

# Bifurcation of Mobility, Bifurcation of Law. Externalization of migration policy before the EU Court of Justice

---

Thomas Spijkerboer, Vrije Universiteit Amsterdam<sup>1</sup>

*to be published in Journal of Refugee Studies*

## *Abstract*

The externalization of European migration policy has resulted in a bifurcation of global human mobility, which is divided along a North/South axis. In two judgments, the EU Court of Justice was confronted with cases challenging the exclusion of Syrian refugees from Europe. These cases concern core elements of externalization, being third country agreements (the EU-Turkey Statement of March 2016) and visa requirements for refugees. This article seeks to analyze these judgments in the context of the broader developments in European migration law and policy. The core argument developed here is that the bifurcation of human mobility is reflected in a bifurcation of law. Excluded people are not merely to be excluded from European territory, but also from European law.

## **The transformation of European migration policy**

Since 1990, the regulation of migration has been transformed in fundamental ways. To use two contrasting images: whereas in 1990, the regulation of migration was embodied by the border guard (a state agent who waited for people to turn up at the border in order to be admitted to the territory), in 2017 the regulation of migration is embodied by drones (hovering over North-Africa, mapping populations whose movement might be reason for a policy response). Migration regulation became proactive (and not merely reactive), focused on populations (instead of individuals), extra- and intraterritorial (in addition to a renewed focus on the physical border), with security (instead of public administration) as the central lens, and administered by an assemblage of various public, private and intermediate actors (instead of by domestic civil servants). In Europe, this transformation took shape in the context of the European Union. Around 1990, several developments coincided and changed both migration and migration policies. The Iron Curtain fell, which made borders in Europe more permeable. Long distance air traffic increased considerably. After the 1986 Single European Act (the first major reform of the European Communities since the founding Rome Treaty of 1957) European integration in the field of migration took form (the 1985 and 1990 intergovernmental Schengen Agreements; and as EU law on the basis of the 1992 Maastricht Treaty, the 1997 Amsterdam Treaty, the 2007 Lisbon Treaty).

---

<sup>1</sup> I am grateful to Yussef Al Tamimi and Hemme Battjes, as well as to two anonymous reviewers, for their comments to earlier versions of the text.

In the framework of this Europeanization, three developments have occurred:

- 1) *proliferation*: policies are increasingly aimed at creating effects outside as well as inside the territorial borders of Europe (Ryan & Mitsilegas 2010; Maes, Foblets & De Bruycker 2011); examples are the Europeanization of borders through the introduction of the notion of ‘external borders’ (Rijpma 2009), legislation obliging airlines to check passports and visas before embarkation (“carrier sanctions”) (Rodenhäuser 2014; Scholten 2015; Baird 2017c); agreements with third countries obliging them to keep migrants away from their territory, and to take back undocumented migrants when they have succeeded in reaching Europe (Godenau & Zapata Hernández 2008; Coleman 2009; López-Sala 2015); sea patrols with third countries in their territorial waters or on the high seas (Cutitta 2005; Den Heijer 2011; Gammeltoft-Hansen 2011); employer sanctions (Verschueren 2016); the linkage principle (Slingenberg 2014, Vonk 2015); combat of “marriages of convenience” in private, administrative and criminal law (De Hart 2006; Foblets & Vanheule 2006; Wray 2006). The reintroduction of internal border controls and the re-fencing of borders since 2015 (European Commission 2017b) suggests that the combined processes of externalization, internalization, and reinforcement of border zones themselves can best be understood as forming part of an overarching process of proliferation.
- 2) *denationalization*: policies are increasingly implemented through non-state actors (Gammeltoft-Hansen & Sørensen 2012); examples are private enterprises being involved in detention (Bosworth 2014:46; Baird 2016a), border control (Gammeltoft-Hansen 2012; Lemberg-Pedersen 2012), the development and every day running of databases on illegal migrants (Andrijasevic 2015; Broeders & Dijstelbloem 2016), in the development and deployment of high tech systems for the surveillance of land and sea borders (Baird 2016b, 2017a, 2017b); migration law being enforced through the obligation to check legal residence for employers, banks, insurance companies, transportation companies, health care providers (Slingenberg 2014). But humanitarian actors are involved as well – think of UNHCR, the Red Cross and the Jesuit Refugee Service running asylum seeker reception in the Balkans and elsewhere, NGO’s such as MSF engaging in search and rescue in the Mediterranean in a way that is very similar to that of the Italian coast guard and navy (Cutitta 2014, 2016); the way in which European states seek to instrumentalize third countries so as to do their border work (Alpes 2015).
- 3) *securitization*: policies rely increasingly on criminal sanctions, high tech equipment (Dijstelbloem & Meijer 2009; Wisman 2012) and militarized means; examples are criminal sanctions against airlines (Scholten 2015), against human smuggling and trafficking (Palermo Protocols) (Gallagher & David 2014), against employers (Verschueren 2016), the use of huge databases (Brouwer 2008), reconceptualising migration as a security issue (Zureik & Salter 2005; Baldaccini & Guild 2006; Guild & Minderhoud 2006; Mallia 2009), as well as the interoperable radar, infrared and video systems assembling information for use by air force, navy and coast guard (such as Eurosur) (Rijpma & Vermeulen 2015); the deployment of EUNavForMed (aka Operation Sophia) on the basis of UNSC Resolution 2240(2015) of 9 October 2015 (Butler & Ratcovich 2016), and the deployment of NATO in the Aegean Sea.<sup>2</sup>

Together, these three changes in migration law and policy have led to a shift from migration control (reactive, orientation on individuals) to migration management (pro-active, orientation on populations) constituting a new migration regime (Geigner & Pecoud 2010, 2012).

---

<sup>2</sup> NATO Defence Ministers Agree on NATO support to assist with the Refugee and Migrant Crisis, press release 11 February 2016, [http://www.nato.int/cps/en/natohq/news\\_127981.htm?selectedLocale=en](http://www.nato.int/cps/en/natohq/news_127981.htm?selectedLocale=en), last accessed 13 October 2017.

The literature references above show that these developments have been studied extensively. As has been pointed out before, the result has been the bifurcation of human movement towards Europe. Law has been an instrument of this bifurcation. From a European perspective, the world is in the process of being divided into two zones (Mau et al 2015). One zone, consisting of the Americas, Europe and the Far East (hereafter for lack of a better term: the global North), has liberalized movement within this zone to quite some extent. Movement of global Northerners towards the global South is not always free, but if visa are needed these are usually granted in principle. In the rest of the world (the “global South”), there are similar zones where human movement has been liberalized – West-Africa (ECOWAS), the Gulf States (GCC), Southern Africa (SADC) and Latin America (Mercosur) (Czaika, De Haas & Villares-Varela 2017). However, people from the global South cannot freely move to the global North, but are subjected to prior permission which is given only if they fulfil particular criteria. This ‘spatial politics’ (Hage 2016:42) results in a bifurcation of human movement. Within the global North, Northerners can move freely. They can also move easily to many countries in the global South – be it not always freely. People from the global South cannot move freely or easily to the global North, but need prior entry visa which are only granted after extensive controls. This bifurcation is uneven. The bifurcation does not result in a situation where people from the global North can move freely within the global North, and people from the global South in (regions of) the global South. There is more to it, because people from the global North can, in addition, move easily to the global South, while the reverse is not the case. A graphic illustration of this bifurcation is the passport index, which ranks countries by their total visa-free score, i.e. the number of countries persons with a particular nationality can visit without needing a visa (Figure 1). The index is headed by

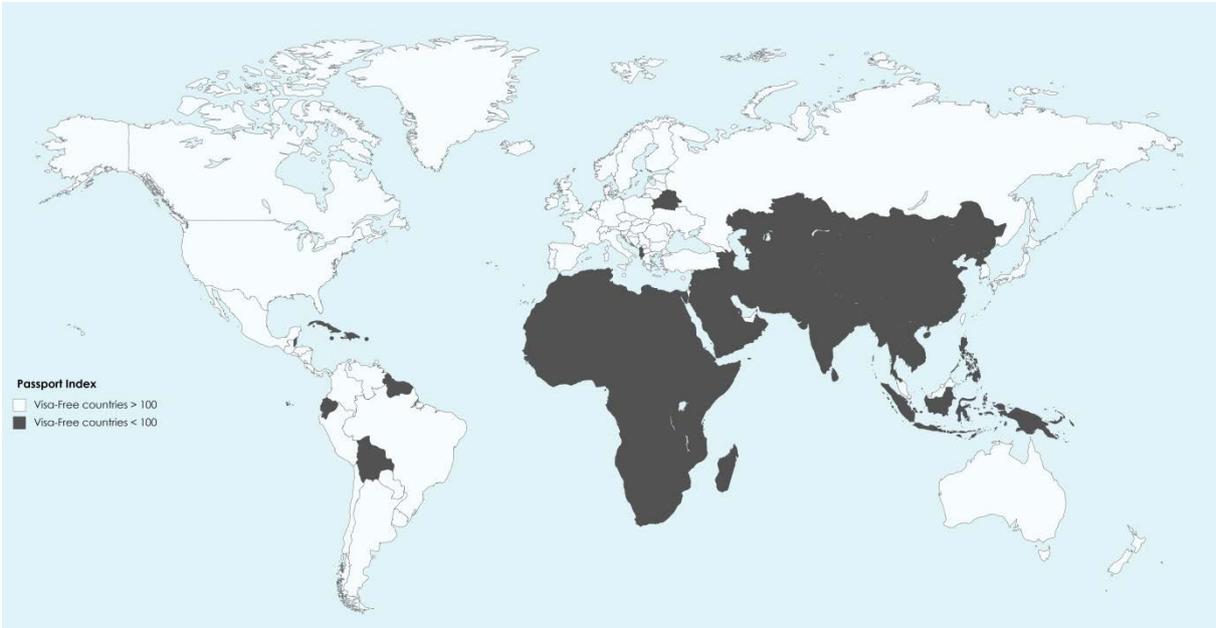


Figure 1 Global passport index (visuals Yussef Al Tamimi)

Germany and Singapore (citizens of both countries can visit 159 countries without needing a visa), and the bottom is made up by Somalia (32 countries for which no visa required), Syria (30), Iraq (26), Pakistan (25), and Afghanistan (22).<sup>3</sup>

### *Consequences for Syrian refugees*

The outbreak of the armed conflict in Syria in 2011 has led to a large scale refugee problem in the proximity of the territory of the European Union. Syria had an estimated 20,9 million inhabitants before the war.<sup>4</sup> Since 2011, the conflict has forced half of the population to flee: 6.3 million refugees within Syria,<sup>5</sup> 5 million outside Syria (655.000 in Jordan,<sup>6</sup> or some 7% out of 9.5 million inhabitants,<sup>7</sup> 1 million in Lebanon,<sup>8</sup> or some 17% out of 6 million inhabitants,<sup>9</sup> 3,2 million in Turkey,<sup>10</sup> or some 4% out of 79,5 million inhabitants<sup>11</sup>). These conservative estimates concern registered refugees; the actual number of refugees is likely to be much higher. The reception of Syrian refugees in the region is seriously under-funded. According to the Financial Tracking Services of the UN Office for the Coordination of Humanitarian Affairs, for 2016, only 54.1% of the funds needed for the Syria Humanitarian Response Plan has been funded;<sup>12</sup> the percentages for earlier years were 42.9% (2015),<sup>13</sup> 50.9% (2014),<sup>14</sup> 68% (2013)<sup>15</sup> and 62% (2012).<sup>16</sup> 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. In March 2016, only 179.147 resettlement places had been made available for Syrian refugees world-wide (UNHCR 2016) – 3.6% of the 5 million Syrian refugees outside Syria, and merely 1.6% of all 11.3 million Syrian refugees.

This illustrates that, to the extent that the EU succeeds in externalizing migration policy, this logically has onward effects in countries closer to the source countries of refugees.<sup>17</sup> Lebanon<sup>18</sup> and Jordan (Spijkerboer 2017b) now refuse to admit Syrian refugees. Turkey

---

<sup>3</sup> *Passport Index*, <https://www.passportindex.org/>, last accessed 13 October 2017.

<sup>4</sup> World Bank, <https://data.worldbank.org/country/syrian-arab-republic?view=chart>, last accessed 13 October 2017.

<sup>5</sup> Humanitarian Needs Overview, <http://hno-syria.org/#key-figures>, last accessed 13 October 2017.

<sup>6</sup> UNHCR, <http://data.unhcr.org/syrianrefugees/country.php?id=107>, last accessed 13 October 2017.

<sup>7</sup> World Bank, <https://data.worldbank.org/country/jordan?view=chart>, last accessed 13 October 2017.

<sup>8</sup> UNHCR, <http://data.unhcr.org/syrianrefugees/country.php?id=122>, last accessed 13 October 2017.

<sup>9</sup> World Bank, <https://data.worldbank.org/country/lebanon?view=chart>, last accessed 13 October 2017.

<sup>10</sup> UNHCR, <http://data.unhcr.org/syrianrefugees/country.php?id=224>, last accessed 13 October 2017.

<sup>11</sup> World Bank, <https://data.worldbank.org/country/turkey?view=chart>, last accessed 13 October 2017.

<sup>12</sup> United Nations Office for the Coordination of Humanitarian Affairs, <https://fts.unocha.org/appeals/501/summary>, last accessed 10 July 2017.

<sup>13</sup> United Nations Office for the Coordination of Humanitarian Affairs, <https://fts.unocha.org/appeals/461/summary>, last accessed 10 July 2017.

<sup>14</sup> United Nations Office for the Coordination of Humanitarian Affairs, <https://fts.unocha.org/appeals/442/summary>, last accessed 10 July 2017.

<sup>15</sup> United Nations Office for the Coordination of Humanitarian Affairs, <https://fts.unocha.org/appeals/421/summary>, last accessed 10 July 2017.

<sup>16</sup> United Nations Office for the Coordination of Humanitarian Affairs, <https://fts.unocha.org/appeals/396/summary>, last accessed 10 July 2017.

<sup>17</sup> MIDDLE EAST: Refugees could face forced repatriation. (2017, May 31). *Oxford Analytica Daily Brief Service*, pp. 1. Retrieved from <https://search-proquest-com.vu-nl.idm.oclc.org/docview/1904841162?accountid=10978>, retrieved 6 July 2017.

<sup>18</sup> I.a. Lebanon has just done the unthinkable, *Al Jazeera* 6 January 2015, <http://www.aljazeera.com/indepth/opinion/2015/01/lebanon-just-done-unthinkable-201516114349914185.html>, last accessed 6 July 2017; *Al Jazeera* 3 January 2015, Syrians to face visa restrictions for Lebanon,

introduced visa requirements for Syrian nationals entering the country by air or sea in January 2016,<sup>19</sup> and since then seems to require visa from all Syrians.<sup>20</sup> Human rights organizations report that the Syrian-Turkish land border has been closed.<sup>21</sup> In effect, private and public third parties (carriers and third countries) have been incentivized to prevent refugees from reaching the territories of EU countries. At the same time, the international community (including the EU) has not enabled refugees to subsist in the countries where they find themselves.

In the beginning of 2017, the Syrian refugee issue led to two judgments of the EU Court of Justice in which the relation between European law and the externalization of European migration and asylum policy was the central issue. The first case was an action initiated by three third country nationals who sought the annulment of the agreement known as the EU-Turkey statement of 18 March 2016. The second case concerned a question of law referred by a Belgian court. The issue at stake in that case was whether European law obliged Belgium to issue a visa to, in this case, a Christian Syrian family from Aleppo in order to enable them to apply for asylum in Belgium. In both of these judgments, the bifurcation of global mobility outlined above is reflected in a bifurcation of law, through which the externalization of migration law is kept outside the scope of European law. Whereas until now law has been an instrument of bifurcation, the judgments mark a development in which law itself is made to be bifurcated.

## The EU-Turkey judgment

On 18 March 2016, on the website of the Council of the European Union a press release was published, which is known as the EU-Turkey statement.<sup>22</sup> This press release made public the outcomes of a meeting between ‘the Members of the European Council’ and ‘their Turkish counterpart’. It announced that “the EU and Turkey” had “agreed” on a number of points. These included the return (forcibly if necessary) of all migrants arriving on the Greek islands from Turkey as of 20 March; admission to the EU of a number of Syrian refugees from Turkey equivalent to the number of Syrians returned from Greece to Turkey; as well as a number of flanking measures, most notably financial support for refugees in Turkey, visa freedom for Turkish nationals in the EU, and a restart of the negotiations on Turkish accession to the EU.

---

<http://www.aljazeera.com/news/middleeast/2015/01/lebanon-visa-restrictions-syrians-2015131029059563.html>, last accessed 6 July 2017.

<sup>19</sup> Turkey’s new visa law for Syrians enters into force, *Hürriyet Daily News*, <http://www.hurriyetdailynews.com/turkeys-new-visa-law-for-syrians-enters-into-force.aspx?pageID=238&nID=93642&NewsCatID=352>, last accessed 13 October 2017.

<sup>20</sup> Republic of Turkey, Ministry of Foreign Affairs, <http://www.mfa.gov.tr/visa-information-for-foreigners.en.mfa>, last accessed 6 July 2017.

<sup>21</sup> Amnesty International: Injured Syrians fleeing Aleppo onslaught among thousands denied entry to Turkey, 19 February 2016, <https://www.amnesty.org/en/latest/news/2016/02/injured-syrians-fleeing-aleppo-onslaught-among-thousands-denied-entry-to-turkey/>, last accessed 6 July 2017; For a recent report on the Turkish border wall see <http://www.al-monitor.com/pulse/en/originals/2017/07/turkey-syria-security-wall-under-construction-border-area.amp.html>, last accessed 18 July 2017.

<sup>22</sup> EU Turkey Statement 18 March 2016, <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/>, last accessed 6 July 2017.

### *Criticism of the EU-Turkey statement*

The EU-Turkey Statement is contested. The main criticism concerns the return of asylum seekers to Turkey which, according to many NGOs as well as academics, does not comply with the requirements for being a safe third country in either European or international law (Roman, Baird & Radcliffe 2016; Peers 2016; Poon 2016).<sup>23</sup> This criticism is based on international and European asylum and refugee law. Another line of criticism concerns European constitutional law. The argument is that the statement contains a legally binding agreement between the European Union and Turkey. However, this international agreement was reached without complying with the constitutional requirements which the Treaty on the Functioning of the EU (hereafter: TFEU) contains for concluding such agreements. In particular, no decision to authorize the opening of negotiations (Article 218(2) TFEU) had been taken; the text had not been submitted to the European Parliament for approval (Article 294(2), 218(6) TFEU); and there had been no possibility to consult the Court of Justice on the compatibility of the agreement with European law (Article 218(10) TFEU) (Cannizzaro 2016; Den Heijer & Spijkerboer 2016; Arribas 2017). In a debate in the European Parliament, there was broad support for the EU-Turkey Statement.<sup>24</sup> Therefore, it is quite possible that the Parliament would have approved the agreement had it been asked for consent. However, the outcome of a potential procedure before the Court of Justice would have been less certain. The court might consider the EU-Turkey Statement as undermining its constitutional position; in addition, the objections relating to international and European asylum law were substantial. Whereas one may consider the lack of formal consent of the Parliament a formality because the procedure prescribed by the TFEU would have led to the same outcome, the same cannot be said about the impossibility to approach the Court of Justice.

In the European Parliament, during a debate on 13 April 2016,<sup>25</sup> it was generally assumed that the EU-Turkey Statement had been concluded by the European Council on behalf of the EU. The President of the European Council, Donald Tusk, stated: “At our first Council in March, I was also asked by leaders to take forward new proposals made by Turkey and work out a common European position, with a view to reaching an agreement later that month. That agreement was finally reached at the European Council on 18 March. We agreed that, as from 20 March, all irregular migrants coming from Turkey to Greek islands would be returned to Turkey. Implementation would be phased in gradually and based on the so-called one-for-one principle. This is what has begun to happen.” Jean-Claude Juncker, President of the European Commission, referred to “l'accord conclu le 18 mars entre l'Union européenne et la Turquie”.

---

<sup>23</sup> Dating from the period when the Statement was being negotiated, see Amnesty International: *EU's Reckless Refugee Returns to Turkey*, 3 June 2016, <https://www.amnesty.org/en/latest/news/2016/06/eus-reckless-refugee-returns-to-turkey-illegal/>, last accessed 6 April 2017; Human Rights Watch: *EU: Turkey Mass-Return Deal Threatens Rights*, 15 March 2016, <https://www.hrw.org/news/2016/03/15/eu-turkey-mass-return-deal-threatens-rights>, last accessed 6 April 2017.

<sup>24</sup> Records of the European Parliament 13 April 2016, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bCRE%2b20160413%2bITEM-005%2bDOC%2bXML%2bV0%2f%2fEN&language=EN>, last accessed 7 April 2017.

<sup>25</sup> Minutes can be found at <http://www.europarl.europa.eu/sides/getDoc.do?type=CRE&reference=20160413&secondRef=ITEM-005&language=EN>, last accessed 19 April 2017.

However, during a debate with the European Parliament on 28 April 2016,<sup>26</sup> Dutch State secretary of Justice Dijkhoff, as President-in-Office of the Council stated “When we look at the legal aspects, it is a political agreement between the Member States and Turkey – between Europe and Turkey – (...).”

The question whether the EU-Turkey Statement is an agreement in the meaning of Article 216 (instead of merely a political agreement not constituting an international treaty) has been raised by a member of the European Parliament.<sup>27</sup> On the issue whether or not the Statement is a treaty a statement of Tusk, President of the European Council, on 13 April could be taken as an indirect response: “The Commission gave a positive assessment of the legality of the agreement (...)”. During the debate on 28 April, Dijkhoff explicitly stated: “Regarding the discussion about whether it is a statement or an agreement, I have a lot of agreements with a lot of people that are not legally taken to court so, from the Council position, we can have a discussion. But in our position it is not an agreement within the legal meaning of Article 218 of the Treaty. Of course, a lot of the things in that agreement between the Union and the Member States and Turkey have to be dealt with and elaborated on and those individual aspects will of course, when it is legally bound to be dealt with by the proper institutions.” Earlier that day, he had referred to the statement as a “political agreement”.

### *The judgment of the General Court*

A number of asylum seekers who had arrived on the Greek islands shortly after the entry into force of the EU-Turkey Statement on 20 March 2016 lodged an application at the General Court of the EU (i.e. the court of first instance in cases directed against EU institutions) in April 2016, and sought annulment of the March 2016 agreement between the EU and Turkey. Although the Court in its judgements of 28 February 2017 (cases T-192/16, T-193/16, T-257/16) does not deign to summarize on which grounds the applicants sought annulment, these most likely include both constitutional objections (the procedure for concluding a treaty had not been followed) as well as objections based on asylum and refugee law (Turkey is not a safe third country). The Court restricts its analysis to the question whether it is competent to hear the case. The Court concludes that it does not have jurisdiction, because the EU-Turkey Statement, contrary to the wording of that text itself, is an agreement not involving the EU as such, but merely the Member States of the EU. It has been concluded not by the European Council (consisting of the Heads of State or Government of the Member States) but by the Heads of State or Government of the Member States (at that particular moment not constituting the European Council). The Court develops its argument in five steps.

1. It is classical European law doctrine that for the classification of a phenomenon in light of European law, its classification according to domestic law or authorities is not

---

<sup>26</sup> <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bCRE%2b20160428%2bITEM-002%2bDOC%2bXML%2bV0%2f%2fEN&language=EN>, last accessed 19 April 2017.

<sup>27</sup> Parliamentary questions for oral answers on 22 March 2016, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+OQ+O-2016-000053+0+DOC+XML+V0//EN>, last accessed 7 April 2017. These questions have not been answered; telephonic enquiry on 19 April 2017 with the assistant of the MEP who posed these questions learnt that in specific circumstances this is not necessary.

decisive (para 44-45). This doctrine has been developed in cases where domestic authorities might be inclined to side-line European law by, for example, labelling a person not as a worker (so that free movement of workers would not be applicable). Whether or not someone is a worker in the sense of European law is governed by European, not domestic law. Similarly, whether an act is an act of an institution of the EU is governed by European law; the characterisation of the act in the act itself is not decisive.

2. The Court argues that the meeting on 18 March 2016 was the third in a series, and that the first two had been meetings of the Heads of State or Government not acting as the European Council (para 49-51).
3. The Court holds that the Communication of the Commission of 16 March 2016 (COM(2016) 166 final) cannot be considered as a proposal in the meaning of Article 294(2) TFEU to the Parliament and the Council. The Court takes this is not as an indication that the procedure of Article 294(2) has been violated, but that it has not been followed because it was not applicable.
4. In its decisive manoeuvre (para. 53-54), the Court begins by acknowledging that the EU-Turkey statement differs from previous statements by referring to its author as “the Members of the European Council” (instead of the Heads of State or Government of the Member States), and to an agreement between Turkey and “the EU” (instead of the Member States). It is “therefore necessary” (para 54) to determine what the terms “the Members of the European Council” and “the EU” mean. The Court observes that while the online version uses the indication ‘Foreign affairs and international relations’, which relates to the work of the European Council, a PDF version submitted by the Council during the procedure before the Court<sup>28</sup> refers to an ‘international summit’ and to the ‘Heads of State or Government’ (para. 55). It then accepts the argument of the Council that the terms “European Council” and “EU” in the EU-Turkey statement amount to simplified wording for the general public in the context of a press release, and therefore cannot be taken literally (para. 57-61). It finds the terms “Members of the European Council” and “EU” in the EU-Turkey statement “ambivalent” (para. 61); it later refers to the “regrettably ambiguous terms of the EU-Turkey statement” (para. 66).
5. Having found the terms “European Council” and “EU” to be ambivalent, ambiguous terms, the Court analyses various materials surrounding the meetings of 17 and 18 March 2016. These documents the Court treats as carefully worded and to be taken literally. In these documents, the term “Members of the European Council” is not considered as potentially ambivalent or ambiguous, but is supposed to refer to the EU institution of that name. Also, “various items of press materials” (para. 63) are now not assumed to contain simplified wording that might not be taken at face value, but to reflect institutional issues in a precise manner. And the conclusion is that, when concluding the EU-Turkey statement, the Heads of State or Government did not meet in the capacity of members of the European Council, but as representatives of the

---

<sup>28</sup> Surprisingly, the Court does not consider the question whether this version, which is at variance with the version published in March 2016, could have been not merely submitted, but also *produced* (dare we say: fabricated?) in the framework of the procedure before the Court.

Member States (para. 66, 69, 72). The EU-Turkey statement binds not the EU but the Member States.

The Court emphatically does not take a decision on the issue of whether the EU-Turkey Statement is a political agreement, or a legally binding treaty in the sense of Article 216-218 TFEU. Whichever it is, the EU is not a party to it (para. 71-72).

After this judgment, the three asylum seekers involved have lodged an appeal to the Court of Justice on 21 April 2017.<sup>29</sup> The case is pending.

### *Analysis*

The EU-Turkey statement is one of the central policy measures in relation to the “refugee crisis” in Europe in 2015-2016.<sup>30</sup> The Court has developed a complicated argumentation in order to reach the conclusion that the EU is not one of the parties to the agreement. A reasoning holding that the EU-Turkey Statement itself uses unambiguous terms (Members of the European Council, and EU) hence does involve the EU would have been more straightforward, and therefore more convincing than the one adopted by the Court. How can we understand the apparent will of the Court to steer free of the substantive issues of this case?

First, if it had addressed the compatibility of the EU-Turkey Statement with European and international asylum and refugee law, it would either have found that the statement is not in conformity with them (because the relevant norms are denied *effet utile*, i.e. they are rendered ineffective); or alternatively it would have had to interpret asylum and refugee law in a very narrow manner. The first alternative would have resulted in an explosive political situation with the court at the heart of a controversy; the second alternative would have been harmful for asylum seekers and refugees in Europe and beyond. In addition, such a narrow interpretation of asylum and refugee law is hard to justify, and might undermine the expansive interpretative approach which characterizes the Court of Justice’s case law, in particular the notion of *effet utile*. Both alternatives are unattractive for the Court.

Second, another option would have been to conclude that the EU-Turkey Statement does not produce legal effects for third parties in the sense of Article 263 TFEU, but merely constitutes a political agreement not subject to the procedure of Article 263 TFEU. This would have required a narrow interpretation of the term agreement in Article 216 TFEU. Such a narrow interpretation results in a narrower scope of the Court of Justice’s jurisdiction under Article 218 TFEU more generally, including in other contexts. Thus, such a narrow interpretation would potentially undermine the constitutional position of the Court of Justice, because it would allow the Council to adopt “press releases” instead of treaties, enabling it to side-line the Court. This is not an attractive option for the Court either.

---

<sup>29</sup> Cases C-208/17 P, C-209/17 P, C-210/17 P, comp. <http://www.statewatch.org/news/2017/may/eu-council-ls-eu-turkey-appeal-9148-17.pdf>, last accessed 6 July 2017.

<sup>30</sup> E.g. the Commission’s Communication on the Migration Partnership framework, 7 June 2016, COM(2016) 385 final, p. 2, 3, 4; the Malta Declaration of the members of the European Council of 3 February 2017, <http://www.consilium.europa.eu/en/press/press-releases/2017/01/03-malta-declaration/>, last accessed 7 April 2017.

Third, the General Court has not relied on what is called the Plaumann doctrine, codified in Article 263 TFEU. Individuals can only institute proceedings against an act if it is of direct and individual concern to them. Clearly, the situation of the applicants in this case is not directly caused by the EU-Turkey Statement itself, and could only lead to their detention and subjection to an asylum procedure of dubious quality through implementing measures of Greece. Therefore, they are not directly affected, nor are they individually affected (because the act is not addressed to them individually). Relying on the Plaumann doctrine would have allowed the Court to stave off the substance of the case in this particular procedure. But a possible follow-up would have been a preliminary question by a Greek judge in domestic litigation. A Greek court could ask the Court of Justice on the compatibility of the EU-Turkey Statement with European constitutional law and international and European asylum law. If that situation would materialize, a judgment in the present case applying the Plaumann doctrine would have left the Court no room whatsoever for staying away from the substance of the case in the subsequent preliminary procedure.

Therefore, it makes sense for the Court to base its ruling on an analysis steeped in factual detail, as it did in its judgment. It is unlikely that such a detailed factual ruling has much precedential value, and therefore the likelihood that, in future cases, the Court will be bothered by its analysis in this case is minimal.

Problematic is that the present judgment seems to be at odds with the so-called ERTA doctrine.<sup>31</sup> This doctrine, codified in Article 3(2) TFEU, holds that whether a decision is a decision of the Council or of the Member States is governed by European law. The label which the decision itself provides is not decisive. The ERTA doctrine concerns exactly the situation at hand: ministers of all EU Member States meet – but do they meet as the Council (thus representing the EU), or as representatives of the Member States? Decisive is not the label, but whether the decision implements a common policy; whether it deals with a matter falling within EU competence; whether it has definite legal effects on a common policy. The EU-Turkey statement has legal effects (if only because it creates considerable tension with European and international asylum law) concerning a common policy (rules on asylum and migration policy, visa policy), and therefore arguably (in the terms of ERTA) “the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules.”<sup>32</sup>

### **The humanitarian visa judgment<sup>33</sup>**

The judgment of the Grand Chamber of the Court of Justice of 7 March 2017 (C-638/16 PPU) concerns a Christian family from Aleppo of Syrian nationality, with three young children. In October 2016, they applied for a short stay visa with limited territorial validity at the Belgian Embassy in Beirut, and returned to Syria the day after. They had indicated that they intended to apply for asylum in Belgium, and explained that they were forced to return to Syria by the

---

<sup>31</sup> I have relied on a manuscript of Narin Idriz.

<sup>32</sup> Joined cases C-181/91 and C-248/91, para. 17.

<sup>33</sup> Together with two colleagues I have provided pro bono advice to the lawyer of the Syrian family in this case, see Spijkerboer, Brouwer & Al Tamimi 2017. See on the issue also Moreno-Lax 2017a, 2017b; Carlier 2017.

fact that they are not allowed to register as refugees in Lebanon, and were not sufficiently prosperous to be able to maintain themselves in Lebanon without such registration.

The referring Belgian court wanted to know whether the Belgian authorities were obliged to issue a humanitarian visa with limited territorial validity on the basis of Article 25 Visa Code, if that would be the only way in which the family could be protected from being exposed to a real risk of being exposed to inhuman or degrading treatment, or to a well-founded fear of being persecuted.

The Court of Justice rules that an application for a visa with the aim of applying for asylum is not an application for a visa for a stay of no longer than three months. Therefore, the issue is not covered by the Visa Code, which only governs short stay visa. As the issue of visa for a stay longer than three months has not been harmonized, it is not governed by European law, but only by national law. As a consequence, the EU Charter of Fundamental Rights does not apply. Therefore, the Court does not have competence to rule on the substantive issue whether European states may be under an obligation to issue a visa in a situation such as that of the Syrian family.

The reasoning of the Court is formal, but compelling. Remarkably, the Advocate-General in this case had an equally compelling reasoning with the opposite outcome. He argues that the applicants have applied for a short stay visa, and it is a short stay visa that has been denied. One of the grounds for denying such a visa is the fact that there are doubts as to whether the applicant will leave after the period for which the visa has been granted. However, it is possible to grant a visa despite such doubts in humanitarian cases by making an exception to this ground for refusal. In addition, the Advocate General argues that the applicants intend to stay for no longer than three months in Belgium on the basis of their visa; after that, their stay will be based on their status as asylum seekers. Therefore, the procedure really and actually concerns a short stay visa. Because in this way the EU Visa Code is applicable, the Charter of Fundamental Rights is thereby applicable. The Advocate General then argues that EU Member states are under an obligation to issue a visa if there are substantial grounds to believe that the refusal thereof would have as a direct consequence that the applicant would be exposed to inhuman or degrading treatment, by depriving that national of a legal route to exercise his right to seek international protection in that Member State. The relevant impending inhuman or degrading treatment consists, in the analysis of the Advocate General, both of the treatment the applicant may be exposed to in the country of origin and in the risks inherent in an irregular trip to a country of asylum to which a refusal of a visa would expose the applicants.

### *Analysis*

In this case, thanks to the Advocate General we have two opposing, but convincing interpretations of European law. It is not hard to understand why the Court preferred the option it chose. It was not only the Belgian government which opposed the idea that there could be an obligation to grant humanitarian visa in the most emphatic terms. The governments of no less than thirteen Member States as well as the European Commission did the same. An indication of the uproar which an alternative judgment would have led to is that,

on the morning of the judgment, Dutch media of a variety of shades (including Volkskrant and NOS) reported that the Court of Justice threatened to detonate a “bomb” or to create “chaos” by its judgment. It would have needed a lot of courage to take another position than the Court did. Also, it is evident that the possibility of applying for humanitarian visa in order to apply for asylum has not been created in European law; proposals to do so have been discussed for a while, and are likely to remain in a discussion stage. It was possible for the Court to construct this possibility by interpreting European law along the lines proposed by the Advocate General. But it would have been a creation of this possibility by judges. This has been done by French and Belgian judges in other cases. But at the European level, the Court would have been entirely on its own, facing staunch opposition of the Member States and the Commission.<sup>34</sup> The Court apparently felt it would have overplayed its hand if it had created the option of humanitarian visa with the aim of applying for asylum.

**Externalization: a mixed success**

One might assume that the Court of Justice’s position vis-à-vis the externalization of migration and asylum policy is motivated by a wish not to interfere with a crucial policy field. This explanation would be convincing in particular if the policies involved were successful. However, the success of externalized migration and asylum policies is unclear.

At first sight, the combination of visa obligations and carrier sanctions (which is at the core of the humanitarian visa case) seems to have been quite effective in getting migration towards Europe under control. The number of people arriving at European airports from outside the EU refused entry has decreased from 5 per 10.000 in 2008 to 3 per 10.000 in 2015 (Figure 2).

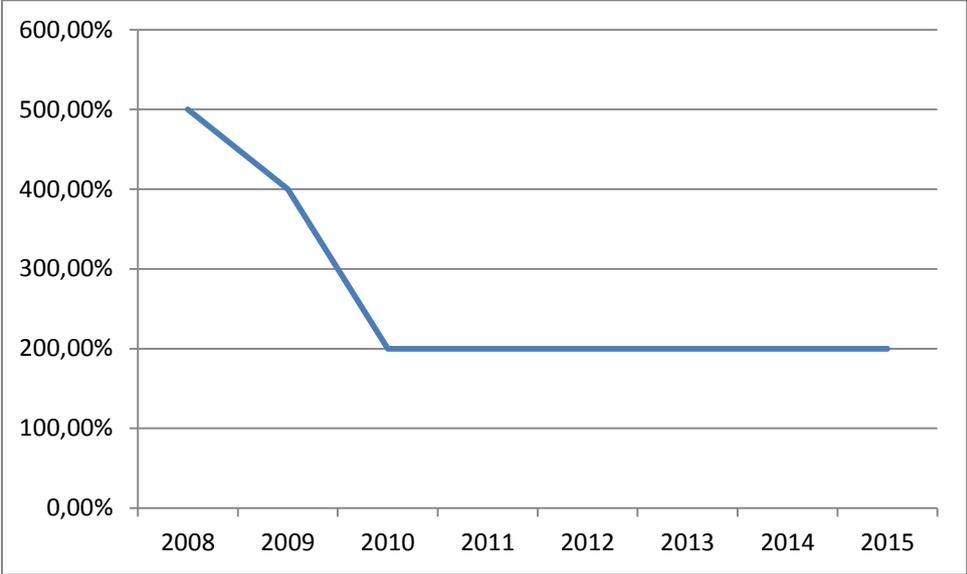


Figure 2: Percentage of extra-EU arrivals refused entry at EU airports 2008-2015 (source: Eurostat migr\_eirfs and avia\_paexcc, accessed 6 July 2017)

<sup>34</sup> The European Parliament has advocated humanitarian visa, see i.a. European Parliament 2014; European Parliament 2016.

Even if it is assumed that a comparable number of people succeeds in entering the EU by using genuine documents not belonging to themselves, the percentage of third country nationals without documents (notably: visa) on airplanes headed for Europe has declined to a low level.

This success however should be seen in light of other developments. First, the total number of passengers arriving from outside the EU has increased considerably. At the airports of the twelve 1993 EU Member States their number went up from 17 million in 1993 to 153 million in 2015 (Figure 3). An important part (studies suggest as much as 70%, Fasani 2010:173 on

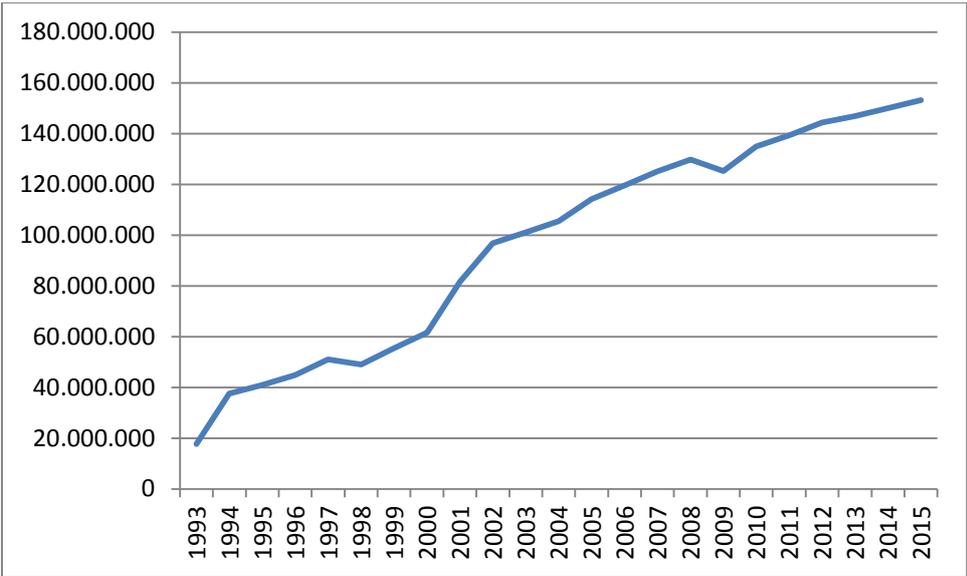


Figure 3: Extra-EU airport arrivals 1993-2015, for the twelve 1993 EU Member States (source Eurostat avia\_paexcc, accessed 6 July 2017)

Italy; comp. González-Enríquez 2010:256: “typical” for Spain) of undocumented migrants on EU territory have entered in a regular manner (with a visa), but have then overstayed (Maroukis 2010:103 on Greece; Cyrus & Kovacheva 2010:134 on Germany; Van der Leun & Ilies 2010:198 on The Netherlands; generally Vogel & Jandl 2008:9-11; Triandafyllidou & Vogel 2010:294). As a consequence, the number of overstayers may have increased at a rate similar to that of the number of incoming passengers. Second, it seems plausible that the number of people crossing borders in an irregular manner (in cars, buses and lorries, through forests or by boat) has increased, although no reliable medium or long term data on this are available.<sup>35</sup> Third, case studies on the US-Mexico border (Massey 2015), migration between Morocco and Spain (De Haas & Fokker 2013), and Caribbean migration (Flahaux & Vezzoli 2017) show that restrictive migration policies have in some cases resulted in more, not less migration. Taking these three developments together, it may be that the clear success of visa policy enforced by carriers is outdone by the inverse effects of other policies (as with the increasing number of passengers) or by the inverse effects of restrictive migration policies themselves.

<sup>35</sup> Frontex has data since 2008: Frontex 2011:56 for 2008-2010; Frontex 2013:65 for 2010-2012; Frontex 2017:47 for 2013-2016.

This suggests that, as a general matter, the externalization of European migration and asylum policy is a mixed success when evaluated in its own terms. Is the same true for individual policy measures? European policy makers have claimed the EU-Turkey Statement as a success (“Since the EU-Turkey Statement, there has been a substantial decrease in the numbers leaving Turkey for Greece “, European Commission 2016a: 2; “The sharp decrease in the number of irregular migrants and asylum seekers crossing from Turkey into Greece is proof of the Statement's effectiveness “, European Commission 2016b: 2; “The substantial fall in both crossings and fatalities since the entry into force of the Statement is testament to its effective delivery.”, European Commission 2016c: 2; “There has been a substantial fall in the number of crossings since the activation of the Statement”, European Commission 2016d: 2; “The number of crossings since the Statement continues to be substantially reduced and the loss of life has been stemmed.”, European Commission 2017a: 2; “During the period covered by this Sixth Report, the EU-Turkey Statement of 18 March 2016 has continued to ensure an effective management of migratory flows along the Eastern Mediterranean route, consolidating the trend described in the previous Reports”, European Commission 2017c: 2, references omitted). Indeed, the number of people crossing the Aegean has decreased significantly. However, as Figure 4 shows, 90% of the decrease preceded the EU-Turkey Statement.

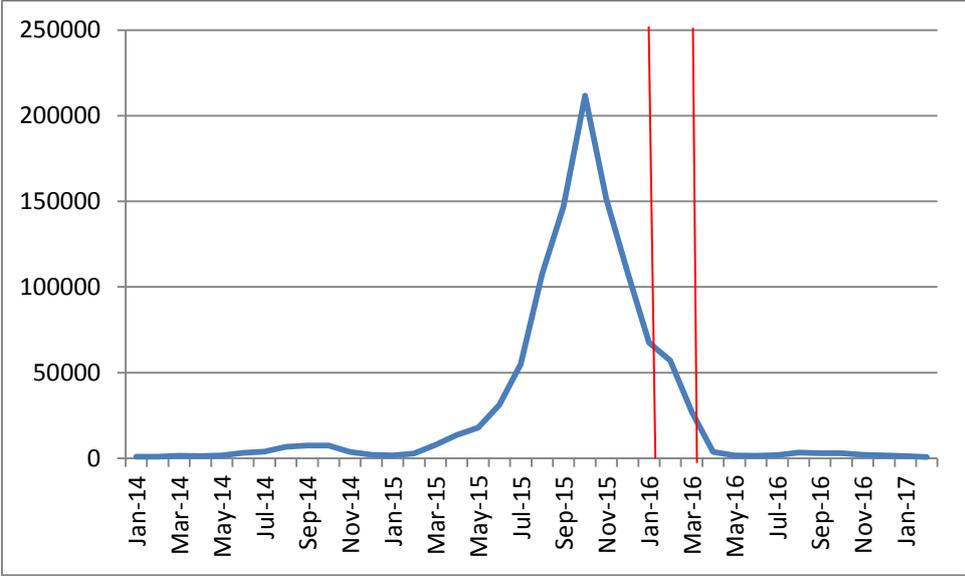


Figure 4: Monthly arrivals Greek islands, vertical lines at 28-1-2016 and 18-3-2016 (source UNHCR)

Because the EU-Turkey Statement did not precede the decrease, but followed it, it cannot possibly be the cause of the decline. The first concrete announcement of the Statement, the 28 January 2016 newspaper interview with Dutch labour party leader Diederik Samsom,<sup>36</sup> does not precede the decline either. In October 2015, the EU and Turkey agreed on a joint action plan.<sup>37</sup> While the adoption of this plan coincides with the peak in crossings, it is unlikely that it can have been the cause of the decline. At the time, it was a plan among many others, and

<sup>36</sup> Rights groups criticize Europe refugee resettlement plan, *The Guardian* 28 January 2016, <https://www.theguardian.com/world/2016/jan/28/rights-groups-criticise-europe-refugee-resettlement-plan>, last accessed 13 October 2017.

<sup>37</sup> European Commission: EU-Turkey joint action plan, memo 15/5860 [http://europa.eu/rapid/press-release\\_MEMO-15-5860\\_en.htm](http://europa.eu/rapid/press-release_MEMO-15-5860_en.htm), last accessed 6 July 2017.

as such is unlikely to have come to the notice of, let alone influenced the behaviour of, smugglers, refugees and migrants in Western Turkey. Like migration patterns more generally (De Haas 2010, but see Brekke, Røed & Schøne 2016), the pattern of crossing on the Aegean may not to be related primarily to European or Turkish policy plans or measures.

Therefore, the effectivity of the externalization of migration and asylum policy in its own terms is subject to doubt. However, externalization has been and continues to be highly significant in two ways. It is successful in establishing legitimacy for European policy makers, and to some extent for the European Union as such. Political leaders such as Angela Merkel and Mark Rutte successfully claim that they have brought migration under control through tough measures, most notably the EU-Turkey Statement. That the Statement followed a prior decrease in crossings is a subtlety that is lost on most observers; claims about its effectivity have been repeated so often now that they count as established fact. Human rights criticism of the EU-Turkey Statement and the involvement of the Turkish president can be used to underscore how daring, unorthodox and brave their move was. Clearly, the deal with Turkey could only have been made by a bloc of European states, not by individual Member States. Consequently, the EU-Turkey Statement can serve to illustrate how useful the European Union is from a migration control perspective, hence from a perspective which is usually associated to anti-European populism. In sum: the first success of externalization in general, and the EU-Turkey Statement in particular, is in the field of internal European politics. To the extent that externalization can be presented as effective, it allows individual leaders as well as the EU to boost their legitimacy.

Second, externalization establishes legitimacy for policy making and enforcement outside the territory of the EU itself. Externalized migration policy seeks to keep undesirable populations in places where they are not in a position to trigger the jurisdiction of the EU or its Member States (Den Heijer 2011; Gammeltoft-Hansen 2011). To this end, externalized migration policy instrumentalizes third countries as well as transnational corporations. Countries like Turkey, Tunisia and Morocco as well as airlines are supposed to function as enforcement agents of European policies by preventing the movement of irregular migrants towards Europe. One would expect resistance against such instrumentalization from the side of third countries and/or corporations. Aren't Third World countries independent states which formulate their own policy aims, with the interests of their own populations in mind? Wasn't the idea of liberal economy that corporations serve the general interest by serving their own interest – within certain limits but without serving external interests? Nonetheless, the legitimacy per se of the EU's territorial outreach, which amounts to a significant intervention in the internal affairs of third states as well as of corporations, is barely questioned. Legal and political debates, to the extent they take place at all, remain limited to the possible accountability of European states for the consequences of external migration policy. The limitation to potential accountability is a success in itself, because the legitimacy of the intervention itself is not subject of debate.

For these reasons, even if there are doubts as to the effectivity on externalization in getting migration under control, it makes sense for the Court of Justice not to interfere with the substance of externalization. The puzzle the Court had to solve was how to justify its non-

intervention, because (as has been argued above) doing this through a substantive application of European law would have undermined crucial elements of legal doctrine developed in the Court's case law. This is how we can understand the move the Court has made in both judgments – to replicate the bifurcation of people in bifurcating law.

## Bifurcation of Law

The Court of Justice has been an important actor in creating the law that makes free movement of capital, goods and persons in the global North possible. Through its expansive interpretation of the free movement of workers and other European citizens, it has contributed significantly to shaping Europe as a zone where people can move freely. Through its case law in for example competition law, it has contributed equally to free circulation of capital, services and goods. In the context of these freedoms within the global North, the Court has developed expansive conceptual tools on the applicability of European law, the autonomous interpretation of concepts like, in our context, treaties, and other central concepts in European law. If these concepts would be applied to the contested external issues relating to people who have been successfully excluded from the global North, this would endanger the Court's project, or the European project as the Court conceives of it. If the Court would apply its usual anti-formal, teleological methods of interpretation this could easily lead to a series of highly controversial judgments (resulting, for example, in annulment of the EU-Turkey statement or an obligation to issue humanitarian visa to Syrian refugees). This would undermine the position of the Court, and potentially the EU as we know it. But if, on the other hand, the Court would adapt its usual methods of interpretation by limiting its anti-formalism and teleological interpretation, this would undermine the Court's project, or the European project as the Court conceives of it. It would make it harder to boost the market freedoms that are at the heart of *une certaine idée de l'Europe*.

What the Court has decided to do when confronted with this dilemma is to replicate the bifurcation in human mobility in law. European law is for Europeans. European law is insulated against application to the huddled masses. And the Court does this in spite of the high spirited references to universal human rights in European law – in European law in general (think of the Charter of Fundamental Rights), but also in European external policies (for example Article 21(1) TEU and Article 205 TFEU). References to human rights are included even in European law on migration and refugees (preambular paragraphs 3, 4, 34 of Directive 2011/95; preambular paragraph 3 of Directive 2013/32). In order to sidestep the human rights in European law, this insulation is best done through formalities. If the Court would have sidestepped human rights issues through argumentation in substantive law (limiting the usual anti-formalist and teleological interpretation), this might well have resulted in the erosion of other fields of European law. It is pure formalities that are used to keep the Syrian family from Aleppo and detainees in Greek refugee camps not just outside the territory of the European Union, but also outside the scope of European law. This phenomenon is similar to the application of very advanced legal instruments in order to protect the right to life of air passengers while simultaneously keeping illegalized migrants outside the scope of positive obligations under the right to life (Spijkerboer 2017).

This is not to say that a proper or less formalist application of the law would or should have led to judgments in favour of the Syrian family from Aleppo and the asylum seekers on the Greek islands. Nor is this to imply that the really existing judgments in these cases are, in fact, politically motivated. The Court had several alternatives, and had to make a choice. This choice was restricted by positive law; for example, the Court needed to work quite hard to reach its outcome in the EU-Turkey judgment. The choice was also restricted by European institutional politics. Notably, not one single European actor had submitted arguments to the benefit of the Syrian family or the detainees on the Greek islands. If the Court would have adopted their arguments, it would have been entirely on its own. Both the options preferred by the Court as well as the alternatives are the outcome of a combination of legal analysis and political choice. The Court's insulation of European law against the *hoi polloi* cannot be understood in isolation from its investment in the global North's insulation from the global South (the bifurcation of mobility referred to earlier). The bifurcation of law which the Court enacts reflects the bifurcation of mobility. But in turn, by reserving European law for Europeans, the Court also naturalizes policies that intervene in third countries without even seeking the legitimacy that comes with judicial supervision and human rights law.

## References

Alpes, M. J. (2015), Airport casualties: Non-admission return risks at times of externalised and internalised migration control, *Social Sciences*, 4(3): 742-757

Andrijasevic, R. (2015): The Commercialization of Migration Control, in: Anderson B., Hughes V. (eds) *Citizenship and its Others*. London: Palgrave Macmillan: 89-93

Arribas, G.F. (2017): The EU-Turkey Statement, the Treaty-Making Process and Competent Organs. Is the Statement an International Agreement?, *European Papers* 2:303-309

Baird, T. (2016a): *Who Is Responsible for Harm in Immigration Detention? Models of Accountability for Private Corporations*, Global Detention Project Working Paper no. 11, available at <http://www.globaldetentionproject.org/publications/who-responsible-harm-immigration-detention-models-accountability-private-corporations>, last accessed 6 July 2017

Baird, T. (2016b): Surveillance Design Communities in Europe: A Network Analysis, *Surveillance and Society* 14:34-58

Baird, T. (2017a): Knowledge of Practice: A Multi-sited Event Ethnography of Border Security Fairs in Europe and North America, *Security Dialogue* 48:187-205

- Baird, T. (2017b): Interest Groups and Strategic Constructivism: Business Actors and Border Security Policies in the European Union, *Journal of Ethnic and Migration Studies*, forthcoming; online version <http://dx.doi.org/10.1080/1369183X.2017.1316185>
- Baird, T. (2017c): Carrier Sanctions in Europe: A Comparison of Trends in 10 Countries, *European Journal of Migration and Law*: 307-334
- Baldaccini, A. and Guild, E. (eds) (2006): *Terrorism and the Foreigner*, Leiden/Boston: Martinus Nijhoff
- Bosworth, M. (2014): *Inside Immigration Detention*, Oxford: Oxford University Press
- Brekke, J.P., Røed, M, Schøne, P. (2016): Reduction or deflection? The effect of asylum policy on interconnected asylum flows, *Migration Studies* 5(1), 65-96
- Broeders, D. & H. Dijstelbloem (2016) ‘The Datafication of Mobility and Migration Management: the Mediating State and its Consequences’, in: I. Van der Ploeg & J. Pridmore (eds.) *Digitizing Identities: Doing Identity in a Networked World*. London: Routledge: 242-260
- Brouwer, E. (2008): *Digital Borders and Real Rights. Effective remedies for third-country nationals in the Schengen Information System*, Leiden/Boston: Martinus Nijhoff
- Butler G. & Ratcovich, M. (2016): Operation Sophia in Uncharted Waters: European and International Law Challenges for the EU Naval Mission in the Mediterranean Sea, *Nordic Journal of International Law*: 235-259
- Cannizzaro, E. (2016): Disintegration Through Law? *European Papers* 1: 3-6
- Coleman, N. (2009): *European Readmission Policy*, Leiden: Brill
- Carrier, J.-Y. (2017): The X. and X. case: *Humanitarian visas and the genuine enjoyment of the substance of the rights, towards a middle way?*, blogpost available at <http://eumigrationlawblog.eu/the-x-and-x-case-humanitarian-visas-and-the-genuine-enjoyment-of-the-substance-of-rights-towards-a-middle-way/>, last accessed 6 July 2017
- Cuttitta, P. (2005): *Delocalization of migration controls to North Africa*, paper for the workshop ‘The Europeanization of National immigration Policies – Varying Developments across Nations and Policy Areas’, European Academy, Berlin, 1-3 September 2005, manuscript on file with author
- Cuttitta, P. (2014): From the Cap Anamur to Mare Nostrum. Humanitarianism and Migration Controls at the EU’s Maritime Borders, in C. Matera, A. Taylor (eds): *The Common European Asylum System and Human Rights: Enhancing Protection in Times of Emergencies*, Den Haag: Asser Institute: 21-37
- Cuttitta, P. (2016): The Way to the Italian Hotspots. The Space of the Sea between Reception and Containment, internet article in *Society and Space*, available at

<http://societyandspace.org/2016/11/15/the-way-to-the-italian-hotspots-the-space-of-the-sea-between-reception-and-containment/>, last accessed 6 July 2017

Cyrus, N. & Kovacheva, V. (2010): Undocumented Migration in Germany: Many Figures, Little Comprehension, in: Triandafyllidou, A. (ed) (2010): *Irregular Migration in Europe. Myths and Realities*, Farnham/Burlington: Ashgate: 125-144

Czaika, M., De Haas, H., & Villares-Varela, M. (2017): *The global evolution of travel visa regimes*, IMI Working papers 134, Oxford University, available at <https://www.imi.ox.ac.uk/publications?keywords=&year=&group=demig&author=&type=Working+paper>, last accessed 6 July 2017

Dijstelbloem, H. and A. Meijer (eds, 2009): *De Migratiemachine. De rol van technologie in het migratiebeleid*, Amsterdam: Van Genneep

European Commission (2016a): *First Report on the progress made in the implementation of the EU-Turkey Statement*, COM(2016) 231 final, 20 April 2016

European Commission (2016b): *Second Report on the progress made in the implementation of the EU-Turkey Statement*, COM(2016) 349 final, 15 June 2016

European Commission (2016c): *Third Report on the progress made in the implementation of the EU-Turkey Statement*, COM(2016) 634 final, 28 September 2016

European Commission (2016d): *Fourth Report on the progress made in the implementation of the EU-Turkey Statement*, COM(2016) 792 final, 8 December 2016

European Commission (2017a): *Fifth Report on the progress made in the implementation of the EU-Turkey Statement*, COM(2017) 204 final, 2 March 2017

European Commission (2017b): *Back to Schengen: Commission recommends phasing out of temporary border controls over next six months*, Press release 2 May 2017, available at [http://europa.eu/rapid/press-release\\_IP-17-1146\\_en.htm](http://europa.eu/rapid/press-release_IP-17-1146_en.htm), last accessed 6 July 2017

European Commission (2017c): *Sixth Report on the progress made in the implementation of the EU-Turkey Statement*, COM(2017) 323 final, 13 June 2017

European Parliament (2014): *Humanitarian visas: option or obligation?*, Policy Department for Citizens' Rights and Constitutional Affairs, available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2014/509986/IPOL\\_STU\(2014\)509986\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2014/509986/IPOL_STU(2014)509986_EN.pdf), last accessed 6 July 2017

European Parliament (2016): *Towards an EU humanitarian visa scheme?*, Policy Department for Citizens' Rights and Constitutional Affairs, available at [http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/556950/IPOL\\_BRI\(2016\)556950\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/556950/IPOL_BRI(2016)556950_EN.pdf), last accessed 6 July 2017

- Fasani, F. (2010): The Quest for la Dolce Vita? Undocumented Migration in Italy, in. Triandafyllidou, A. (ed) (2010): *Irregular Migration in Europe. Myths and Realities*, Farnham/Burlington: Ashgate: 167-186
- Flahaux, M.-L., & Vezzoli, S. (2017): Examining the role of border closure and post-colonial ties in Caribbean migration, *Migration Studies*, forthcoming
- Foblets, M.-C., & Vanheule, D. (2006): Marriages of Convenience in Belgium: The Punitive Approach Gains Ground in Migration law, *European Journal of Migration and Law* 8:263-280
- Frontex (2011): *Annual Risk Analysis 2011*, Warsaw: Frontex, available at [http://frontex.europa.eu/assets/Publications/Risk\\_Analysis/Annual\\_Risk\\_Analysis\\_2011.pdf](http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2011.pdf), last accessed 6 July 2017
- Frontex (2013): *Annual Risk Analysis 2013*, Warsaw: Frontex, available at [http://frontex.europa.eu/assets/Publications/Risk\\_Analysis/Annual\\_Risk\\_Analysis\\_2013.pdf](http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2013.pdf), last accessed 6 July 2017
- Frontex (2017): *Risk Analysis for 2017*, Warsaw: Frontex, available at [http://frontex.europa.eu/assets/Publications/Risk\\_Analysis/Annual\\_Risk\\_Analysis\\_2017.pdf](http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2017.pdf), last accessed 6 July 2017
- Gallagher, A & David, F. (2014): *The International Law of Migrant Smuggling*, Cambridge: Cambridge University Press
- Gammeltoft-Hansen, T. (2011): *Access to Asylum: International refugee law and the globalization of migration control*, Cambridge: Cambridge University Press
- Gammeltoft-Hansen, T. (2012): The rise of the private border guard: Accountability and responsibility in the migration control industry, in Gammeltoft-Hansen, T., & N.N. Sørensen (eds): *The Migration Industry and the Commercialization of International Migration*, London: Routledge: 128-151
- Gammeltoft-Hansen, T., & N.N. Sørensen (eds) (2012): *The Migration Industry and the Commercialization of International Migration*, London: Routledge
- Geigner, M. & A. Pecoud (eds) (2010): *The Politics of International Migration Management*, Basingstoke: Palgrave
- Geigner, M. & A. Pecoud (eds) (2012): *The New Politics of International Mobility: Migration Management and its Discontents*, IMIS Beiträge 40/2012;
- Godenau, D. & Zapata Hernández, M. (2008): The Case of the Canary Islands (Spain). A Region of Transit Between Africa and Europe, in Gemma Pinyol (ed): *Immigration flows and the management of the EU's southern maritime borders*, Barcelona: Documentos CIDOB Migraciones 17: 13-43

- González-Enríques, C. (2010): Spain: Irregularity as a Rule, in. Triandafyllidou, A. (ed) (2010): *Irregular Migration in Europe. Myths and Realities*, Farnham/Burlington: Ashgate: 147-266
- Guild, E. and P. Minderhoud (eds) (2006): *Immigration and Criminal Law in the European Union*, Leiden/Boston: Martinus Nijhoff;
- Haas, H. de (2010): The Internal Dynamics of Migration Processes: A Theoretical Inquiry, *Journal of Ethnic and Migration Studies* 36:1587-1617
- Haas, H. de, and Fokker, T. (2013): Intra-Household Conflicts in Migration Decision-Making: Return and Pendulum Migration in Morocco, *Population and Development Review* 36:541-561
- Hage, G. (2016): État de siège: A dying domesticating colonialism? *American Ethnologist* 43(1):38-49
- Hart, B. de (2006): The Marriage of Convenience in European Immigration Law, *European Journal of Migration and Law* 8:251-262
- Heijer, M. den (2011): *Europe and Extraterritorial Asylum*, dissertation Leiden University
- Heijer, M. den, & Spijkerboer, T. (2016): *Is the EU-Turkey Refugee and Migration Deal a Treaty?* EU Law Analysis, blogpost available at <http://eulawanalysis.blogspot.nl/2016/04/is-eu-turkey-refugee-and-migration-deal.html>, last accessed 6 July 2017
- Lember-Pedersen, M. (2012): Private security companies and the European borderscapes, , in Gammeltoft-Hansen, T., & N.N. Sørensen (eds): *The Migration Industry and the Commercialization of International Migration*, London: Routledge: 152-172
- Leun, J. van der, & Ilies, M. (2010): The Netherlands: Assessing the Irregular Population in a Restrictive Setting, in. Triandafyllidou, A. (ed) (2010): *Irregular Migration in Europe. Myths and Realities*, Farnham/Burlington: Ashgate: 187-206
- López-Sala, A. (2015): Dissuasion as a (Geo)Political Instrument in Irregular Migration Control at the Southern Spanish Maritime Border, *Geopolitics*: 1-22
- Maes, M., Foblets, M.C., & De Bruycker, Ph. (eds) (2011): *External Dimensions of EU Migration and Asylum Law and Policy*, Brussels : Bruylant
- Mallia, P. (2009): *Migrant Smuggling by Sea: Combating a Current Threat to Maritime Security through the Creation of a Cooperative Framework*, Leiden: Martinus Nijhoff
- Maroukis, T. (2010): Irregular Migration in Greece: Size and Features, Causes and Discourses, in. Triandafyllidou, A. (ed) (2010): *Irregular Migration in Europe. Myths and Realities*, Farnham/Burlington: Ashgate: 93-114
- Massey, D.S. (2015): A Missing Element in Migration Theories, *Migration Letters* 12: 279-299

Mau, S., et al (2015): *The Global Mobility Divide: How Visa Policies Have Evolved over Time*, *Journal of Ethnic and Migration Studies*:1-22

Moreno-Lax, V. (2017a): *Asylum Visas as an Obligation under EU Law: Case PPU C-638/16, X, X v État belge (Part I)*, blogpost available at <http://eumigrationlawblog.eu/asylum-visas-as-an-obligation-under-eu-law-case-ppu-c-63816-x-x-v-etat-belge/>, last accessed 6 July 2017

Moreno-Lax, V. (2017b): *Asylum Visas as an Obligation under EU Law: Case PPU C-638/16, X, X v État belge (Part II)*, blogpost available at <http://eumigrationlawblog.eu/asylum-visas-as-an-obligation-under-eu-law-case-ppu-c-63816-x-x-v-etat-belge-part-ii/>, last accessed 6 July 2017

Peers, S. (2017): *The final EU/Turkey Refugee Deal: A Legal Assessment*, blogpost available at <http://eulawanalysis.blogspot.nl/2016/03/the-final-euturkey-refugee-deal-legal.html>, last accessed 6 July 2017

Poon, J (2016): *EU-Turkey Deal: Violation of, Or Consistency With, International Law?* *European Papers* 1:1195-1203

Rijpma, J.J. (2009): *Building Borders: The Regulatory Framework for the management of the External Borders of the European Union*, Doctoral thesis, San Domenico di Fiesole: European University Institute.

Rijpma, J., and Vermeulen, M. (2015): *Eurosur: saving lives or building borders?* *European Security* 24: 454-472

Rodenhäuser, T. (2014): *Another Brick in the Wall: Carrier Sanctions and the Privatization of Immigration Control*, *International Journal of Refugee Law* 26: 223-247

Roman, E., Baird, T., & Radcliffe, T. (2016): *Why Turkey is Not a “Safe Country”*, Statewatch, available at <http://www.statewatch.org/analyses/no-283-why-turkey-is-not-a-safe-country.pdf>, last accessed 6 July 2017

Ryan, B. & V. Mitsilegas (eds) (2010): *External Immigration Control: Legal Challenges*, Leiden/Boston: Martinus Nijhoff

Scholten, S. (2015): *The Privatization of Immigration Control Through Carrier Sanctions*, Leiden: Brill

Slingenberg, L. (2014): *The Reception of Asylum Seekers under International Law. Between Sovereignty and Equality*. Oxford: Hart

Spijkerboer, T. (2017a): *Wasted Lives. Borders and the Right to Life of People Crossing Them*, *Nordic Journal of International Law* 86:1-29

Spijkerboer, T. (2017b): *Got the picture? Forced Migration Forum*, 7 February 2017, <https://forcedmigrationforum.com/2017/02/07/got-the-picture/>, last accessed 6 July 2017

Spijkerboer, T., Brouwer, E., & Al Tamimi, Y (2017): *Advice in Case C-638/16 PPU*, available at <http://thomasspijkerboer.eu/crisis-european-refugee-law-academic/advice-to-the-cjeu-on-prejudicial-questions-concerning-humanitarian-visas/>, last accessed 6 July 2017

Triandafyllidou, A., & Vogel, D. (2010): Irregular Migration in the European Union: Evidence, Facts and Myths, in: Triandafyllidou, A. (ed) (2010): *Irregular Migration in Europe. Myths and Realities*, Farnham/Burlington: Ashgate: 291-299

UNHCR: *Resettlement and Other Forms of Legal Admission for Syrian Refugees*, 18 March 2016, available at <https://data2.unhcr.org/en/documents/download/43659>, last accessed 10 July 2017.

Verschueren, H. (2016): Employment and Social Security Rights of Third-Country Labour Migrants under EU Law: An Incomplete Patchwork of Legal Protection, *European Journal of Migration and Law* 18: 373-408

Vogel, D. & Jandl, M. (2008): Introduction into the methodological problem, in Kraler, A. & Vogel, D. (eds) (2008): *Report on methodological issues*, p.5-11, available at [http://clandestino.eliamep.gr/wp-content/uploads/2009/10/clandestino\\_report-on-methodological-issues\\_final12.pdf](http://clandestino.eliamep.gr/wp-content/uploads/2009/10/clandestino_report-on-methodological-issues_final12.pdf), last accessed 6 July 2017

Vonk, G.J. (2015): Access to Social Protection for Non-Citizen Migrants: The Position of Irregular Immigrants, in: R. Plender (ed.), *Issues in International Migration Law*, Leiden: Brill: 81-90

Wisman, T. (2012): *Function creep by design*, paper for the Fourth Bergen aan Zee Seminar on Migration and law, VU University, 9 & 10 February 2012, manuscript on file with author

Wray, H. (2006): An Ideal Husband? Marriages of Convenience, Moral Gate-keeping and Immigration to the UK, *European Journal of Migration and Law* 8:303-320

Zureik, E. and M.B. Salter (2005): Global surveillance and policing: borders, security, identity – introduction, in E. Zureik and M.B. Salter (eds): *Global Surveillance and Policing. Borders, security, identity*, Cullompton: Willan Publishing: 1-10