were laid down in writing.

The idea that there was a shift was shared at the time – innovative composers made distinctions between the *stilo antico* and their own *stilo moderno* and the *prima pratica* versus the *seconda pratica*. However, contrary to emphasising the rupture (as I did above), one may also emphasise the continuities. The new composers still used the ornaments of their predecessors in their written compositions, as Johann Sebastian Bach did a century later. And many claim that the modern composers presumed that musicians knew and mastered the techniques described by Rognoni and his predecessors. They did not want to abolish them but took them for granted. They were con-

² F. ROGNONI, *Selva de' varii passage secondo l'uso modern, per cantare e suonare con ogni sorte de stromenti, divisa in due parti*, Milano, 1620. A facsimile was published in Sala Bolognese: Arnaldo Forni Editore, 2012; a transcription was published in Albese con Cassano: Musedita, 2014.

scious of a change, which they wanted and were proud of (as is clear from the self-designations *stilo moderno* and *seconda pratica*), but that does not imply they necessarily wanted to put an end to what had been general practice before.

The refugee 'crisis' (about the inverted commas more will follow) in Europe seems to signify that something is coming to an end. State representatives openly say they are fed up with the obligations following from international and European refugee law. The core of the unanimous Grand Chamber judgment of the European Court of Human Rights in *Hirsi Jamaa v. Italy* (*Hirsi Jamaa*)³ on the prohibition of collective expulsion and the exercise of jurisdiction outside the territory is considered obsolete⁴ – to the extent it is noted at all. In the agreement between the EU and Turkey,⁵ the tension between refugee and human rights law on the one hand, and what States have actually agreed to do on the other, has become so intense and explicit that a breaking point may have been reached.

The increasing obesity of refugee law is similar to Rognoni's length and complexity. The handbooks are becoming thicker and thicker; doctrine is becoming more and more refined and learned; there are ever more journals and peer reviewed articles; domestic and European legislation and case law is increasingly complex; the interaction between international, European and domestic law is Byzantine. One may interpret this as a sign that the field is being codified to the last detail because it is dead, because it is not actual State practice any more. In that perspective, the people insisting on the proper application of international and European refugee law are *stilo antico*, while the State representatives concluding hard to classify agreements (called *memorandum of understanding*, or merely *statement*)⁶ are the infinitely cooler *stilo moderno* guys building the future. They bewilder the traditionalists ("is this a treaty? does it need to be ratified?" – more on this below) and elicit conservative responses ("but you could have achieved the same through a treaty, and ratification has never hurt anyone"). But they (we) are the Rognoni's of our era. A time will come in the future when people will discover the beauty in what we are trying to do (traditionalists like Ortiz, Bassano and Rognoni are stars in the present day ancient music scene). For now, however, we are standing on the side while the action is elsewhere. But an alternative interpretation would hold that the

³ European Court of Human Rights, judgment of 23 February 2012, no. 27765/09, *Hirsi Jamaa et al. v. Italy*.

⁴ For example, Hathaway has labelled the Court's systematic and broadly supported case law as ill conceived, in M. STEINBEIS, *Three Legal Requirements for the EU-Turkey Deal: An Interview with JAMES HATHAWAY*, 9 March 2016, verfassungsblog.de. Hailbronner goes further and states that the Court's case law "largely ignores the wording and purpose of" Art. 4 Protocol 4 ECHR, in K. HAILBRONNER, *Legal Requirements for the EU-Turkey Refugee Agreement: A Reply to J. Hathaway*, 11 March 2016, verfassungsblog.de.

⁵ Press releases and statements, *EU-Turkey statement*, 18 March 2016, www.consilium.europa.eu.

⁶ On the question whether the EU-Turkey Statement of 18 March is a treaty in the sense of Art. 2 of the Vienna Convention on the Law of Treaties, and of Art. 216 TFEU see below, section VI.

enormous amount of activity in refugee law in which we engage is a sign of the importance and liveliness of the field.

It is hard to understand the current developments in European refugee law without the benefit of hindsight. Are we living through a rupture? Will the EU-Turkey deal signal the end of the prohibition of collective expulsion as we have known it, the end of the prohibition of indirect refoulement? Does the deployment of NATO in the Aegean Sea in order to stop boat people mean that refugees will from now on be met by the military instead of by international law? Or do the references to human rights and refugee law in the relevant documents embody the resilience of international law, and will the continuities outweigh the differences? One may decide for one of these perspectives. In this essay, I will refrain from such a decision. We are right in the middle of chaotic and complex developments, which make it impossible to fully diagnose the situation. Therefore, the effort will be to collect fragments which are small enough to be able to examine them, and to withstand the seduction to claim to be sure of what the bigger picture looks like.

II. PERFECT STORM

A perfect storm⁷ is a disastrous event which happens because a number of problems occur simultaneously. The interaction of different elements reinforces these problems and makes them into a 'crisis'. Europe's migration 'crisis' is such a perfect storm. Here are the elements.

a) A major refugee crisis: since 2011, a conflict has broken out in Syria which has resulted in the forced movement of half of the Syrian population, most of them (some 7.5 million) inside Syria,⁸ and some 4.8 million to territories outside Syria.⁹ Over one million Syrians are registered as refugees in Lebanon; 630.000 in Jordan; 2.7 million in Turkey; 118.000 in Egypt; and 246.000 in Iraq.¹⁰ Compared to the number of inhabitants of these countries (Lebanon 5.8 million inhabitants,¹¹ Jordan 8 million inhabitants,¹² Turkey 77.6 million inhabitants,¹³ Egypt 82.5 million inhabitants,¹⁴ Iraq 32.5 million inhabitants)¹⁵ the percentage of registered Syrian refugees is as high as 20 per cent for Lebanon (and estimated at 30 per cent if non-registered refugees are included). Much can be

⁷ This passage is based on an earlier article published as T. SPIJKERBOER, *Europe's Refugee Crisis: A Perfect Storm*, 10 February 2016, www.law.ox.ac.uk.

⁸ Cf. UNHCR, *Where We Work: Middle East and North Africa*, www.unhcr.org.

⁹ Cf. Syria Regional Refugee Response – Inter-agency Information Sharing Portal, *Regional Overview*, www.data.unhcr.org.

¹⁰ *Ibid.*

¹¹ Cf. *Demographics of Lebanon*, en.wikipedia.org.

¹² Cf. *Demographics of Jordan*, en.wikipedia.org.

¹³ Cf. *Demographics of Turkey*, en.wikipedia.org.

¹⁴ Cf. *Demographics of Egypt*, en.wikipedia.org.

¹⁵ Cf. *Demographics of Iraq*, en.wikipedia.org.

said to relativize these estimates, but they dwarf the estimated 1.3 million asylum seekers in Europe in 2015,¹⁶ constituting 0.26 per cent of the EU's 508 million inhabitants.¹⁷

b) Willingness to use migration as geopolitical instrument:¹⁸ Russia may have an interest in destabilization of the EU. The massive displacement during the offensive to recapture Aleppo in February 2016 can plausibly be interpreted as a side-effect welcome to Russian foreign policy. That Turkey is prepared to use migration flows as a political instrument is evident. During a meeting last fall, Turkish president Erdoğan said to Juncker: "We can open the doors to Greece and Bulgaria any time and we can put the refugees on buses".¹⁹ Erdoğan has explicitly confirmed the authenticity of the minutes which contain these statements, and publicly added: "In the past we have stopped people at the gates of Europe; in Edirne we stopped their buses. This happens once or twice, and then we'll open the gates and wish them a safe journey, that's what I said".²⁰

c) Serious under-funding: programmes for hosting Syrian refugees in the region are badly under-funded. The United Nations Office for the Coordination of Humanitarian Assistance reported that for 2015, 56 per cent of the required funding had been received.²¹ The World Food Programme reports that critical funding shortages forced the organization to reduce the level of assistance, with most refugees now living on 50 cents a day.²² The EU has recently agreed on how to fund the three billion of Euros promised to Turkey, but when actual payments will be made remains to be seen.²³ In addition, Turkey is not the country where the humanitarian disaster is worst.

d) Minimal resettlement: resettlement of Syrian refugees in other parts of the world – crucial in order to enable especially Lebanon to host Syrian refugees – is not occurring on a scale of any significance. Since the beginning of the conflict, only 162.151 Syrian refugees have been resettled elsewhere in the world – four per cent of the four million Syrian refugees outside Syria, and merely two per cent of all Syrian refugees.²⁴

¹⁶ Cf. Eurostat, *Asylum and first time asylum applicants by citizenship, age and sex Annual aggregated data (rounded)*, 18 March 2016, appsso.eurostat.ec.europa.eu.

¹⁷ Cf. *Demographics of the European Union*, en.wikipedia.org.

¹⁸ I am grateful to Martijn Pluim of ICMPD for this observation, which he made in response to an earlier version of this text.

¹⁹ P. FOSTER, *Turkey's Erdogan 'Taunted EU Leaders' Over Migrant Deal*, 8 February 2016, www.telegraph.co.uk.

²⁰ *Minutes Revealing Refugee Talks with EU Leaders Provide 'Absolution,' Says Erdoğan*, 11 February 2016, www.hurriyetdailynews.com. An EU spokesperson declined to comment, cf. J. MORTIMER, *Did EU Meddle with Turkish Elections?*, 18 February 2016, www.al-monitor.com. I am grateful to Orçun Ulusoy for these sources.

²¹ Cf. *Total Funding to the Syrian Crisis 2015*, fts.unocha.org.

²² Cf. *Syria Emergency*, www.wfp.org.

²³ *Ibid.*

²⁴ *Ibid.*

e) Prohibition of travel:²⁵ States have prohibited Syrians to travel, thus making it impossible for them to leave Syria or the overburdened refugee camps in the region. Responding to European pressure, countries which did not require visa from Syrians in 2011 have introduced them. Crucially, Lebanon and Jordan now require Syrians to have a visa.²⁶ Enforcement of these visa requirements is ensured by obliging airlines to check travel documents before departure, under threat of significant fines. The external borders of the EU have been militarized, and the EU is intensifying its criminal law approach to irregular migration. UN Security Council, Resolution 2240 of October 2015, UN Doc. S/RES/2240 (2015), considers irregular migration to be a threat to international security and empowers the EU to take military action.

f) Intended ripple effect: by prohibiting refugees from entering the EU and encouraging neighbouring countries to prohibit refugees entering their countries, the European Union has intentionally made it illegal and therefore very difficult for many Syrian refugees to leave their own country in order to seek the protection they need and to which they are entitled. In January, it was reported that 16.000 Syrian refugees are stranded in the desert because Jordan blocks entry.²⁷ In February, Turkey closed its border for the estimated 70.000 refugees fleeing Aleppo.²⁸

g) Common European Asylum System fails: the European Union has a set of directives and regulations which together are called the Common European Asylum System (CEAS). The aim of the CEAS is to harmonize asylum law in the EU. However, in any respect the standards vary dramatically from State to State. The quality of asylum procedures ranges from near perfect to non-existent. In some countries refugees have to live on the streets for years, whereas in others they get shelter. Some countries recognize almost no one as a refugee, while in other countries two thirds of all asylum seekers get asylum.²⁹ And in some countries refugees are maltreated by authorities on a large scale, while in others that happens only incidentally. European asylum law has little in common, and there is no system to it. As a consequence, refugees have very high stakes in being in countries like Germany and Sweden, and not in countries such as Greece.

²⁵ This prohibition approach is not specific for Syrian refugees, cf. J.C. HATHAWAY, *A Global Solution to a Global Refugee Crisis*, in *European Papers*, 2016, www.europeanpapers.eu, p. 93 *et seq.*

²⁶ Cf. *Visa requirements for Syrian citizens*, en.m.wikipedia.org.

²⁷ Cf. World: Europe, www.ft.com.

²⁸ Cf. C. JOHNSTON, *EU Urges Turkey to Open Its Borders to Syrians Fleeing War-torn Aleppo*, 6 February 2016, www.theguardian.com.

²⁹ The European Commission mentions the case of Afghans; their recognition rate in Italy is almost 100 per cent, whereas in Bulgaria it is 5.88 per cent, in Communication COM(2016) 197 final 6 April 2016 from the Commission to the European Parliament and the Council, p. 5. For more systematic information see A. LEERKES, *How (Un)restrictive Are We? 'Adjusted' and 'Expected' Asylum Recognition Rates in Europe*, in *Wetenschappelijk Onderzoek – en Documentatiecentrum (WODC)*, 2015, www.wodc.nl.

h) Systematic underestimation: the Syrian conflict has been building up for a couple of years now, and refugees started to leave the country in significant numbers in 2012. The major under-funding and the lack of meaningful resettlement ensured that Syrian refugees would feel forced to try to reach Europe after a while. No fortune telling was required to predict that the combination of millions of refugees and them being neglected by the international community would lead to a movement towards Europe. Nevertheless, European authorities were taken by surprise when this happened in 2015. The lack of preparation – not enough reception facilities, insufficient immigration officers, etc. – created the idea that the numbers are more than the EU can handle. Similar to the underestimation of the number of new arrivals is the overestimation of the people who will return. European asylum policies systematically produce people whose asylum claim is rejected while it is evident that they will not return and cannot be deported (as in the Dutch policy based on the idea that people will voluntarily migrate to ... Mogadishu).³⁰

i) Exploitation of problems: by now, almost every European country has prominent politicians successfully profiteering from the problems that, obviously, accompany an influx of refugees. Mainstream parties mimic their xenophobic rhetoric, and thereby undermine support for sheltering refugees.

The number of refugees is small in relation to the population and wealth of the EU. Nevertheless, the wide spread perception is that Europe has a refugee crisis on its hands, which potentially threatens the European project as a whole. The situation could get out of hand because the nine elements listed above interlock. The refugees were ignored when they failed to access meaningful protection in the region. They were faced with the impossibility to seek safety in Europe by legal means. This has created a huge demand for the services of human smugglers. The prices (and consequently: profit margins) of smugglers went up, which attracted new suppliers of smuggling services. In the energetic cycle of supply and demand, prices have now gone down because there is so much supply, which attracts new migrants. This explains why Moroccans and Algerians now enter Europe via Turkey. The influx in 2015 constituted the first stress test for the CEAS – and it's plain to see how robust it is. The systemic failures were evident for years, but could be ignored as long as the number of asylum seekers was negligible. Now the number of refugees equals that of the 1990s, it's clear that far from having harmonized their asylum systems, European asylum policies still predominantly consists of passing the buck.

It is the interaction between the elements mentioned above that has created the perfect storm now raging over Europe. Can anything be done? It should be noted that the elements *c)* to *h)* are of Europe's own making. It's probably too late now to put in place a more robust system of reception in the region. The cycle of supply and demand

³⁰ T. SPIJKERBOER, *Rechtsherstel voor Somaliërs*, in *Nederland Juristenblad*, 2014, p. 1672 *et seq.*, p. 1674.

for smuggling services and the lack of trust of Syrian refugees in the international community cannot be changed soon. But other elements can be influenced in the short run. The market for smuggling can be disrupted by large scale resettlement, and by partially or entirely liberalizing travel for Syrian nationals, preferably together with the world's other wealthiest nations. People recognized as refugees in Europe could be given a version of the right of free movement in the EU, facilitating them to find employment or enjoy the support of their families or ethnic communities. And underestimating the number of asylum seekers is something that States simply can stop doing.

But it's quite unlikely that anything like this will happen. European policy makers are caught in tunnel vision (more below). They do notice that their policies fail to achieve the intended effect, but draw the conclusion that what is needed is intensification of basically the same policies. Trying to interrupt the perfect storm, however, would require a fundamental reconsideration of policies of the past 25 years – and this requires not just admitting that they have failed, but that they backfired. Therefore, policy makers try to ignore analyses such as the present one. They habitually state that they are a plea for open borders, and then ignore them.

It is more likely that European policy makers will go on fuelling the storm. Is it possible that the storm gets worse? Certainly. If Lebanon is not assisted immediately in shouldering the burden of the Syrian refugees – in addition to the Palestinians who have been there for over half a century! – it's quite possible that the civil war which ravaged the country between 1975 and 1990 will be reignited. This can lead to millions more refugees. And if European countries keep reinforcing their criminal approach to the travel of refugees and migrants, human smuggling is likely to be incorporated in the more organized drug trafficking business – a phenomenon that has occurred at the US-Mexico border and has attracted extremely well organized and ruthless entrepreneurs to the human smuggling business.

III. TUNNEL

In 2015, I was contacted to act as an expert for the European Commission, which was doing an impact assessment for a recast of the directives on smuggling and trafficking. There was one occasion in the fall where the experts actually met with the commission civil servants and the external consultants working on the project. Half of the experts were positive about the idea to intensify the criminal approach to these phenomena, while the other half (including me) was sceptical or outright negative about this idea. This scepticism was not what the commission representatives wanted to hear. They ignored interventions doubting the usefulness of further criminalization. Some of us got a bit annoyed; we sceptics became increasingly vocal. The clearest response we received was: "Aha, so you are against border control altogether," and "So you take an open border position". Apparently, any hesitation about the dominant paradigm (criminalisation of smuggling & trafficking is good, hence more criminalisation is better) was seen as

equal to being opposed as a matter of principle to State regulation of migration. On my way back to Amsterdam, this struck me as a bad case of tunnel vision. And maybe this is my own case of tunnel vision, but I began to notice it as one of the dominant characteristics of European migration policies.

For example:³¹ the European Commission presented a proposal for a European border policy on 15 December 2015. At the core of its proposal is the European Border and Coast Guard. The tools the European Border and Coast Guard would use are intensified versions of the tools of Member State border policies over the past 25 years: more controls, more technology, externalization through more cooperation with third countries, and internalization through more emphasis on forced return. The entire package consists of several documents jointly amounting to hundreds of pages. A first analysis leads to three observations.

To begin with, the Commission justifies its proposals by referring to the 'migration crisis' at the European borders. What the proposals fails to deal with is that this crisis is primarily a crisis of European asylum policy. The past few months and years have shown that what's formally called the Common European Asylum System is neither common, nor is it a system. EU Member States all have their own distinctive asylum procedures and their own way of examining asylum applications. In addition, the level of facilities in asylum reception systems varies wildly. As a consequence, migrants and refugees risk death while trying to cross internal borders (such as the one between Hungary and Austria) because they have good reasons not to want to end up in a Member State without a functioning asylum system.

The 1.3 million new asylum applications which the European Union faced in 2015 are a challenge for the asylum systems of European States. But if there would have been something worth calling a Common European Asylum System, this wouldn't have created a crisis. Less than 0.3 per cent of the population of the European Union was an asylum seeker – a number that pales in comparison to the challenges faced by Turkey, Jordan, and Lebanon.

Whereas the inability of the European Union to develop a functioning asylum system is at the root of what the European Commission calls the 'migration crisis,' little is being undertaken to address this (more below). The plans to redistribute a minimal number of asylum seekers – agreed on in September after bitter negotiations and subject to litigation in the Court of Justice – are implemented in miniscule numbers – are in fact not being implemented.

The second observation concerns the proposals which the Commission does make. What has been done in the past 25 years to combat irregular migration? Until 1990, European countries all had their own visa policies. From most countries in the world at

³¹ This passage is based on an earlier article published as T. SPIJKERBOER, T. LAST, *EU Border Plan is a Textbook Example of Tunnel Vision*, 16 December 2015, www.law.ox.ac.uk.

least one European country could be reached without an entry visa. Therefore, most people didn't need a smuggler. As part of Europeanization, this has changed. Today, all EU countries require visas from nationals of poor countries. In addition, Europe has forced transport companies to check passports and visas before travellers are allowed to board an airplane or ferry. The technical quality of documents has also improved considerably. As a consequence, it's much more difficult now to enter Europe by plane or ferry without being in possession of all required documents.

This policy ended temporary migration (including seasonal migration) from the Maghreb to Spain and Italy. Travel became so burdensome that those who had succeeded in entering Europe now remained there. Furthermore, the permanent intensification of these policy measures led to an ever increasing demand for human smuggling, by land or by sea. Europe responded by guarding its borders ever more strictly. Fences appeared along with infrared cameras, radar, and satellite systems, and negotiations with transit countries were started. In addition to the traditional coast guard and police, the navy was put to use, criminal sanctions were introduced, a separate EU agency was created (Frontex), and European border guard operations were carried out (with ancient Greek names such as Poseidon, Hera, Triton). The private security sector alone has an estimated annual turnover of seven billion of Euros of European border business.

These policies haven't had the intended effect of reducing or controlling migration. They have had the unintended effect of boosting the market for human smuggling. Basically, the policies have backfired. Yet policy makers don't tire of repeating that these policies have had no visible effect, and consequently... should be intensified. This is a textbook case of tunnel vision: policy has failed so what we need is more of the same policy.

A third observation concerns border deaths. Many have pointed out that the steady increase of unauthorised migration across the EU's external borders since 1990 (and thereby border deaths) coincides with the harmonization of European migration policies which, as part of harmonization, have become much stricter towards certain groups. There may well be a relationship between the two, as is shown by our research on border deaths.³²

The European Commission, in response to what are labelled as the 'tragedies' at sea which took place in recent months, years, and decades, now proposes to intensify current restrictive migration policies. But there is a considerable risk that, by making migration more difficult, EU policies may put more lives at risk. What has been changed in order to reduce or remove the unintended side-effects of European migration policies, most notably the increasing loss of lives?

The answers to such questions should be based on evidence about almost three decades of migration and border policies. But policy decisions are presently being driven by politics rather than facts. It's necessary for European policy-makers to begin a

³² Cf. T. LAST, T. SPIJKERBOER, *Analysis*, www.borderdeaths.org.

process of evidence-based policy-making in an area which affects the lives of countless people. However, in its proposals, the European Commission doesn't even begin to ask the question whether there may be a relation between the policies which it now proposes to intensify, and the increasing number of migrants dying at European borders.

Existing data sets, such as the Deaths at the Borders Database³³ and the lists compiled by UNITED Against Racism³⁴ and the Fortress Europe Blog³⁵ can be an important part of evidence-based policy-making, in combination with data on migration policies and the determinants of international migration (for example, research of the DEMIG project of the University of Oxford's International Migration Institute),³⁶ data on the volume of unauthorised migration (such as apprehension data), and data on smuggling (for example, research of the Migration and Border Management project of the Danish Institute of International Studies).³⁷

Such data can be collected and analysed in an observatory that tracks migrant deaths in Europe. Local authorities trying to identify the bodies of dead migrants, and families searching for their loved ones, as well as the many organisations and individuals trying to help, need an appropriate and mandated office to which they can turn. And evidence-based policies require accurate data to be collected and analysed using a holistic and longitudinal approach by an independent office which could properly evaluate the effects (intended and unintended) of past and current EU policy, to inform future policy decisions.

The observatory should operate at a European level because these needs could not be satisfactorily met at a regional or national level. First, migration routes in different regions and countries are related, so policies directed at preventing unauthorised, unwanted migration must take an encompassing European approach to stand a chance at success. Second, individual migrants' routes can change and their bodies may end up in places their families would not search, so to maximise the chances of identification, all available *ante-mortem* and *post-mortem* information needs to be centralised. Third, one responsible office is more likely to result in consistent procedures, data collection, and analysis. Fourth, discovery and exchange of best practices on recording deaths and on identification benefits from maximising the number of actors (and their localities) involved. Finally, direct cooperation between local authorities of different countries requires an alternative to the usual nationalised model. Such an observatory would preferably be hosted by the Council of Europe because of its larger geographical scope

³³ Cf. *Deaths at the Borders of Southern Europe*, 2015, www.borderdeaths.org.

³⁴ Cf. UNITED, *List of 22.394 Documented Deaths of Asylum Seekers, Refugees and Migrants Due to the Restrictive Policies of Fortress Europe*, 19 June 2015, www.unitedagainstracism.org.

³⁵ Cf. *Immigrants Dead at Frontiers of Europe*, fortresseurope.blogspot.nl.

³⁶ Cf. International Migration Institute, *Determinants of International Migration*, www.imi.ox.ac.uk.

³⁷ Cf. Danish Institute for International Studies, *Migration and Border Management*, www.diis.dk.

(consisting of 47 Member States as opposed to the EU's 28 Member States), and because it has extensive experience with the supervision of human rights practices.

The observatory (which has been outlined in more detail elsewhere)³⁸ could use a very similar methodology to that of the Deaths at the Borders Database to collect data from 1 January 2014 – the date on which the Database ends. The task would be made far easier by the fact that death registration in Spain, Italy, Malta, and Greece has now been digitalised and are accessible at the national (Spain, Greece, Malta) or regional (Italy) levels.

IV. NATO

On Thursday 11 February 2016, NATO³⁹ announced that its ships would immediately be deployed in the Aegean in order to combat irregular migration, in cooperation with the relevant authorities and with Frontex.⁴⁰ On 23 February, NATO Secretary-General Stoltenberg stated in the European Parliament: “When we rescue those people, what we agreed with Turkey at a ministerial level, we agreed that if those people came from Turkey then we can return them to Turkey”.⁴¹ Stoltenberg repeated this on 24 February.⁴² Is this compatible with international law?

Politico.eu reported the following on the NATO plans.⁴³ A group of five vessels (from Germany, Italy, Canada, Turkey and Greece) already were present in the Eastern Mediterranean. Denmark and the Netherlands are said to have promised vessels too.⁴⁴ Stoltenberg said that Turkey and Greece will not operate in each other's territorial waters, thereby addressing a political sensitivity. The mandate of the mission will not be to intercept or to return boats, but to engage in search and rescue (which however, as Stoltenberg made clear on 23 and 24 February, may consist of interception and return). Activities were to take place in Turkish territorial waters. The Guardian reported that the action was to start on 12 February.⁴⁵ Operational reports on NATO activity in the Aegean are lacking so far.

³⁸ T. SPIJKERBOER, *Policy Conclusions*, May 2015, www.borderdeaths.org.

³⁹ This passage is based on an earlier article published as T. SPIJKERBOER, *The NATO Pushbacks in the Aegean and International Law*, 2016, thomasspijkerboer.eu. I am grateful to Martin Scheinin for his feedback on the original version of the text.

⁴⁰ Cf. *NATO Defence Ministers Agree on NATO Support to Assist With the Refugee and Migrant Crisis*, 11 February 2016, statewatch.org.

⁴¹ Cf. A. RETTMAN, *Nato to Take Migrants Back to Turkey, If Rescued*, 23 February 2016, euobserver.com.

⁴² Cf. *NATO Support to Assist with the Refugee and Migrant Crisis*, 24 February 2016, www.youtube.com.

⁴³ Cf. F. EDER, *72 Hours to Launch NATO's Migrant Mission*, 11 February 2016, www.politico.eu.

⁴⁴ Cf. *NAVO helpt bij indammen vluchtelingenstroom Egeïsche Zee*, 11 February 2016, nos.nl.

⁴⁵ Cf. E. MACASKILL, E. GRAHAM-HARRISON, *Nato Launches Naval Patrols to Return Migrants to Turkey*, 11 February 2016, www.theguardian.com.

A number of questions is relevant in order to assess the legitimacy of this in light of international law: are NATO Member States exercising jurisdiction; are there international law objections; and are there ways to evade jurisdiction and international law obligations?

States are bound to international law when they exercise jurisdiction. If – for example – a German vessel picks up people while it is in Turkish territorial waters and brings them to the Turkish shore, is Germany exercising jurisdiction? This is not an irrelevant question. If such a German vessel exercises jurisdiction, Germany has a number of international law obligations, relating *inter alia* to asylum. The issue of jurisdiction has been the subject of a number of cases.

One of the first cases on the issue is a decision of the UN Human Rights Committee from the early 1980s. The case of *Burgos v. Uruguay* concerned a Uruguayan refugee who enjoyed asylum in Argentina.⁴⁶ After the military coup in Argentina, he was kidnapped by the Uruguayan secret service, detained in Argentina for two weeks, and transferred to Uruguay where he was tortured. The question arose whether Burgos was under Uruguayan jurisdiction during his initial arrest. The UN Human Rights Committee held that it would be unconscionable to interpret the International Covenant on Civil and Political Rights (ICCPR) in such a manner that a State would be allowed to perpetrate acts on the territory of another State which it would not be allowed to perpetrate on its own territory. The Human Rights Committee formulated a fundamental rule: what a State is prohibited from doing on its own territory, it is not allowed to do somewhere else.

A case of the Committee Against Torture displays more similarities with the NATO plan. The Marine I-case concerned a cargo vessel carrying 369 migrants, which in 2007 issued a rescue call in international waters.⁴⁷ A Spanish rescue vessel approached the Marine I and towed it to the Mauritanian coast. After a week and a half of negotiations, the Mauritanian authorities gave permission to tow the vessel into a Mauritanian harbour. The migrants were detained under supervision of Spanish personnel. In groups most of them were returned to their country of origin; a few received a humanitarian residence permit. The complaints concerned detention conditions and removal to the country of origin. One of the arguments brought forward on behalf of the Spanish authorities was that all this occurred outside Spanish territory. The Committee Against Torture held that a State exercises jurisdiction when it has, directly or indirectly, in whole or in part, *de jure* or *de facto* effective control. The Committee ruled that Spain exercised jurisdiction from the moment it came to the rescue of the Marine I.

⁴⁶ Human Rights Committee (CCPR), views of 29 June 1981, communication no. 52/1979, *Sergio Euben Lopez Burgos v. Uruguay*.

⁴⁷ Committee against Torture (CAT), decision of 21 November 2008, communication no. 323/2007, *P.K. et al. v. Spain*.

The most directly applicable case is the 2012 *Hirsi Jamaa v. Italy* judgment, in which the Grand Chamber of the European Court of Human Rights passed judgment on the Italian pushbacks, which consisted of transferring migrants from vessels onto Italian navy vessels and returning to Libya without any procedure.⁴⁸ The Court held that a State exercises *de jure* jurisdiction over vessels flying its flag, and therefore the migrants were under Italian jurisdiction. It added that Italy could not evade the exercise of jurisdiction by arguing that its activities constitute a search and rescue action – just like NATO is doing at present.

The Court referred to another case, in which it held that French agents who took over a vessel (suspected of engaging in drugs trafficking) flying a Cambodian flag exercised *de facto* jurisdiction.⁴⁹ In conclusion, the Italian authorities had exercised jurisdiction during the pushbacks because the migrants were put on Italian vessels (*de jure* jurisdiction) and because the Italian navy had factual control over them (*de facto* jurisdiction).

Legal doctrine holds that the same applies to the 1951 Refugee Convention. It has to be noted that the US Supreme Court ruled that the Refugee Convention does not apply outside the territory of the United States.⁵⁰ However, this interpretation of the Supreme Court is highly contested, and has more to do with US constitutional law (in particular with the plenary powers doctrine) than with international law. The Supreme Court projected a piece of domestic constitutional law onto the international convention on refugees. It is not to be expected that European courts will change their position in order to adopt this American interpretation, although that cannot be strictly excluded either.

In sum: it is evident that, when they return migrants to the Turkish shore, NATO vessels exercise jurisdiction in the sense of the European Convention on Human Rights (ECHR), the ICCPR, and the Convention Against Torture (CAT) – even when the entire operation takes place within Turkish territorial waters. That this is evident is clear from the fact that the judgment of the Grand Chamber of the European Court of Human Rights was unanimous on all major points. This underlines that the Court's interpretation is not far-fetched or activist, but reflects a broad consensus. The Court did nothing else than restate the obvious and basic rule formulated in *Burgos v. Uruguay*: what a State is not permitted to do on its own territory, it cannot do somewhere else. This is a fundamental rule. If the US is not permitted to waterboard people, it is not permitted to do so on Guantanamo Bay either. If the Russian secret service is not allowed to poison an opponent with polonium, it is not allowed to do so in London.

It would be conceivable to use a construction which Spain is said to apply in its cooperation with some West-African countries. Imagine that on board of all participating

⁴⁸ *Hirsi Jamaa et al. v. Italy*, cit.

⁴⁹ European Court of Human Rights, judgment of 29 March 2010, no. 3394/03, *Medvedyev et al. v. France*.

⁵⁰ US Supreme Court, judgment of 2 March 1993, *Sale v. Haitian Ctrs. Council*.

NATO vessels a Turkish representative is posted who – even when s/he is taking a nap – is supposed to command the vessel. This would clearly be a mere construction to hide the jurisdiction the NATO State concerned is exercising under a formalist veil. But even for those who wish to go along with that, it would merely mean that the *de jure* jurisdiction of that NATO State would disappear. It would not do away with its *de facto* exercise of jurisdiction. The presence of a Turkish functionary could possibly mean that Turkey would exercise *de jure* jurisdiction in addition to the exercise of jurisdiction of the NATO State concerned. The fact is that it is hard to think of a clearer example of the exercise of jurisdiction that a State has over its own navy vessels.

Migrants who may want to ask for asylum can be returned to a third country, on the condition that the third country is safe; it has been established in an individual decision that the country is safe for this person as well; and the migrant has had the possibility to appeal this decision in a court of law.⁵¹ As has been explained elsewhere, it is highly questionable whether Turkey is to be considered as a safe third country.⁵² The last time the European Court of Human Rights concluded that Turkey violated the human rights of an asylum seeker dates from 15 December last year.⁵³ In addition to this, the NATO action excludes the possibility of individual decisions and appeal to courts. Therefore, the NATO action would be contrary to the prohibition of *refoulement*. The prohibition of *refoulement* contained in the ECHR, ICCPR and CAT is non-derogable.

What NATO plans to do is contrary to case law of the European Court of Human Rights (*Hirsi Jamaa v. Italy*), the CAT (*Marine I*) and the ICCPR (*Burgos v. Uruguay*). States may denounce (i.e. stop being a party to) most conventions (the ICCPR does not foresee denunciation),⁵⁴ but that is not an easy thing. EU law requires that its Member States are party to these conventions. Therefore, denouncing them would require amendment of EU treaties (as well as of all secondary legislation referring to the prohibition of *refoulement*).

An additional problem would be that the prohibition of *refoulement* which the NATO Member States would violate is part of international customary law, according to most authors. International customary law binds States even if they have not ratified any international treaty. So maybe it would not help to denounce all these conventions. On the other hand, one might argue that the idea that the prohibition of *refoulement* is customary law is based primarily in the fact that it has been incorporated into a number of treaties (in addition to the ones already referred to also in regional treaties in Africa

⁵¹ Extensively S. PEERS, E. ROMAN, *The EU, Turkey and the Refugee Crisis: What Could Possibly Go Wrong?*, 5 February 2016, eulawanalysis.blogspot.nl.

⁵² E. ROMAN, T. BAIRD, T. RADCLIFFE, *Analysis Why Turkey is Not a "Safe Country"*, 2016, www.statewatch.org.

⁵³ European Court of Human Rights, judgment of 15 December 2015, no. 74535/10, *S.A. v. Turkey*.

⁵⁴ Human Rights Committee (CCPR), *General Comment No. 26: Continuity of Obligations*, 8 December 1997, CCPR/C/21/Rev.1/Add.8/Rev.1.

and the Americas). So, if all NATO-States withdraw from these treaties, one might argue that customary law has changed.

The conclusion has to be that the NATO actions are in violation of international law; and that the relevant parts of international law are binding on NATO States because they exercise jurisdiction over migrants. Returning migrants to Turkey as envisioned violates the prohibition of *refoulement*, also when it happens in the form of search and rescue.

V. WEAKNESS

Elsewhere, it has been argued that the miserable achievement of the CEAS in the face of its first stress test (the foreseeable arrival of Syrian refugees) is caused by four structural weaknesses in the CEAS itself. These are, first, outcomes that are unfair towards both Member States and asylum seekers⁵⁵ as a result of which key players (being those Member States and asylum seekers) have legitimate interests in cheating. Secondly, both in empirical and in legal terms, too much is expected of what borders can achieve. Thirdly, the external element is based on the prohibition of refugee movement across borders, including the borders of their country of origin. This is morally illegitimate, legally problematic, and empirically unrealistic. Finally, the legal forms used in European asylum policy are complicated to the point of being obscure.⁵⁶

Does the EU-Turkey deal of 18 March 2016,⁵⁷ which for the time being is the culmination point of the European response to the Syrian refugee arrivals, begin to address these structural weaknesses? It does not change the distribution of asylum seekers among the Member States. Quite the contrary, it is based on the notion that Greece has to process all asylum applications of people arriving at its borders, ignoring that Greece has a disproportionate burden to share. True: the EU has suggested Greece will be assisted in doing this, but such promises remained empty in 2015. This way of trying to force Greece to apply the Dublin system, with patently unfair consequences for Greece, has aptly been called *troikaisation* elsewhere.⁵⁸ The EU-Turkey deal also does not address the significant disparities in the asylum systems of EU Member States. To give just one example: whereas under the EU-Turkey deal, Greece initially was to return only people who had not asked for asylum, UNHCR reported that the first group included 13 people who actually had asked for asylum, but whose asylum application Greece had

⁵⁵ Cf. B. NASCIBENE, *Refugees, the European Union and the Dublin System. The Reasons for a Crisis*, in *European Papers*, 2016, www.europeanpapers.eu, p. 101 *et seq.*

⁵⁶ M. DEN HEIJER, J. RIJPMAN, T. SPIJKERBOER, *Coercion, Prohibition, and Great Expectations. The Continuing Failure of the Common European Asylum System*, in *Common Market Law Review*, 2016, pp. 607-642.

⁵⁷ Cf. Press releases and statements, *EU-Turkey statement, 18 March 2016*, *cit.*

⁵⁸ C. HELLER, L. PEZZANI, *Ebbing and Flowing. The EU's Shifting Practices of (Non-) Assistance and Bordering in a Time of Crisis*, Nearfuturesonline.org.

“forgotten” to process.⁵⁹ This should have come as no surprise, because return of asylum seekers to Greece would amount to a violation of Arts 3 and 13 of the ECHR on account of the sub-standard Greek asylum policy.⁶⁰ The second structural weakness (unrealistic expectations of the border) is even being reinforced. The core of the EU-Turkey deal is the notion that all “irregular migrants” (a term used despite the fact that a solid majority of them would be granted asylum if their asylum claims were to be processed in substance) are to be returned to Turkey. This is expected to reduce the number of boat arrivals in Greece to almost zero. This is both factually and legally unrealistic. Even if arrivals in Greece indeed drop, it is to be expected that arrivals will go up somewhere else, as this is the mechanism we have seen over the past 25 years. And although the EU-Turkey deal claims that returning everyone can be done without violating international law (including the prohibition of collective expulsion, the prohibition of *refoulement*, and the right to remain on the territory pending appeals against negative asylum decisions), the tension between the main objective of the deal (return everyone so as to stop all arrivals) and international law is extreme. The third structural weakness was prohibition of refugee movement. The EU has promised to resettle Syrian refugees from Turkey. However, it has capped this at 54,000 – which is a mere 1.9 per cent of the 2,749,140 Syrian refugees registered in Turkey,⁶¹ and merely 1.1 per cent of the 4,837,208 Syrian refugees registered in the region.⁶² This minimal form of resettlement (even if it works, which is doubtful) is humanitarian window dressing. The final weakness (the unclear legal form of cooperation) is exemplified, not repaired by the EU-Turkey deal – see the next chapter.

On 6 April 2016, the European Commission published a communication on reform of the CEAS and legal migration avenues to Europe.⁶³ At first sight, this seems a more promising approach. The document begins by identifying “significant structural weaknesses”: uneven responsibility sharing between Member States; problematic implementation of the Dublin regulation; systemic flaws in the asylum systems of Member States such as Greece; differing treatment of asylum seekers in procedures, reception conditions and percentage of asylum seekers granted protection.⁶⁴ This means that the first and fourth structural weakness identified above are recognised as such by the Commission. The unrealistic expectation of the border are not identified – note for example the

⁵⁹ Cf. P. KINGSLEY, *Greece May Have Deported Asylum Seekers by Mistake, Says UN*, 5 April 2016, www.theguardian.com.

⁶⁰ European Court of Human Rights, judgment of 21 January 2011, no. 30696/09, *M.S.S. v. Belgium and Greece*.

⁶¹ Cf. Syria Regional Refugee Response, Inter-agency Information Sharing Portal, *Turkey*, data.unhcr.org.

⁶² Cf. Syria Regional Refugee Response, Inter-agency Information Sharing Portal, *Regional Overview*, cit.

⁶³ Communication COM(2016) 197, cit.

⁶⁴ *Ivi*, pp. 2-5.

repeated idea that Member States are responsible for protection of their part of the external border⁶⁵ which is assumed to imply that no migrants will arrive there instead of assuming it implies (as it does under the CEAS) that all asylum applications will be dealt with in accordance with international law. And the external element (prohibition) arguable is not within the scope of this communication. But what does the communication actually propose with the two structural weaknesses it does identify?

It suggests two rather minimal changes to the Dublin system. Both assume that, just like now, the Member State of first entry (think: Greece, Italy) will examine applications, and will return people not in need of international protection (for example because they come from a country of origin declared to be safe). This means that Greece and Italy will bear the brunt, just as they do now. However, the Commission suggests two ways of diminishing the unfairness a bit. The first is to add to the present Dublin system a corrective fairness mechanism, activated when a certain threshold is reached. This is a variation on the hotspot approach which has so miserably failed in 2015.⁶⁶ The second variety goes a bit further and replaces the present Dublin system by a distribution key for all applications which stand a reasonable chance. This goes a little way in addressing this structural weakness. For reducing the differing treatment of asylum seekers, the Commission suggests to replace the Qualification and Procedures Directives by Regulations, and to give European Asylum Support Office (EASO) a more prominent role. As has been argued elsewhere, it is the national application of these mechanisms (and not their legal status under EU law) that is problematic,⁶⁷ and therefore the effect of this will be minimal. For the longer run, the Commission suggests federalization of asylum decision making, which in fact would address part of the first structural weakness. In sum, the first structural weakness is identified in the communication, but the proposals the Commission tables barely begin to address it.

The fourth weakness (the unclear legal nature of the CEAS) is only addressed in the proposal to federalize asylum decision making in the long run. As has been argued elsewhere, piecemeal federalization will probably not only solve this weakness, but may even increase the chaos.⁶⁸

The EU-Turkey deal reinforces the four structural weaknesses which made the arrival of 1.3 million new asylum seekers in 2015 into a crisis. The Commission proposals of 6 April 2016 may signify a beginning awareness that fundamental aspects of European asylum policies have to be revised, but is not the beginning of that revision itself.

⁶⁵ *Ivi*, pp. 4, 7, 8.

⁶⁶ M. DEN HEIJER, J. RIJPMAN, T. SPIJKERBOER, *Coercion, Prohibition, and Great Expectations*, cit., pp. 627-630.

⁶⁷ *Ivi*, p. 610.

⁶⁸ *Ivi*, pp. 638-641.

VI. DEAL

On 18 March 2016, the EU and Turkey made a deal about the return of irregular migrants from Greece to Turkey.⁶⁹ On the basis of this deal, people were deported from Turkey to Greece as of 20 March 2016. The deal was laid down in a press release.⁷⁰ In the European Parliament, the question was raised whether this statement is to be considered as an agreement in the sense of Art. 216 TFEU.⁷¹ Apparently, the EU's procedure for negotiating and concluding treaties with third countries, laid down in Art. 218 TFEU, has not been followed. The European Parliament wants to know whether the Council nonetheless considers the Statement to be a treaty, and, if not, whether Turkey has been informed about the non-binding nature.

It is evident that legal counselors of the Commission and the Council have identified the problem. After the EU-Turkey statement, the Commission has proposed to amend the Council Decision of 22 September 2015.⁷² This seems to contradict the idea that no changes are needed in order to implement the 18 March deal in order to bring Syrians resettled from Turkey under the relocation quota.⁷³ If the EU has to amend existing legal instruments in order to implement the EU-Turkey Statement, that would be a strong indication that the Statement is a treaty obliging the EU to implement it. However, in preamble consideration four, the basis for the proposed amendment is given as the EU decision of 7 March:⁷⁴ "The EU Heads of State or Government agreed on 7 March to work on the basis of a series of principles for an agreement with Turkey, including to resettle, for every Syrian readmitted by Turkey from Greek islands, another Syrian from Turkey to the Member States, within the framework of the existing commitments". In this proposal, the Commission is navigating around the EU-Turkey Statement as the ground for amending the 22 September Council Decision, and instead uses another basis.

It could be argued that the statement is not a treaty in the meaning of the Vienna Convention on the Law of Treaties or an international agreement in the meaning of Art.

⁶⁹ This paragraph is based on M. DEN HEIJER, T. SPIJKERBOER, *Is the EU-Turkey Migration and Refugee Deal a Treaty?*, Eulawanalysis.blogspot.nl. See for a similar analysis E. CANNIZZARO, *Disintegration Through Law?*, in *European Papers*, 2016, www.europeanpapers.eu, p. 3 *et seq.*

⁷⁰ Cf. Press releases and statements, *EU-Turkey statement, 18 March 2016*, cit.

⁷¹ Cf. European Parliament, Parliamentary questions, 22 March 2016, www.europarl.europa.eu.

⁷² Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece.

⁷³ Council Decision (EU) 2016/0089 of 21 March 2016 amending Council Decision EU 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece.

⁷⁴ Cf. Press releases and statements, *Statement of the EU Heads of State or Government, 07/03/2016*, www.consilium.europa.eu.

216 TFEU, because the exchanges between the EU and Turkey were merely included in a statement. This is the view of Steve Peers⁷⁵ and Karolína Babická.⁷⁶

A further reason not to view the statement as a treaty is that it does not use terms as shall and should, which are normally used in international law to indicate obligations of result (shall) or obligations of effort (should). Instead, the more indistinct term 'will' is used. On the other hand, the Statement says that the EU and Turkey "have agreed on the following additional points". Art. 216 TFEU uses the term 'agreement' when referring to a treaty with third countries. If two parties agree to something, can the result be anything less than an "agreement"? Or is the meaning of the term agreement in Art. 216 TFEU different from its ordinary meaning?

If one would embrace the thought that the Statement of 18 March is not a treaty or agreement because it is designated as "Statement" and uses the term "will", it would follow that the EU could neglect the constitutional safeguards of Art. 218 TFEU by changing the form or terminology of a particular text. It would be rather odd if the European Parliament and the CJEU could be sidetracked by such clever ruses. It would mean that the applicability of constitutional safeguards depends entirely on choices regarding the design instead of content made by Commission or Council.

That the form is not decisive is confirmed in the case law of the International Court of Justice (ICJ). In *Aegean Sea*, the question was whether a joint *communiqué*, issued after a meeting between the Prime Ministers of Greece and Turkey, in which they agreed that a territorial dispute dividing the two countries should be resolved by the ICJ, constituted a treaty on the basis of which the ICJ had jurisdiction over the case. The Court held "that it knows of no rule of international law which might preclude a joint communiqué from constituting an international agreement to submit a dispute to arbitration or judicial settlement (cf. Arts 2, 3 and 11 of the Vienna Convention on the Law of Treaties). Accordingly, whether the Brussels Communiqué of 31 May 1975 does or does not constitute such an agreement essentially depends on the nature of the act or transaction to which the Communiqué gives expression; and it does not settle the question simply to refer to the form – a communiqué – in which that act or transaction is embodied. On the contrary, in determining what was indeed the nature of the act or transaction embodied in the Brussels Communiqué, the Court must have regard above all to its actual terms and to the particular circumstances in which it was drawn up".⁷⁷

The ICJ found that the terms of the *communiqué*, using terms as "decision" and "obligation" were indicative of the parties intending to bind themselves. However, it transpired from the context, namely previous and later negotiations and diplomatic ex-

⁷⁵ Cf. S. PEERS, *The Draft EU/Turkey Deal on Migration and Refugees: Is It Legal?*, 16 March 2016, eulawanalysis.blogspot.nl.

⁷⁶ Cf. K. BABICKÁ, *EU-Turkey Deal Seems to Be Schizophrenic*, 22 March 2016, www.migrationonline.cz.

⁷⁷ International Court of Justice, *Aegean Sea Continental Shelf* (Greece v. Turkey), judgment of 19 December 1978.

changes between the parties, that they had not yet undertaken an unconditional commitment to submit the continental shelf dispute to the Court.

In *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, the question was whether minutes of a meeting between two Foreign Ministers constituted a treaty. The ICJ held that the minutes included a reaffirmation of obligations previously entered into; undertook attempting to find a solution to the dispute during a period of six months; and addressed the circumstances under which the Court could be seized after May 1991. According to the ICJ, the minutes are not a simple record of a meeting. They do not merely give an account of discussions and summarize points of agreement and disagreement. They enumerate the commitments to which the Parties have consented. They thus create rights and obligations in international law for the Parties. They constitute an international agreement.⁷⁸

It follows that the question of whether a text is a treaty does not depend on form but on whether the parties consented to bind themselves. Whether there is such consent, depends on the terms used and the context in which the text was drawn up.

Both the text and context of the EU-Turkey Statement support the view that it is a treaty. The parties “decided” to end the irregular migration from Turkey to the EU, and, to that purpose, they “agreed” on a number of action points. These include a commitment on the part of Turkey to accept returned migrants and a commitment on the part of the EU to accept for resettlement one Syrian for every one Syrian returned to Turkey. Further, the Statement reaffirms the joint action plan of November 2015 and mentions that it is already being implemented. Indeed, several implementation reports have been drawn up since November 2015, from which it is clear that the previous action plan has been activated.⁷⁹

The only way to argue that the EU-Turkey statement is not an agreement in the sense of Art. 216 TFEU would be to argue that it merely reconfirms already existing obligations from previous agreements (such as the EU-Turkey and Greece-Turkey Readmission Agreements), as well as expressing the political intention to enter into new obligations (establishing a procedure for resettlement of Syrians from Turkey). If one focuses exclusively on the text of the statement and disregards the context, this is a position which can be made to look tenable. However, it would require disregard of two blatant aspects of the statement. First, the substantive part of the agreement opens with the decision to return all irregular migrants to Turkey. If one focuses merely on the text of this crucial sentence, this would imply violation of the prohibition of collective expul-

⁷⁸ International Court of Justice, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v. Bahrain), judgment of 1 July 1994.

⁷⁹ Cf. European Commission, *Managing the Refugee Crisis. EU-Turkey Joint Action Plan: Implementation Report*, ec.europa.eu and Report from the Commission to the European Parliament and the Council, *EU-Turkey Joint Action Plan: Third Implementation Report*, COM(2016) 144 final of 4 March 2016 ec.europa.eu/dgs.

sion. Because application of this provision would constitute a violation of international law, by that very fact it is not merely a restatement of pre-existing obligations. It is true that this sentence is followed by qualifications about compatibility with international and European law and even the explicit statement that this does not constitute collective expulsion, but the internal tension (returning everyone *versus* compliance with international law) is so evident that the idea that the agreement contains a novel legal element is more convincing than the idea that it contains nothing new. Secondly, it is well known that the pre-existing legal readmission obligations (on the basis of the EU-Turkey and Greece-Turkey Readmission Agreements) were barely being applied.⁸⁰ Therefore, the fact that Turkey agreed that, as of 20 March 2016, all irregular migrants were to be accepted is a substantively novel element. Therefore, for two reasons the idea that the EU-Turkey Statement merely repeats pre-existing legal obligations is not convincing.

The EU-Turkey Statement now at issue is also being implemented. For example, the Greek parliament has passed a law allowing migrants arriving in the country to be returned to Turkey.⁸¹ On Monday 4 April 2016, Turkey accepted the first returned asylum seekers from Greece.⁸² All this indicates that the EU-Turkey Statement was meant to create mutual obligations to implement its terms. This indicates that it is a treaty.

There is no reason to assume that this reasoning does not apply to the EU (which is not a party to the Vienna Convention on the Law of Treaties). In interpreting agreements concluded between the EU and third countries, the CJEU consistently observes that even though the Vienna Convention does not bind either the Community or all its Member States, a series of provisions in that convention reflect the rules of customary international law which, as such, are binding upon the Community institutions and form part of the Community legal order.⁸³ Presumably, the definition of a treaty in Art. 2, para. 1, let. a) of the Vienna Convention on the Law of Treaties belongs to customary international law. The 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, which has not yet entered into force, uses the same definition and expands it to agreements concluded between international organizations or an international organization and a State.

Does the fact that the internal EU rules were possibly not followed mean that the Statement does not have legal effect? Probably not, as the Statement was agreed by the

⁸⁰ This is evident from Council Decision (EU) 2016/551 of 23 March 2016 establishing the position to be taken on behalf of the European Union within the Joint Readmission Committee on a Decision of the Joint Readmission Committee on implementing arrangements for the application of Articles 4 and 6 of the Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation from 1 June 2016. This makes clear it was not being applied (at least not systematically) before that date.

⁸¹ Cf. *Greece Passes Law Allowing Migrants' Return to Turkey*, 1° April 2016, www.bbc.com.

⁸² Cf. P. KINGSLEY, H. SMITH, *First Boats Returning Migrants and Refugees From Greece Arrive in Turkey*, 4 April 2016, www.theguardian.com.

⁸³ Court of Justice, judgment of 25 February 2010, case C-386/08, *Brita*, para. 42.

Members of the European Council, whom Turkey could have considered to have full powers to bind the EU. Art. 46 of the Vienna Convention on the Law of Treaties provides that a party may not “invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance”.

Para. 2 of that provision provides that a violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith. In *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, the ICJ did not consider it relevant that Qatar had not followed the procedures required by its own Constitution for the conclusion of treaties: “Nor is there anything in the material before the Court which would justify deducing from any disregard by Qatar of its constitutional rules relating to the conclusion of treaties that it did not intend to conclude, and did not consider that it had concluded, an instrument of that kind; nor could any such intention, even if shown to exist, prevail over the actual terms of the instrument in question”.⁸⁴

We therefore conclude that the EU-Turkey Statement is a treaty with legal effects, despite its name and despite internal EU rules not having been observed.

That the Statement is a treaty implies not only that the EU and Turkey must uphold its terms; it also opens up a debate about its legal effects, including possible challenges against its legality in view of possible conflict with other rules and treaties, such as human rights. The fact that the Statement has already been concluded and is therefore no longer merely ‘envisaged’, means, however, that it is no longer possible to obtain an opinion of the CJEU “as to whether an agreement envisaged is compatible with the Treaties” (Art. 218, para. 11, TFEU). It is still possible for one of the EU institutions or a Member State to bring an action for annulment of the act of the European Council to conclude the agreement with Turkey. Such an action was successfully brought in *France v. Commission*, when the ECJ declared void the act whereby the Commission sought to conclude a competition agreement with the US, for reason of the Commission not being empowered to do so.⁸⁵ However, this left the Agreement with the US itself intact, which is in conformity with the rule of Art. 46 of the Vienna Convention on the Law of Treaties.

In view of the default position in international law that all treaties are equal, it further is difficult to argue that the Statement is void because of a possible conflict with human rights such as guaranteed in the ECHR or within the EU legal order, such as the right to asylum and the prohibitions of *non-refoulement* and collective expulsion (the EU Charter of Fundamental Rights). Only if the EU-Turkey Statement conflicts with *jus co-*

⁸⁴ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, cit., para. 29.

⁸⁵ Court of justice, judgment of 9 August 1994, case C-327/91, *France v. Commission*.

gens, is it to be considered void and may Member States not give effect to it (Art. 53 of the Vienna Convention on the Law of Treaties).

It is however possible for individuals (such as those being returned from Greece to Turkey) to challenge the implementation of the EU-Turkey agreement before national courts, arguing that it conflicts with fundamental rights. This in turn, may lead to a referral to the CJEU or a complaint before the European Court of Human Rights. Is the agreement in violation of human rights? As has been argued elsewhere,⁸⁶ the agreement may raise issues under the prohibition of *refoulement* (is Turkey safe?), the right to liberty (is systematic detention in Greece allowed?) and the prohibition of collective expulsion (are the returnees able to challenge their return on individual basis, including before a court?). However, the Statement does not prescribe how, exactly, returns are to be effectuated and does not oblige Greece to systematically detain all asylum seekers who enter the country from Turkey. The Statement says that returns are to “take place in full accordance with EU and international law, thus excluding any kind of collective expulsion” and that “[a]ll migrants will be protected in accordance with the relevant international standards and in respect of the principle of non-refoulement”. Further, migrants are to be “duly registered and any application for asylum will be processed individually by the Greek authorities in accordance with the Asylum Procedures Directive”. It would seem therefore that the Statement itself does not directly violate international norms – it leaves the Member States sufficient freedom to implement the obligations in harmony with human rights. It follows that the Member States (Greece) must implement the agreement in harmony with human rights: “Where a number of apparently contradictory instruments are simultaneously applicable, they must be construed in such a way as to coordinate their effects and avoid any opposition between them. Two diverging commitments must therefore be harmonised as far as possible so that they produce effects that are fully in accordance with existing law”.⁸⁷ A similar line of reasoning is followed in the case law of the ECJ.⁸⁸

This brings us to two concluding observations. First, the devil of implementing the EU-Turkey deal is in the detail. Although its effectiveness in terms of stopping irregular migration by creating a deterrent effect may depend on returning *all* persons arriving in Greece *as quickly as possible*, fundamental rights may well halt returns in individual case or result in lengthy procedures. It is indeed the question whether the appropriate hu-

⁸⁶ Cf. United Nations High Commissioner for Refugees (UNHCR), *Legal Considerations On the Return of Asylum-Seekers and Refugees From Greece to Turkey As Part of the EU-Turkey Cooperation in Tackling the Migration Crisis Under the Safe Third Country and First Country of Asylum Concept*, 23 March 2016, www.refworld.org; H. LABAYLE, P. DE BRUYCKER, *The EU-Turkey Agreement on Migration and Asylum: False Pretences or a Fool's Bargain?*, 1° April 2016, eumigrationlawblog.eu.

⁸⁷ European Court of Human Rights, judgment of 12 September 2012, no. 10593/08, *Nada v. Switzerland*, para. 170.

⁸⁸ Court of Justice, judgment of 27 June 2006, case C-540/03, *Parliament v. Council*.

man rights framework is in place in Greece. Second, the European Parliament is right in asking critical questions about the Council not following the rules for concluding a treaty (also see earlier questions about the EU-Turkey deal of 29 November 2015).⁸⁹ Although one could take the view that time did not allow to await an Opinion of the CJEU, the agreement was not concluded with Turkey overnight and there was at least ample opportunity for European Parliament to deliver an opinion “within a time-limit which the Council may set depending on the urgency of the matter” as provided by Art. 218, para. 6, let. b), TFEU.

It is an affront to European democracy and the rule of law that such a controversial agreement, touching on fundamental human rights is concluded without properly allowing the European Parliament and, if approached, the CJEU, to play the constitutional role which they have been assigned by the Member States themselves in the TFEU.

VII. WOMENANDCHILDREN[¶]

“As I write, highly civilized human beings are flying overhead, trying to kill me”. This is the memorable opening sentence of a long essay George Orwell wrote in London in 1941.⁹⁰ Three years of being bombarded later, he returned to the topic. Why would it be worse to kill civilians than soldiers? “Every time a German submarine goes to the bottom about fifty young men of fine physique and good nerves are suffocated”.⁹¹ “The other thing that needs dealing with is the parrot cry ‘killing women and children’. [...] Why is it worse to kill a woman than a man?”⁹² Orwell objected “to the hypocrisy of accepting force as an instrument while squealing against this or that individual weapon, or of denouncing war while wanting to preserve the kind of society that makes war inevitable”. (The last few words show Orwell to be a committed socialist, which for some reason is not what he is remembered for today).

Somewhere in his argument, Orwell makes a mistake. He ignores that warfare which makes more victims than is strictly necessary for military aims is worse than warfare that tries to minimise the number of victims. Less victims are less bad than more victims. He pretends not to notice that women and children often are non-combatants, hence cannot be killed for military reasons. He does not try to understand what his op-

⁸⁹ Cf. M. SCHAAKE, *Written Question About the Appendix Letter to the EU-Turkey Deal*, 12 January 2016, www.marietjeschaake.eu.

[¶] The term is Cynthia Enloe's: C. ENLOE, *Margins, Silences and Bottom Rungs: How to Overcome the Underestimation of Power in the Study of International Relations*, in S. SMITH, K. BOOTH, M. ZALEWSKI (eds), *International Theory: Positivism and Beyond*, Cambridge: Cambridge University Press, 1996, p. 186 *et seq.*

⁹⁰ S. ORWELL, I. ANGUS (eds), *The Collected Essays, Journalism and Letters of George Orwell*, Vol. 2, Harmondsworth: Penguin, 1977, p. 74 *et seq.*, at p. 74.

⁹¹ S. ORWELL, I. ANGUS (eds), *The Collected Essays, Journalism and Letters of George Orwell*, Vol. 3, Harmondsworth: Penguin, 1971, p. 180.

⁹² *Ivi*, p. 214.

ponents want to argue, and instead goes after the exact words they use. The shocked response to his essays show that his opponents often also did not understand what they wanted to argue. Many people believed (and still believe) that women and children belong to a higher moral category and that them being victims is more tragic than victimisation of “young men of fine physique and good nerves”. Orwell had a sharp eye for hypocrisy, and an almost flawless style.

The picture of Aylan Kurdi, the Kurdish-Syrian toddler who drowned in the Aegean in September 2015, brought home to the world that children were dying on their way to Europe. If these children had been granted a visa (the Kurdi’s had been trying to get to relatives in Canada) this would not have happened. But is Aylan’s death worse than that of the four months old girl who drowned in the Adriatic on 13 October 1994?⁹³ And is the death of these children more tragic than that of the 27 year old Iraqi man who stepped on a Greek mine at the Turkish-Greek border on 15 September 1997? Or that of the Somali man in his early twenties who drowned between Morocco and Spain on 5 May 2011? The people who die at European borders predominantly are young men.

In the context of warfare, it does make sense to distinguish between avoidable and non-avoidable deaths (assuming that one accepts that the use of violence may be legitimate under certain circumstances). And because combatants are predominantly male adults, this implies that adult male deaths will be morally acceptable more often than those of women and children. The same is not true for border deaths. The use of force at European and other borders, which results in these deaths, is equally legitimate or illegitimate for men and women, for adults and children. The shock at the picture of Aylan Kurdi’s body merely underscored that the death of less photogenic corpses has been accepted as a daily routine.

⁹³ The individual data are based on T. LAST, *Deaths at the Borders: Database for the Southern EU 2015*, retrieved from www.borderdeaths.org on 6 April 2016.