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Spijkerboer, Thomas

published in

Journal of Refugee Studies
2018

DOI (link to publisher)

[10.1093/jrs/fex038](https://doi.org/10.1093/jrs/fex038)

document version

Publisher's PDF, also known as Version of record

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citation for published version (APA)

Spijkerboer, T. (2018). Bifurcation of people, bifurcation of law: Externalization of migration policy before the EU Court of Justice. *Journal of Refugee Studies*, 31(2), 216-239. <https://doi.org/10.1093/jrs/fex038>

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Bifurcation of people, bifurcation of law: externalization of migration policy before the EU Court of Justice

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MS received July 2017; revised MS received October 2017

In the past 25 years, European migration policy has been externalized, resulting in a bifurcation of human movement. This has become clearly visible in the context of Syrian refugees. In two judgments, the EU Court of Justice was confronted with cases challenging the exclusion of Syrian refugees from Europe. This article seeks to analyse these judgments in the context of the broader developments in European migration law and policy. The core analysis developed here is that the bifurcation of human movement is reflected in a bifurcation of law. Excluded people are to be excluded not merely from European territory, but also from European law.

Keywords: externalization, European Union, humanitarian visa, EU-Turkey statement

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 intra-territorial (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).

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 and Mitsilegas 2010; Maes *et al.* 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 2017a); 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 and Zapata Hernández 2008; Coleman 2009; López-Sala 2015); sea patrols with third countries in their territorial waters or on the high seas (Cuttitta 2005; Den Heijer 2011; Gammeltoft-Hansen 2011); employer sanctions (Verschuere 2016); the linkage principle (Slingenberg 2014; Vonk 2015); combat of ‘marriages of convenience’ in private, administrative and criminal law (De Hart 2006; Foblets and Vanheule 2006; Wray 2006). The reintroduction of internal border controls and the re-fencing of borders since 2015 (European Commission 2017a) suggest 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 and Sørensen 2012); examples are private enterprises being involved in detention (Bosworth 2014: 46; Baird 2016b), border control (Gammeltoft-Hansen 2012; Lemberg-Pedersen 2012), the development and everyday running of databases on illegal migrants (Andrijasevic 2015; Broeders and Dijkstra 2016), in the development and deployment of high-tech systems for the surveillance of land and sea borders (Baird 2016a, 2017b, 2017c); 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 the UNHCR, the Red Cross and the Jesuit Refugee Service running asylum-seeker reception in the Balkans and elsewhere; non-governmental organizations (NGOs) 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 (Cuttitta 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 and Meijer 2009; Wisman 2012) and militarized

means; examples are criminal sanctions against airlines (Scholten 2015), against human smuggling and trafficking (Palermo Protocols) (Gallagher and David 2014), against employers (Verschueren 2016), the use of huge databases (Brouwer 2008), reconceptualizing migration as a security issue (Zureik and Salter 2005; Baldaccini and Guild 2006; Guild and 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 and Vermeulen 2015); the deployment of EUNavForMed (aka Operation Sophia) on the basis of UNSC Resolution 2240(2015) of 9 October 2015 (Butler and Ratcovich 2016) and the deployment of NATO in the Aegean Sea.¹

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

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 visas 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 *et al.* 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—the number of countries persons with a particular nationality can visit without needing a visa (Figure 1). The index is headed by Germany and Singapore (citizens of both countries can visit 159 countries without needing



Figure 1
Global Passport Index (Visuals Yussef Al Tamimi)

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).²

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.³ Since 2011, the conflict has forced half of the population to flee: 6.3 million refugees within Syria,⁴ 5 million outside Syria (655,000 in Jordan,⁵ or some 7 per cent out of 9.5 million inhabitants,⁶ 1 million in Lebanon,⁷ or some 17 per cent out of 6 million inhabitants,⁸ 3.2 million in Turkey,⁹ or some 4 per cent out of 79.5 million inhabitants).¹⁰ 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 per cent of the funds needed for the Syria Humanitarian Response Plan has been funded;¹¹ the percentages for earlier years were 42.9 per cent (2015),¹² 50.9 per cent (2014),¹³ 68 per cent (2013)¹⁴ and 62 per cent (2012).¹⁵ 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 worldwide (UNHCR 2016)—3.6 per cent of the 5 million Syrian refugees outside Syria, and merely 1.6 per cent of all 11.3 million Syrian refugees.

This illustrates that, to the extent that the European Union succeeds in externalizing migration policy, this logically has onward effects in countries closer to the source countries of refugees.¹⁶ Lebanon¹⁷ and Jordan (Spijkerboer 2017a) now refuse to admit Syrian refugees. Turkey introduced visa requirements for Syrian nationals entering the country by air or sea in January 2016¹⁸ and, since then, seems to require visas from all Syrians.¹⁹ Human rights organizations report that the Syrian–Turkish land border has been closed.²⁰ 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 European Union) 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 European Union 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 self 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.²¹ 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 European Union 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 European Union and a restart of the negotiations on Turkish accession to the European Union.

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 *et al.* 2016; Peers 2016; Poon 2016).²² 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 and Spijkerboer 2016; Arribas 2017). In a debate in the European Parliament, there was broad support for the EU-Turkey Statement.²³ 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 2016,²⁴ it was generally assumed that the EU-Turkey Statement had been concluded by the European Council on behalf of the European Union. 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'. However, during a debate with the European Parliament on 28 April 2016,²⁵ 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 of 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.²⁶ On the issue of 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 European Union (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 European Union 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 European Union as such, but merely the Member States of the European Union. 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 decisive (paras 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 European Union is governed by European law; the characterization 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 (paras 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 (paras 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 court²⁷ 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 (paras 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 Member States (paras 66, 69, 72). The EU-Turkey Statement binds not the European Union, 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 Articles 216–218 TFEU. Whichever it is, the European Union is not a party to it (paras 71–72).

After this judgment, the three asylum seekers involved lodged an appeal to the Court of Justice on 21 April 2017.²⁸ 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 2015–16.²⁹ The court has developed a complicated argumentation in order to reach the conclusion that the European Union 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’) and hence does involve the European Union 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 that 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.

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.³⁰ 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 that 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 European Union) 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’.³¹

The Humanitarian Visa Judgment³²

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 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 visas. As the issue of visas 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 of 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 that opposed the idea that there could be an obligation to grant humanitarian visas in the most emphatic terms. The governments of no fewer than 13 Member States as well as the European Commission did the same. An indication of the uproar that 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 visas 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 from the Member States and the commission.³³ The court apparently felt it would have overplayed its hand if it had created the option of humanitarian visas 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 European Union refused entry has decreased from 5 per 10,000 in 2008 to 3 per 10,000 in 2015 (Figure 2). Even if it is assumed that a comparable number of people succeed in entering the European Union by using genuine documents not belonging to themselves, the percentage of third-country nationals without documents (notably: visas) on aeroplanes 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 European Union has increased considerably. At the airports of the 12 1993 EU Member States, their number went up from 17 million in 1993 to 153 million in 2015 (Figure 3). An important proportion (studies suggest as much as 70 per cent, Fasani 2010: 173 on Italy; cf. 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 and

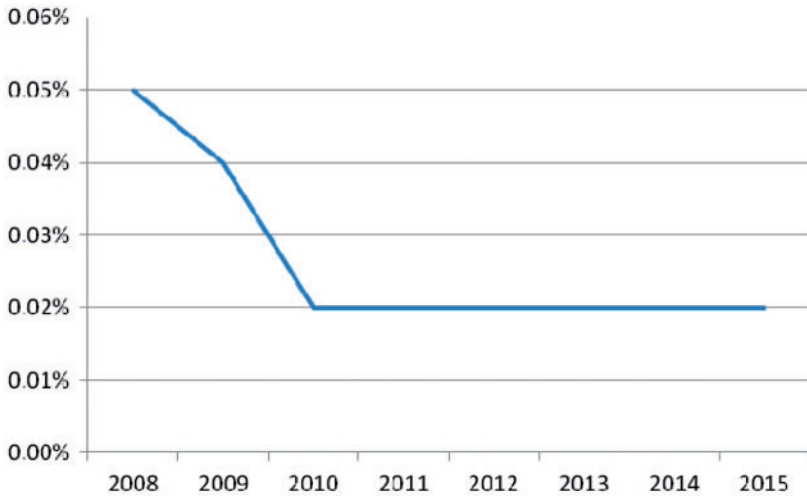


Figure 2
Percentage of Extra-EU Arrivals Refused Entry at EU Airports 2008–15
Source: Eurostat migr_eirfs and avia_paexcc (accessed 6 July 2017)

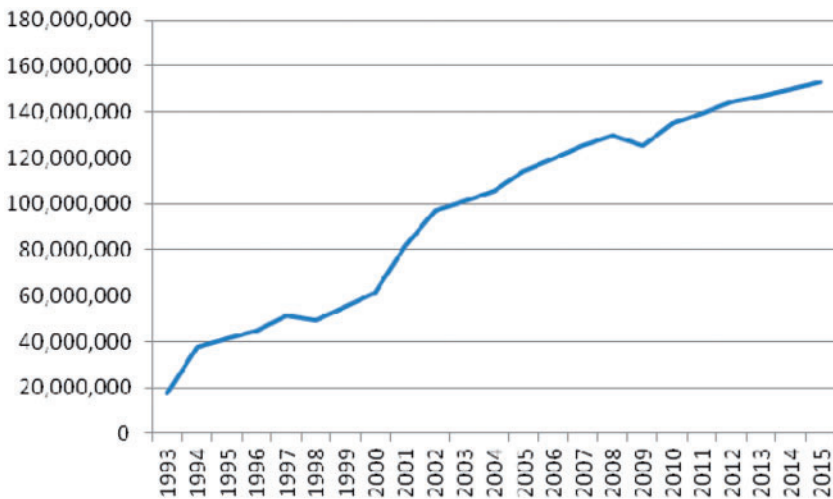


Figure 3
Extra-EU Airport Arrivals 1993–2015, for the 12 1993 EU Member States
Source: Eurostat avia_paexcc (accessed 6 July 2017)

Kovacheva 2010: 134 on Germany; Van der Leun and Ilies 2010: 198 on the Netherlands; generally Vogel and Jandl 2008: 9–11; Triandafyllidou and 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.³⁴ Third, case studies on the United States–Mexico border (Massey 2015), migration between Morocco and Spain (De Haas and Fokker 2013) and Caribbean migration (Flahaux and 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.

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 2016c: 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 2016d: 2); 'There has been a substantial fall in the number of crossings since the activation of the Statement' (European Commission 2016b: 2); 'The number of crossings since the Statement continues to be substantially reduced and the loss of life has been stemmed' (European Commission 2017b: 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 per cent of the decrease preceded the EU-Turkey Statement. 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,³⁵ does not precede the decline either. In October 2015, the European Union and Turkey agreed on a joint action plan.³⁶ 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, 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 *et al.* 2016), the pattern of crossing on the Aegean may not to be related primarily to European or Turkish policy plans or measures.

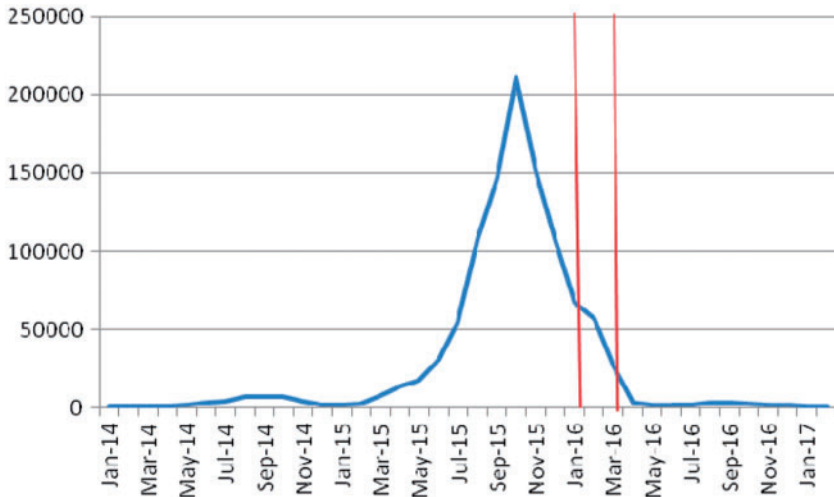


Figure 4
Monthly Arrivals Greek Islands, Source UNHCR. Vertical lines at 28-1-2016 and 18-3-2016 added by author
Source: UNHCR

Therefore, the effectiveness 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 effectiveness 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 that is usually associated with 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 European Union to boost their legitimacy.

Second, externalization establishes legitimacy for policy making and enforcement outside the territory of the European Union itself. Externalized migration policy seeks to keep undesirable populations in places where they are not in a position to trigger the jurisdiction of the European Union 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 that 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 European Union'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 to debate.

For these reasons, even if there are doubts as to the effectiveness of 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 such as, 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 visas to Syrian refugees). This would undermine the position of the court, and potentially the European Union 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 (e.g. Article 21(1) TEU and Article 205 TFEU). References to human rights are included even in European law on migration and refugees (preamble paras 3, 4 and 34 of Directive 2011/95; preamble para. 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 2017b).

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 that 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.

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24. Minutes can be found at <http://www.europarl.europa.eu/sides/getDoc.do?type=CRE&reference=20160413&secondRef=ITEM-005&language=EN> (accessed 19 April 2017).
25. <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bCRE%2b20160428%2bITEM-002%2bDOC%2bXML%2bV0%2f%2fEN&language=EN> (accessed 19 April 2017).
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27. Surprisingly, the court does not consider the question of 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.
28. Cases C-208/17 P, C-209/17 P, C-210/17 P. Cf. <http://www.statewatch.org/news/2017/may/eu-council-ls-eu-turkey-appeal-9148-17.pdf> (accessed 6 July 2017).
29. E.g. the Commission's Communication on the Migration Partnership framework, 7 June 2016, COM(2016) 385 final, pp. 2–4; 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/> (accessed 7 April 2017).
30. I have relied on a manuscript of Narin Idriz.
31. Joined cases C-181/91 and C-248/91, para. 17.
32. Together with two colleagues, I have provided pro bono advice to the lawyer of the Syrian family in this case; see Spijkerboer 2017. See on the issue also Moreno-Lax 2017a, 2017b; Carlier 2017.
33. The European Parliament has advocated humanitarian visa; see e.g. European Parliament 2014, 2016.

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Acknowledgements

I am grateful to Yussef Al Tamimi and Hemme Battjes for their comments to earlier versions of the text.

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