

On 28 February 2017, the General Court of the European Union (‘Court’) declared that it lacked jurisdiction to hear three Article 263 TFEU actions¹ brought by two Pakistani and one Afghan asylum seeker against the EU – Turkey Statement of 18 March 2016 (‘Statement’).² The Court reasoned that the Statement was not adopted by an institution of the EU, but was made jointly by the Republic of Turkey and the Heads of State or Government of the Member States of the EU representing their respective Member States and not the European Council³ or any other EU institution. In consequence, asylum seekers stranded on the Greek islands and subject to the Statement may only seek judicial relief in Greece against the individual administrative act that returns them to Turkey, but there is no legal action available against the Statement itself on the EU level. To add insult to injury, courts in Greece are so backlogged that it is debatable whether they even provide effective judicial relief.⁴ That leaves asylum seekers with the European Court for Human Rights, which, due to its nature as an international court, has a much less effective means of executing judgements than the European Union courts and it is not entirely clear what the course of action would be.⁵ Right after the Statement was made last year, academics heatedly debated whether it was a binding international agreement under the Vienna Convention on the Law of Treaties that would have merited involvement of the European Parliament under Article 218 TFEU or merely a non-binding press statement.⁶ The Court did not consider that question. However, “for the sake of completeness”⁷ it stated that even if an international agreement was informally concluded between the EU Member States and Turkey, the EU and its institutions were not party to that agreement. Recalling that the Statement created or at least served as the basis for very real obligations of the EU and its institutions, such as visa liberations for Turkish citizens and the allocation of three billion Euros for refugees in Turkey, the chivalric Order of the Garter’s motto “*honi soit qui mal y pense*” comes to mind. How very convenient that the European Union courts cannot poach on a territory where European governments without involving either the democratically elected European Parliament, much less their own parliaments, seemingly decided to find a creative handling of their legal and moral obligations.

By summer 2015, Europe was desperate for any relief in the refugee crisis. Aiming to close the eastern Mediterranean route, discourage smugglers and prevent further deaths at sea, the Statement publicized as a press release on the website of the European Council reflected three main points agreed upon.⁸ First, “all new irregular migrants crossing from Turkey into Greek islands as from 20 March 2016 will be returned to Turkey”. Second, “for every Syrian being

¹ Article 263 TFEU (action for annulment): “The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, [...], and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. [...] Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.”

² Orders of the General Court in Cases T-192/16, T-193/16, T-257/16.

³ The European Council is an institution of the EU that comprises the Heads of State or Government of the Member States, along with the President of the European Council and the President of the European Commission. As such, the Heads of State or Government wear two hats as (i) members of the European Council and (ii) representatives of their home country.

⁴ <http://www.migrationpolicy.org/news/paradox-eu-turkey-refugee-deal>.

⁵ Before the EU – Turkey deal was put in practice, there was a concern that its implementation would amount to collective expulsions which are disallowed under Article 4 Protocol No. 4 to the European Convention for Human Rights. However, practice showed that that might not be a concern after all.

⁶ <http://eulawanalysis.blogspot.com/2016/03/the-draft-euturkey-deal-on-migration.html>;
<http://eulawanalysis.blogspot.com/2016/04/is-eu-turkey-refugee-and-migration-deal.html>.

⁷ Order T-192/16 of 28 February 2017 mn. 72.

⁸ <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/>.

returned to Turkey from Greek islands, another Syrian will be resettled from Turkey to the EU”. Third, the EU will disburse three billion Euros to assist refugees in Turkey until the end of 2018. In exchange, visa requirements for Turkish citizens will be lifted, provided that Turkey fulfils the required benchmarks and EU-accession talks will be revived. Debate on the legality of the deal concentrated on three principles. If it was guaranteed that (i) asylum seekers were considered and recognized on an individual basis, (ii) effective protection was available in the country of destination, i.e. the destination state in fact honored refugee rights (Art. 2 – 34 Refugee Convention), (iii) adequate procedural safeguards were available in both the inadmissibility process prior to removal and in the asylum system of the destination state⁹ the deal could be considered as being in accordance with international law. James Hathaway argued that the destination state must also be a state party to the Refugee Convention¹⁰, while Kay Hailbronner in quoting the EU’s position stressed the importance of material protection over formal unconditional adherence to the Refugee Convention¹¹. In the case of Turkey, the discussion revolved around Turkey’s geographical limitation in the application of the Refugee Convention under which it assumes no obligation to non-European refugees.

Over the last weeks, European governments discussed the so-called Malta-Plan, which intends to use the EU – Turkey deal as a blueprint for similar schemes between the EU and African states such as Libya, Sudan or Niger to close the central Mediterranean route.¹² At an informal EU summit in February 2017 a paper was launched that provides for Greece and Italy founding “EU-Asylum-Missions” that decide about asylum applications within four weeks during which time applicants are not allowed to leave the missions to stop uncontrolled migration into other EU states. Approved asylum seekers are to be resettled in the EU, denied applicants that according to the paper make up the majority of people migrating from Africa will be swiftly returned to their home countries on the basis of readmission agreements. In exchange, the EU will increase development aid. This plan can only function in cooperation with the African countries of origin, though. States like Nigeria, Eritrea or Guinea do not have national registers of their citizens and those who arrive at Europe’s doorstep without passports often are not taken back by their home countries as there is no sufficient proof of nationality.¹³ It is argued that the EU – Turkey deal and the Malta Plan secure the Schengen Agreement and the Refugee Convention alike.¹⁴ Preventing all asylum seekers from entering the EU would render international refugee law meaningless while the current chaos proved to be a threat to open borders within Europe.

The blueprint idea merits stock taking on the basis of the above discussion. Interestingly enough, the EU and German Chancellor Angela Merkel praise the successes of the EU – Turkey Deal¹⁵, while NGOs, namely Amnesty International and Médecins sans Frontières, and the UNHCR see it as a humanitarian and legal disaster¹⁶. Amnesty International explicitly warns

⁹ www.chathamhouse.org/expert; <http://verfassungsblog.de/three-legal-requirements-for-the-eu-turkey-deal-an-interview-with-james-hathaway/>.

¹⁰ <http://verfassungsblog.de/three-legal-requirements-for-the-eu-turkey-deal-an-interview-with-james-hathaway/>; <http://verfassungsblog.de/taking-refugee-rights-seriously-a-reply-to-professor-hailbronner/>.

¹¹ <http://verfassungsblog.de/legal-requirements-for-the-eu-turkey-refugee-agreement-a-reply-to-j-hathaway/>.

¹² <http://www.zeit.de/gesellschaft/zeitgeschehen/2017-02/eu-tuerkei-abkommen-amnesty-international-kritik>; <https://www.tagesschau.de/ausland/eu-fluechtlinge-145.html>.

¹³ <http://spiegel.de/politik/ausland/fluechtlinge-malta-pla-der-esi-soll-migration-aus-afrika-bremsen-a-1133719.html>.

¹⁴ Id.

¹⁵ <http://www.zeit.de/politik/ausland/2017-02/fluechtlingsabkommen-tuerkei-eu-inhalt>.

¹⁶ <http://leidenlawblog.nl/articles/eu-turkey-deal-good-on-paper-bad-in-practice>.

Europe to use the deal as a blueprint for North Africa.¹⁷ Where does this gap in assessing the deal’s merit come from? Discouraging smugglers and keeping asylum seekers from drowning at sea sound reasonably commendable on paper. The problem is two-fold, though. First, although the EU – Turkey deal had a deterring effect, which politicians applaud, its implementation is far from ideal, which NGOs and the UNHCR decry. Greek authorities are not able to process asylum applications in a timely fashion, largely due to the fact that until 2013 Greece did not even have its own asylum agency and that the support from other Member States did not turn out as promised by the EU.¹⁸ Furthermore, asylum seekers were detained on the Greek islands in camps with too little capacity under inhumane conditions.¹⁹ Moreover, returns to Turkey were rather theory than practice. Turkey is not formally a safe third country and returns have been stopped by courts and a Greek governmental commission on numerous occasions.²⁰ Turkey has a shaky human rights record. NGOs report that refugees are mostly left to fend for themselves in camps, and there have been repeated reports about refoulement of Syrian asylum seekers at the Syrian-Turkish border.²¹ The resettlement in Member States is also still mostly theory. Under the EU’s Emergency Relocation Mechanism 160,000 refugees should have been resettled and only around 12,000 were actually resettled²² as Member States are very reluctant or flat out refuse to take in refugees. Before that backdrop, it is safe to assume that Italy and Greece together are also not equipped for fast processing as foreseen under the Malta-Plan²³. On top of that, Libya for example is politically unstable, the government does not even have control over all parts of the country²⁴. Moreover, where Turkey at least granted some rights to refugees, Libya, although a member to the Refugee Convention, does not have an asylum process.²⁵ Lastly, Libya has an even worse human rights record regarding refugees. There are reports of rape, torture and willful killings²⁶. Thankfully, though, the Malta-Plan does not arrange for asylum seekers to stay in camps in African nations, but provides for their processing in Europe. As such, the Malta-Plan could facilitate asylum seekers to leave Libyan camps in a timely fashion.²⁷ In sum, Libya is an even less reliable partner than Turkey while at the same time inner-European problems such as insufficient administrative capacity and states’ unwillingness to resettle refugees is unlikely to change any time soon. Second, nations worldwide that are hosting refugees are paying close attention as to whether Europe outsources its international obligations to despots or is making a good faith effort to establish legally and morally sustainable mechanisms.²⁸ The vast majority of refugees is hosted by developing countries that have less means to fulfill their obligations under

¹⁷ Amnesty International, A Blueprint for Despair – Human Rights Impact of the EU-Turkey Deal at <https://www.amnesty.org/en/documents/eur25/5664/2017/en/>.

¹⁸ <http://www.zeit.de/politik/ausland/2016-08/eu-tuerkei-abkommen-fluechtlinge-asylverfahren-finanzierung>.

¹⁹ Amnesty International, A Blueprint for Despair – Human Rights Impact of the EU-Turkey Deal at <https://www.amnesty.org/en/documents/eur25/5664/2017/en/>.

²⁰ <http://www.zeit.de/politik/ausland/2016-08/eu-tuerkei-abkommen-fluechtlinge-asylverfahren-finanzierung>.

²¹ Id.

²² Id.

²³ <http://www.unhcr.org/56f10d049.html>; <http://spiegel.de/politik/ausland/fluechtlinge-malta-pla-der-esi-soll-migration-aus-afrika-bremsen-a-1133719.html>.

²⁴ <https://www.tagesschau.de/ausland/eu-fluechtlinge-145.html>; <http://www.independent.co.uk/news/world/europe/eu-malta-summit-leaders-warn-strand-thousands-refugees-libya-deal-concentration-camps-crisis-a7560956.html>; <http://www.merit.unu.edu/libya-is-not-turkey-why-the-eu-plan-to-stop-mediterranean-migration-is-a-human-rights-concern/>.

²⁵ <http://www.merit.unu.edu/libya-is-not-turkey-why-the-eu-plan-to-stop-mediterranean-migration-is-a-human-rights-concern/>.

²⁶ Id.

²⁷ http://www.hr-online.de/website/radio/hr-info/index.jsp?rubrik=47572&key=standard_document_63483618.

²⁸ <http://eumigrationlawblog.eu/why-the-eu-turkey-deal-can-be-legal-and-a-step-in-the-right-direction/>.

international law than Europe has.²⁹ There is an inherent danger that those nations will take a page out of the European playbook and try to rid themselves of their obligations with dramatic consequences for refugee protection worldwide. The recent orders of the General Court of the European Union discussed above do not speak for a Europe truly committed to its international obligations. Moreover, Europe right now is sending the message that cooperation on refugee matters is a high commodity. By way of example, Europe mostly silently watches the erosion of Turkish democracy while President Erdogan hangs the threat of withdrawal from the EU – Turkey deal as a Damocles sword over Europe’s head.

As long as Syria, Libya, Somalia and other countries are in upheaval, people will leave for Europe or anywhere else in the world where they are not murdered and can feed their children. These people willingly embark on a journey towards an uncertain future that on top of all is likely to kill them. Do we really want our answer to be a fortress of Europe besieged by desperate people in camps tended to by nations that trample on human rights? Proponents of the various deals cry realpolitik and decry criticism as unrealistic idealism. However, providing expedient administration of asylum claims along with humane living conditions in camps and honoring resettlement quotas should not be rocket science for Europe. A solution that lives up to the European ideal must be realpolitik guided by compassion for those in need and I refuse to believe that that is impossible.

²⁹ <https://www.newsdeeply.com/refugees/articles/2016/08/30/expert-discussion-the-future-of-the-e-u-turkey-refugee-deal>.