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Shifting the Burden

On the Legal Nature of the EU-Turkey Statement

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Contents

Summary

On 18 March 2016, the European Council published a press release on their deal with Turkey to readmit asylum seekers from the Greek Islands. It was headed 'EU-Turkey Statement'. In return for accepting the readmitted migrants, Turkey would receive financial compensation and increased possibilities of visa freedom and EU membership.

In the general public, the agreement was criticized for shifting responsibility for asylum seekers from the EU to Turkey, a country with a questionable human rights record and a recently established asylum system. In discussions among lawyers, the agreement has been characterized by its indefinite nature. It had been concluded by the European Council in violation of the treaties and without obtaining the European Parliament's approval. If the agreement were binding under international law, this would mean that the EU's primary law on international agreements had not been respected. When the issue was to be resolved, the General Court found that the agreement had not been concluded by the EU at all, but by the Member States. This finding was met with severe criticism.

This thesis provides an in-depth explanation of these issues by considering the interplay between law and politics. The text addresses various arguments on whether the agreement is binding and whether it is the EU or the Member States that are its parties. Thereafter, it considers how the agreement’s non-traditional form makes it easier for the EU to avoid accountability. It also examines why the agreement looks the way it does. The Statement is part of a larger development, where international law is increasingly informalized, especially readmission agreements between the EU and third countries. Shaping an agreement in an informal manner is advantageous when an issue needs to be resolved quickly or when a cooperation is controversial. Turkey has historically had an instable relationship with Europe, and within the EU there was widespread opposition to cooperating. In addition, the EU had a strong need to quickly present a solution to the 'migrant crisis' in 2015. This solution became an undefinable agreement.

Sammanfattning

Den 18 mars 2016 publicerade Europeiska Rådet en överenskommelse på sin hemsida. Den blev känd som ’EU-Turkiet-avtalet’ och gick ut på att asylsökande skickas tillbaka från de grekiska öarna till Turkiet. I utbyte får Turkiet bl a ekonomisk kompensation och ökade chanser till visafrihet och EU-medlemskap.

Bland allmänheten möttes avtalet av kritik eftersom det överförde ansvaret för asylsökande till Turkiet, ett land med ett nyskapat asylsystem som ofta får kritik för brott mot mänskliga rättigheter. I diskussionerna bland jurister karaktäriserades avtalet istället av dess obestämbarhet. Överenskommelsen hade ingåtts av Europeiska Rådet i strid med fördragen och utan att inhämta Europaparlamentets godkännande. Ifall avtalet skulle vara bindande under folkrätten skulle det innebära att EU:s primärrätt om internationella avtal inte har respekterats. I februari 2017, när frågan skulle avgöras, fann Tribunalen istället att avtalet inte hade ingåtts av EU, utan av medlemsstaterna. Uttalandet möttes av skarp kritik.

I den här uppsatsen ges en djupgående förklaring av de här problemen genom att undersöka samspelet mellan juridiska och politiska faktorer. Texten tar upp olika argument för och emot ifall avtalet är bindande och ifall det är EU eller medlemsstaterna som är part till avtalet. Därefter undersöks hur avtalets icke-traditionella form gör det enklare för EU att undvika ansvar för dess ingående och konsekvenser. Sedan förklaras varför avtalet ser ut som det gör. Överenskommelsen är en del av en större utveckling, där mer och mer av folkrätten informaliseras, särskilt återvändandeavtal mellan EU och utomeuropeiska stater. Att ingå ett informellt avtal är dessutom särskilt fördelaktigt när problem snabba lösningar, eller när lösningen är kontroversiell. Turkiet har historiskt haft en ostadig relation till Europa och inom EU fanns ett starkt motstånd till samarbete. Dessutom hade EU ett behov av att snabbt presentera en lösning på ’flyktingkrisen’ 2015. Lösningen blev ett svårdefinierat avtal.

Preface

I would like to thank everyone who has helped and inspired me, showed me new perspectives and guided me on how to stay grounded in my own thoughts during my years at university. Thanks to friends and family for your patience all the times I have studied instead of seeing you. Thank you Klara and Esbjörn for the support and the food. I would also like to thank my classmates in Lund and in Amsterdam, in particular Erica, Frederick and Frida. Without you I would probably not know much about law, and these years would have been much more boring. Finally, I would like thank Gregor Noll for supervising this thesis.

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Abbreviations

CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
Charter	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
EAM	European Agenda on Migration
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
ICJ	International Court of Justice
ITLOS	International Tribunal for the Law of the Sea
Refugee Convention	Convention Relating to the Status of Refugees
TEU	Treaty of the European Union
TFEU	Treaty of the Functioning of the European Union
UN	United Nations

1 Introduction

1.1 Introduction

After having been on the rise since 2010, the numbers of people applying for asylum in the EU increased sharply in spring 2015.[1] Among the EU Member States, this development caused a sense of crisis. The influx of migrants was described as a 'unprecedented pressure'[2] and was used to legitimise the new EU migration package, the European Agenda of Migration (hereafter EAM). The EAM included several proposals on reforming the Common European Asylum System, along with extended cooperation with third countries regarding pushbacks and resettlements, usually combined with economic incentives.[3] One such arrangement was the EU-Turkey Statement, released in March 2016, regulating the return of asylum seekers from Greece to Turkey.[4]

Most asylum seekers arriving in 2015 originated from Syria, Afghanistan and Iraq.[5] Many had transited in Turkey before continuing to the EU. As a consequence of increased surveillance of land borders, and the sea crossing between Libya and Italy being a far more dangerous journey, the Eastern Mediterranean Route (across the Aegean Sea) became the most common point of entrance to the EU.[6] There had been previous attempts to close this

[1] Eurostat, *Asylum applications (non-EU) in the EU-28 Member States, 2006–2017*, http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics (accessed 20 April 2018).
[2] European Commission, 'Proposal for a Regulation of the European Parliament and the Council establishing an EU common list of safe countries of origin for the purposes of Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection, and amending Directive 2013/32/EU' COM(2015) 452 final, section 1.1.
[3] European Commission, 'Communication from the Commission to the European Parliament, the European Council, the Council and the European Investment Bank on establishing a new Partnership Framework with third countries under the European Agenda on Migration' COM/2016/0385 final.
[4] European Council, *EU-Turkey statement, 18 March 2016* (18 March 2016) http://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/ (accessed 15 May 2018).
[5] Eurostat, *Asylum and new asylum applicants by citizenship, age and sex, Annual aggregated data (rounded)* and *First instance decisions on applications by citizenship, age and sex, Annual aggregated data (rounded)*, http://ec.europa.eu/eurostat/data/database (accessed 17 May 2018).
[6] European Stability Initiative, *The Refugee Crisis Through Statistics*, 30 January 2017, https://www.esiweb.org/pdf/ESI%20-

route by readmission arrangement. In 2002, Greece and Turkey signed a bilateral agreement, the *Greece-Turkey Readmission Protocol*. However, the numbers of returned migrants under the Protocol were low. During the period 2006-2012, only 10.1% of the requested readmissions were accepted by Turkey and only 3.1% were effectively returned. The responses to the requests were often delayed until the time-limits of the Protocol were exhausted, resulting in a cancellation of the request.[7] In 2010 a joint statement was signed, holding that Turkey would accept 1000 requests per year. Despite this, the Protocol remained ineffective.[8]

In 2005, at the same time as the negotiations of Turkey's accession into the EU began, a readmission agreement was drafted. In December 2013, the EU and Turkey signed the *EU-Turkey Readmission Agreement* which entered into force in January 2014.[9] Initially, the agreement only concerned readmission of Turkish nationals residing unauthorized in the EU Member States. It was expected to come into force regarding third country nationals as well in November 2017.[10] However, following the EU-Turkey Statement, the Joint Readmission Committee, which was set up to facilitate the cooperation and monitor the implementation of the agreement, advanced this moment to June 2016.[11]

%20The%20refugee%20crisis%20through%20statistics%20-%2030%20Jan%202017.pdf (accessed 15 May 2018), 13.

[7] Anna Triandafyllidou, *Migration in Greece: Developments in 2013*, Report prepared for the OECD Network of International Migration Experts, 13 November 2013 http://www.eliamep.gr/wp-content/uploads/2014/10/Migration-in-Greece-Recent-Developments-2013.pdf (accessed 23 April 2018), 11.

[8] Ibid, 12.

[9] Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorization [2014] OJ L134/3.

[10] Article 24(3) EU-Turkey Readmission Agreement.

[11] Joint Readmission Council, *Decision 2/2016* COM(2016) 72 final (Brussels, 2 October 2016). Implemented by the Council by *Council Decision (EU) 2016/551f 23 March 2016 establishing the position to be taken on behalf of the European Union within the Joint Readmission Committee on a Decision of the Joint Readmission Committee on implementing arrangements for the application of Articles 4 and 6 of the Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation from 1 June 2016*, OJ L 95, 9 April 2016, 9–11 http://eur-lex.europa.eu/legalcontent/EN/TXT/?uri=CELEX%3A32016D0551 (accessed 23 April 2018). On why this decision is null and void, see Nuray Ekşi 'Readmission Agreement Between the European Union and Turkey: A Chain of Mistakes' in *International Community And Refugees: Responsibilities, Possibilities, Human Rights Violations* (2016, Istanbul: Amnesty International Turkey), 163; Hemme Battjes and Orcun Ulusoy, *Situation of Readmitted Migrants and Refugees from Greece to Turkey under the EU-Turkey Statement* (Migration Law Series, 2017), 11.

The EU-Turkey Statement was issued through a press release by the European Council on 18 March 2016. As the members of the European Council had negotiated with Turkey since October 2015, some kind of agreement was anticipated. The main purposes of the Statement were to 'break the business model of the smugglers' and 'end the irregular migration from Turkey to the EU'.[12] It introduced several new obligations in the EU-Turkey relations, although related to previous agreements and policy decisions. The Statement is composed of the following elements:

a) The return of all irregular migrants, crossing from Turkey into Greek islands as from 20 March 2016. This should be carried out in full accordance with EU and international law. Migrants applying for asylum in Greece will have their applications assessed by the Greek authorities in cooperation with UNHCR. Those not applying for asylum or whose application is found inadmissible under EU law will be returned to Turkey. In case Turkey is found to be a third safe country for the asylum seeker, the application can be declared inadmissible.[13] The costs of the returns will be covered by the EU and the returns will be carried out by Turkey and Greece, with assistance by EU institutions and agencies.

b) For every Syrian national returned to Turkey, another Syrian national will be resettled in the EU. Priority will be given to Syrians who have not attempted to enter the EU irregularly. The UN Vulnerability Criteria will also be taken into account. This will be implemented by the Commission, other EU agencies, Member States and the UNHCR.

c) Turkey will take 'all necessary measures' to prevent the opening of new sea or land routes from Turkey to the EU.

d) The EU will allocate €6 billion to Turkey to fund refugee projects within the country.

e) The parties will accelerate the visa liberalisation roadmap, with the aim of lifting the visa requirements for Turkish citizens vis-à-vis the Member States.

[12] European Council, (n 4).

[13] Arts 33 and 38 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, [2013] OJ L180/60.

f) As soon as irregular crossings between Turkey and the EU have ended or have been sustainably and substantially reduced, a 'Voluntary Humanitarian Admission Scheme' will be activated.
g) Turkey's accession process to the EU will be re-energized.
h) The EU, its Member States and Turkey will together improve the humanitarian conditions in Syria, in particular in the area close to the Turkish borders.

1.2 Research Question, Terminology and Delimitation

When writing this text, I was aiming for a broader understanding of the development at the EU's external borders. The EU-Turkey Statement had been subjected to extensive debate, even since before it was completely concluded. There appeared to be a general disagreement on basic traits of the Statement, such as what the agreement was and who had concluded it. Partly, I wanted to go into the details of this discussion and get a more complete understanding of what it was about. Furthermore, I was driven by a disbelief that the lawyers of the EU or of the Member States would not be able to set up a legally clear agreement, regardless of whether they chose a political or a legal form. Consequently, there must be benefits of choosing a form which floats between the legal and the political, as well as between the EU and the Member States. In light of this, my thesis aims at answering the following question:

Why does the EU-Turkey Statement have an unconventional form?

The term 'unconventional form' refers to the aspects of the Statement that has been subjected to debate, i e whether the Statement is legally binding and whether it was entered by the EU or by the Member States. I consider the lack of clarity regarding these parts to make the Statement unconventional. As will be explained in detail in Chapter Three, the conclusion of the EU-Turkey

Statement disregards traditional rules of treaty-making in relation to the procedure, the actors involved and the output.

In media and by the public, the Statement has in general been referred to as the 'EU-Turkey Deal'. The EU institutions have used the terms 'EU-Turkey Statement' and, occasionally, 'EU-Turkey Agreement'.[14] In this thesis, I will use the term 'EU-Turkey Statement' since that is the wording used in the original press release. I will also refer to the EU-Turkey Statement as simply 'the Statement' or sometimes 'the Agreement'.

In relation to the release of the EU-Turkey Statement, and following the 2015 migrant influx in general, there was a widespread misuse of terminology regarding the migrants that arrived in Europe. EU institutions and representatives repeatedly referred to people crossing the Aegean Sea as 'irregular migrants', despite many needing international protection. When discussing the people affected by the EU-Turkey Statement, I will simply refer to them as 'migrants' or 'migrants crossing the Aegean Sea'. This is not ideal since migrants with a Schengen visa may cross the Aegean Sea by ferry or by plane. However, as I do not wish to make any statements on the affected migrants' potential right to international protection, I have to resort to a more general term. Furthermore, I wish to include both those who apply for asylum in Greece and those who choose not to.

This thesis will not consider whether the EU-Turkey Statement violates human rights law or not. That perspective has already been repeatedly examined by many others.[15] I agree with the widespread opinion that the Statement is problematic for migrant protection and increases the risk of human rights violations. However, I believe this question needs to be examined by taking into account the actions of each state and the individual

[14] 'Statement' used for example European Commission, *First Report on the progress made in the implementation of the EU-Turkey Statement* (Brussels, 20 April 2016) https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160420/report_implementation_eu-turkey_agreement_nr_01_en.pdf (accessed 26 April 2018). 'Agreement' used in European Commission, *Fact sheet - Implementing the EU-Turkey Agreement Questions and Answers* (Brussels, 15 June 2016) http://europa.eu/rapid/press-release_MEMO-16-1664_en.htm (accessed 26 April 2018).

[15] Amnesty International, *A Blueprint for Despair: Human Rights Impact of the EU-Turkey Deal* (London, 2017); Human Rights Watch, *EU: Returns to Greece Put Refugees at Risk* http://www.refworld.org/docid/584e767b4.html (accessed 17 May 2018).

situation of each person. As the Member States are not under an obligation to exclude anyone from their territories, the Statement itself does not give rise to any human rights violations, even though it increases the possibilities to commit them. Rather, this thesis will focus on the legal technicalities that made it possible to conclude the EU-Turkey Statement, considering inter-state relations and constitutional issues. This includes a human rights aspect concerning how the Statement's legal form affects the access to legal remedies. Nevertheless, the Statement would have been problematic regardless of the current material conditions or procedural safeguards for asylum seekers in Turkey and Greece.[16]

[16] On the situation in Greece, see Angeliki Dimitriadi, *The Impact of the EU-Turkey Statement on Protection and Reception : The Case of Greece* (Global Turkey in Europe No 15, 2016) http://www.iai.it/en/pubblicazioni/impact-eu-turkey-statement-protection-and-reception-case-greece (accessed 17 May 2018); François Crépeau, *Report of the Special Rapporteur on the human rights of migrants on his mission to Greece* A/HRC/35/25/Add.2 (UN General Assembly, 2017). On the situation in Turkey, see Hemme Battjes and Orcun Ulusoy, *Situation of Readmitted Migrants and Refugees from Greece to Turkey under the EU-Turkey Statement* (Migration Law Series, 2017).

1.3 Disposition, Sources and Methodology

Returning to the formulation of the research question, the use of the word 'why' hints of something larger than what may be answered by a traditional legalistic approach. Indeed, this thesis is not written from a perspective of legal positivism. Rather, I draw on critical legal studies when authoring this text.[17] The two elements of this school that will be most evident are:

1. Law is not neutral, but is both a product of, and produces, politics and ideology.
2. Legal proceedings are not primarily determined by legal provisions.

This perspective, in particular the first point, is beneficial to this thesis since a central and reoccurring theme is the division between the legal and the political, or the legislative and the executive, and how the shift between these different sides occur.

Mainly, this thesis relies on primary sources. The most used material is legislation, documents issued by EU institutions and case law by international and EU courts, in particular in the second chapter which deals with strictly legal questions. Other types of sources are primarily found in the third chapter. Throughout the thesis, I rely on *Treaty Law and Practice* by Anthony Aust in order to present general perspectives on treaties and the procedure of concluding them. A disadvantage with this book is that it heavily reflects an Anglo-Saxon perspective on law, including the idea that the legal nature of an act is entirely dependent on the will of the concluding states. However, considering the subject of the thesis, I believe this standpoint poses a good contrast to the final analysis.

In Chapter Two, the legal nature of the EU-Turkey Statement will be explained. I have chosen to build this chapter on testing the following hypothesis:

[17] For introduction to CLS, see for example Alan Hunt, 'The Theory of Critical Legal Studies' (1986) 6[1] *Oxford Journal of Legal Studies* 1; Mark Kelman, *A Guide to Critical Legal Studies* (Harvard University Press, 1987); Roberto Mangabeira Unger, *The Critical Legal Studies Movement* (Harvard University Press: 1986).

The legal nature of the EU-Turkey Statement aims to divert the EU of accountability.

I chose to use a hypothesis instead of a research question since Chapter Two is quite long and complex. A hypothesis is often more specific and less open than a question, and in this context it makes it easier to follow the reasoning. In order to examine the hypothesis, I need to outline answers to the following subquestions:

a. What is the legal nature of the EU-Turkey Statement?
b. How does it divert the EU of accountability?

The main body of Chapter Two is divided into two sections. The first concerns who the parties are and the second whether the Statement is legally binding. In the first section, a central part will be the General Court order *NF v European Council* stating that the EU-Turkey Statement is not a product of the EU, but of all 28 Member States acting individually within the EU framework. My method for dealing with this case will reflect the second element of critical legal studies, on how the outcome of legal proceedings is shaped by other factors than law. After outlining the case, I will criticise the legal reasoning of the General Court. By doing so, I present an alternative interpretation which would have been equally feasible and more convincing. This follows my standpoint that law is not an exact science but shaped by legal-political interests. The consequence of presenting an alternative interpretation is that it reveals choice. If two legal interpretations are equally plausible, it cannot have been law that decided between these outcomes, but rather moral or political considerations. In general, I do not believe this reflects bad faith or a conscious will to shape law in a certain direction. However, in this case it is difficult to find any other explanation due to the very fragile legal argumentation.

The second issue, whether the Statement is legally binding under international law or not, is examined through a formal legal method. In this section, I present what definitions of a legally binding treaty that can be found in international law, turning to legal sources such as conventions and case law by the International Court of Justice (hereafter ICJ) and International Tribunal for the Law of the Sea (hereafter ITLOS). As the case law on this subject is

scarce, a selection has not been necessary to make. Thereafter, I attempt to answer whether the EU-Turkey Statement is a legally binding treaty by analyzing how well the elements of the Statement corresponds with the requirements. I also consider whether the Statement could be invalid due to the many complications of its entering.

As the two aspects of the EU-Turkey Statement are analyzed from a perspective of international law, the *1969 Vienna Convention of the Law of Treaties* (hereafter VCLT I) will be central in the legal assessments of this chapter. Also, the *1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations* (hereafter VCLT II) will be employed when relevant, such as when considering the EU as the party. The relationship between these instruments vis-à-vis the different parties and the status of the Statement will be discussed further in the beginning of Chapter Two. The chapter will also include assessments under EU primary law in order to understand the internal aspects of the treaty-making procedure, and how the EU considers its own external obligations. The issue of accountability will be assessed through EU primary law as well as international law.

In Chapter Three, I attempt to answer the original research question by taking a broader perspective on the conclusion of the agreement. In Chapter Two, it is asserted that the shape of the EU-Turkey Statement is beneficial since it serves EU interests without burdening the EU with accountability. In this next chapter, I wish to examine why this way was chosen for this particular agreement. Causality is a sensitive subject, and it is difficult to make statements on which development that led to which effect. However, in this chapter I chose to focus on the influence of three aspects that I consider to be most characteristic for the EU-Turkey Statement:

1. It does not follow the traditional forms of treaty-making
2. It was concluded between EU and Turkey
3. It was concluded as a response to the 2015 migration ‘crisis’

Regarding the first aspect, I consider the trend of untraditional treaty-making in general. Here I consult research on the ongoing informalization of international law. Thereafter, I examine whether this trend is reflected in

recent EU readmission policies by relying on collections and systematizations of. EU readmission arrangements. When doing so, I find a clear division on the informalization trend between Western and orientalist or post-colonial countries. This leads me to the second aspect, the relationship between EU and Turkey. This part concerns in particular Turkey's accession negotiations and visa liberalization roadmap, two important elements of the EU-Turkey Statement. In order to understand the EU-Turkey relationship, I turn to political science. I have attempted to pick out both European and Turkish authors in order to avoid a one-sided perspective. Regarding the third aspect, the 2015 migration crisis, I consider legal philosophy and political theory in order to understand the EU's reaction. Over time, several philosophers and political theorists have written on the issue of sovereign responses to crisis. The main element that I use, the shift from legislative power to executive power as a safeguard for self-preservation, is reoccurring in several of these theories.

In order to analyse the relationship between the political landscape and the EU-Turkey Statement, I use Charles Lipson thorough article from 1991, *Why are Some International Agreements Informal?*.[18] In his article, Lipson outlines four reasons to choose an informal agreement over a formal. In Chapter Three, I analyse how well these four reasons correspond to the EU's situation, taking into account the three aspects described above.

In the fourth and final chapter, I summarise the findings I have made in this thesis and provide an answer to the research question.

[18] Charles Lipson, 'Why Are Some International Agreements Informal?' (1991) 45[4] *International Organization*, 500.

2 The Legal Nature of the EU-Turkey Statement

2.1 Introduction

Since the EU-Turkey Statement was released, it has been the focus point of widespread legal discussions. Initially, the debate only concerned whether it contained binding obligations under international law, or if the Statement was merely politically binding. The EU-Turkey Statement was, as its name indicates, generally considered to be an act attributable to the EU. However, in February 2017 the General Court of the EU issued three orders, turning this position on its head. The Court held that the Statement was not an EU act, but instead had been entered by the Member States. These orders were met with severe criticism and resulted in a second discussion, on whether the General Court's findings were correct.

From a legal perspective, the most characteristic trait of the EU-Turkey Statement is its consistent lack of clarity. In this text I will argue that its current shape is not a result of mistakes. While it is precarious to make statements on the motivations of others, it appears unlikely that the lawyers of the EU would set up an agreement that could be binding as much as non-binding, and attributable to the Member States as much as to the Union, due to lack of skill. Nevertheless, the discussions about the legal nature of the EU-Turkey Statement seem never-ending. To lay bare the steps of my argument, I have formulated this as the following hypothesis:

The legal nature of the EU-Turkey Statement aims to divert the EU of accountability.

I have chosen the term 'legal nature' over for example 'form' in order to clarify that it is not only the text of the press release in itself that is important for the assessment. Other legally relevant factors, such as the context in which the agreement was concluded, will also be taken into consideration.

'Accountability' refers to the broad sense of the word. If the Statement is not legally binding, this would have consequences in three aspects. First, vis-à-vis Turkey under international treaty law. Secondly, within the EU constitutional framework and for the relationships between the Member States, EU institutions and union citizens. Thirdly, towards the migrants crossing the Aegean Sea whose human rights risk being violated as a consequence of the Statement.

The main body of this chapter is divided into two sections. In the first, I will assess who may be considered the parties of the agreement (except for Turkey). That is, I will analyse whether the European Council, when concluding the agreement, was acting on behalf of the EU or of the Member States. Thereafter, I will outline what consequences the different answers may have under EU law and international law. The second part of the chapter focuses on the Statement's potential status as a treaty. In this section I will examine whether the Statement may be considered legally binding under international law. Finally, I will return to the main hypothesis and make some concluding remarks.

2.2 Application of the Vienna Conventions

Before analyzing the legal nature, we need to consider how to assess the EU-Turkey Statement under international law. Applying the VCLT I on this situation is complicated, since neither Turkey, the EU nor all of the EU Member States are parties to the Convention. Therefore, we need to clarify the effect of the VCLT I's provisions depending on who is considered party to the EU-Turkey Statement.

If the Member States are the parties of the Statement, we may note that most of the states have ratified or acceded to VCLT I. However, two Member States (France and Romania) have not done so.[19] Neither is Turkey party to the

[19] See UN, *United Nations Treaty Collection, Vienna Convention on the Law of Treaties* https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en (accessed on 9 April 2018).

Convention.[20] Therefore, in order to determine the scope of application it is necessary to consider to what extent the VCLT I reflects customary law.

116 states are currently parties to the VCLT I.[21] Several of its articles have been found to reflect customary law by the ICJ. This includes the Convention's definitions,[22] rules of interpretation[23] and rules of termination and suspension.[24] Similar findings have been made by other international courts and tribunals.[25] The ICJ has not yet issued a case where it holds that an article of the VCLT I does not reflect customary law.[26] Since the creation of the Convention to a large extent was a codification of the practice between the drafting states, this is not surprising. In general, the articles used in this chapter reflect customary law. In case an article is not an evident part of customary law, this will be discussed in connection to the legal assessment.

Regarding the EU, the application of the VCLT I is even more difficult. The EU's status as a legal persona was established through Article 47 of the Lisbon Treaty.[27] It clarified that the Union holds legal personality and can have rights and assume obligations under international law. Thereby it can also enter agreements with third countries. The EU has often been described as *sui generis* under international law. The discussion of the EU's legal nature falls outside the scope of this thesis, but the standpoints vary between considering it to be an international organisation, a federation of states or a supranational organisation.[28] The provisions of the VCLT I are often explicit

[20] [20] See UN, *United Nations Treaty Collection, Vienna Convention on the Law of Treaties* https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en (accessed on 9 April 2018).
[21] Ibid.
[22] ICJ, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening*) (Judgment) ICJ Report 2002, 303, para 263.
[23] ICJ, *Kasikili/Sedudu Island (Botswana v Namibia)* (Judgment) ICJ Report 1999, 1045.
[24] ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276* (Advisory Opinion) ICJ Report 1971, 16.
[25] ITLOS, *South China Sea Arbitration (Philippines v China)* (Award) CA Case No 2013-19, 29 October 2015, 116, para 274; CJEU, case C-386/08, *Brita v Hauptzollamt Hamburg Hafen* [2010] EU:C:2010:91, para 42; ECtHR (Plenary), *Golder v United Kingdom*, App No 4451/70 (ECtHR, 21 February 1975), para 29.
[26] Anthony Aust, *Modern Treaty Law and Practice* (2nd ed, Cambridge University Press, 2007) 13.
[27] Treaty of Lisbon, Amending the Treaty on the European Union and the Treaty Establishing the European Community [2007] OJ C306/01.
[28] Joxerramon Bengoetxea 'The EU as (More Than) an International Organization' in Jan Klabbers and Åsa Wallendahl (eds), *Research Handbook on the Law of International*

on that they concern agreements between states. While being more than an international organisation, the EU is not a sovereign state. Since it is something in between, we need to examine instruments concerning treaties between states and international organisation to interpret customary law in this situation. Despite only being ratified by 32 states and 12 international organisations, and thereby not yet being into force, the most important instrument is the VCLT II.[29]

The VCLT II is the counterpart of VCLT I on treaties between several international organisations, or between one or more states and one or more international organisations.[30] Most of its provisions are identical to the VCLT I, but occasionally the wordings differ. Therefore, the VCLT II can provide a wider understanding of how to assess treaties between states and international organisations.

The EU is not one of the organisations which have ratified the VCLT II. Moreover, the VCLT I is only open for signatures by states.[31] Regarding its internal law, the Court of Justice of the European Union (hereafter CJEU) has considered several of the VCLT I's provisions to reflect customary law. According to the Court, these provisions form a part of the EU legal order and are thereby binding on all EU institutions.[32] Regarding the VCLT II, the CJEU has applied several of its articles to agreements between the Union and third countries, though without explaining why it is applicable.[33]

Organizations (Northampton Publishing House 2011); Armin von Bogdandy, 'Neither an International Organization Nor A Nation State: The EU as a Supranational Federation' in Erik Jones, Anand Menon, and Stephen Weatherill (eds), *The Oxford Handbook of the European Union* (University of Pennsylvania, 2012).

[29] The Convention will enter into force when ratified by 35 states according to Article 85 of the VCLT II. For status of ratifications, see UN, *United Nations Treaty Collection, Vienna Convention on the Law of Treaties Between States and International Organizations* https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXIII-3&chapter=23&lang=en (accessed 9 April 2018).

[30] Article 1 of the VCLT II.

[31] Article 81 of the VCLT I.

[32] CJEU, case C-386/08, *Brita v Hauptzollamt Hamburg Hafen* EU:C:2010:91, para 42; see also case C-192/16 *Racke v Hauptzollamt Mainz* EU:C:1998:293, para 24, 45 and 46; case C-416/96 *Eddline El-Yassini* EU:C:1999:107, paragraph 47, and case C-268/99 *Jany and Others*, EU:C:2001:616, paragraph 35.

[33] CJEU, case C-327/91 *France v Commission*, EU:C:1994:305, para 25; see also the Opinion of Mr Advocate General Tesauro in the case, delivered on 16 December 1993, para 12.

2.3 The Parties to the Statement

During the first year of the EU-Turkey Statement, it was hardly up for discussion who its parties were.[34] Considering the wording of the Statement and the context in which it was presented, it was assumed that Turkey had entered the agreement with the EU. However, in February 2017, the General Court issued three orders, holding that the Statement was an act of the Member States rather than the Union. This controversial finding makes it necessary to assess who may be considered a party under international law.

According to the hypothesis, the EU is the actual party to the Statement and should hold accountability for its creation and its consequences. In this section I will try this part of the hypothesis. After presenting the definition of a party under international law, I will move on to examine the legal reasoning of the General Court orders. Thereafter, I will present some legal and political consequences of the different standpoints. Finally, some concluding remarks will be made.

2.3.1 Becoming a Party

In the VCLT I, the definition of 'party' is found in Article 2(1)(g). According to the article, '"[p]arty" means a State which has *consented to be bound* by the treaty and for which the treaty is *in force*'.[35] The corresponding article of the VCLT II refers to 'a State or international organization' but is otherwise identical.[36]

The EU-Turkey Statement does not make any explicit statements on when it will enter into force. However, the implementation of its elements began on 20 March 2015.[37] The other requirement of the VCLT definition, *consent to*

[34] For one of the few exceptions, see Enzo Cannizzaro 'Disintegration through law?' (2016) 1[1] *European Papers* 3, 3.
[35] Italics added.
[36] Article 2(1)(g) of the VCLT II.
[37] Also, it makes no difference. If the Statement had not entered into force the EU or the Member States would have to be assessed under Article 2(1)(f) instead, which defines 'Contracting State'. A contracting state is simply a state which has consented to be bound, why the assessment would have been the same. When the treaty would have entered into force, it would have become legally binding for the state.

be bound, is a bit more complicated. As the Vienna Conventions are quite flexible on this point, there are several ways to express consent to be bound. The consent may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession.[38] The mode of expression depends on the States involved in the treaty process and what types of expression they agree on. As such, several other ways to express consent has also been developed through state practice.[39]

Both the European Council and the Commission have claimed that no written agreement was concluded with Turkey on the 18 March 2016. Moreover, there is no public record of the discussions that took place. The NGO *Access Info Europe* has requested all documents generated or received by the Commission in relation to the legality of the EU-Turkey Statement.[40] This request was denied by the Commission, relying on the interest of protecting international relations.[41] In a recent judgment, the General Court held that the Commission's decision was correct with regard to almost all documents.[42] It is therefore very difficult to determine how the consent to be bound may have been expressed in this case.

Against this background, the definition in the Vienna Conventions on how to enter an agreement does not bring us any closer to an answer. However, it is clear that an agreement, regardless of its legal status, was entered by the Heads of State or Government of the EU Member States with Turkey on 18 March 2016. The central question is whether they, at the time, were acting as representatives of their own states or as the European Council. In the following section this will be examined, taking the orders of the General Court as a point of departure. Thereafter, the Court's findings will be criticized from perspectives of EU law and international law. Finally,

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[38] Articles 11-17 of the VCLT I.
[39] Malgosia Fitzmaurice, 'Consent to Be Bound – Anything New under the Sun?' (2005) 74[3] *Nordic Journal of International Law* 483, 484f.
[40] Ask the EU, *Legal advice and/or analysis of the legality on EU-Turkey agreements*, 17 March 2016 https://www.asktheeu.org/en/request/legal_advice_andor_analysis_of_t_2#outgoing-5620 (accessed 9 April 2018)
[41] Article 4(1)(a) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L 145/43.
[42] Case T-852/16 *Access Info Europe v Commission*, EU:T:2018:71.

different problems and consequences that arise depending on who the party is will be outlined.

2.3.2 The General Court's Orders

2.3.2.1 Action for Annulment

First, a few words on the procedure of the General Court orders. The applicants were bringing actions for annulment of the EU-Turkey Statement under Article 263 of the Treaty on the Functioning of the European Union (hereafter TFEU). In this procedure, the General Court is empowered to review the legality of acts by EU Institutions intended to produce legal effects vis-à-vis third parties.[43] In case the agreement infringes a procedural requirement or a rule of law, the General Court can declare the act to be void.[44] Any legal or natural person may initiate proceedings against an act, as long as it is of direct and individual concern to them. General Court orders concerning annulment may be appealed to the CJEU, but only on points of law.[45] It is important to note that the EU courts only have jurisdiction over EU acts, not international agreements with third parties. Therefore, an annulment by the CJEU or the General Court could only render the EU decision to enter the agreement void, not the international agreement in itself. The agreement would still be valid under international law.[46]

2.3.2.2 NF v European Council

Moving on the actual orders; on 28 February 2017, the General Court issued three orders with almost identical legal reasoning, *NF, NG and NM v European Council*.[47] All applicants were migrants who had arrived to Greece from Turkey and were at risk of being returned. In this section, we will take

[43] Case C-28/12 *Commission v Council*, EU:C:2015:282, para 14; joined cases C-181/91 and C-248/91 *Parliament v Council and Commission*, EU:C:1993:271, para 13; case C-27/04 *Commission v Council*, EU:C:2004:436, para 44.
[44] Art 264 TFEU.
[45] Art 256(1) TFEU.
[46] CJEU, joined cases C-103/12 and C-165/12 *Parliament v Commission*, EU:C:2014:2400, para 91.
[47] Case T-192/16 *NF v European Council* EU:T:2017:128; case T-193/16 *NG v European Council* EU:T:2017:129; case T-257/16 *NM v European Council* EU:T:2017:130.

a closer look at *NF*. In the case, *NF* claimed that the EU-Turkey Statement was an unlawful act, both in relation to Article 218 TFEU and to the human rights of the concerned migrants, as regulated in the Charter of Fundamental Rights of the European Union (hereafter the Charter). Under Article 218 TFEU, international agreements should be negotiated by the Council and the Commission, not the European Council.[48] Even more important, entering a readmission agreement requires consent by the European Parliament, something that was not requested in this case.[49] The European Council responded by requesting the Court to declare the plea inadmissible since no agreement or treaty had been concluded between Turkey and the EU.[50]

The European Council argued that the meeting that took place on 18 March 2016 was between Turkey and the Heads of State or Government of the Member States of the EU, not the European Council. That is, during the meeting with Turkey, the Heads of State or Government were not acting as the European Council, but as representants of 28 different states which were all members of the EU.[51] Consequently, the General Court had no jurisdiction. The applicant responded to this argument by pointing out that the Statement repeatedly mentions an agreement between Turkey and EU, rather than the Member States.[52]

The main issue of the case was to determine whether the group of people which met with Turkey on 18 March 2016 was acting in capacity of the European Council or not. The Court recalled that the meeting was preceded by two other meetings, on 29 November 2015 and 7 March 2016. However, the press releases of these meetings both clearly stated that they took place between Turkey and the Heads of State or Government. This differed from the press release from 18 March 2016 in which the terms 'EU' or 'European Council' were consistently used. The European Council explained this by claiming that the press release of 18 March 2018 contained journalistic simplifications in order to address the general public. The General Court

[48] Art 218 TFEU. On the role of the European Council, see Art 15 TEU.
[49] Art 218(6)(a)(v) TFEU. On regulation of entering readmission agreements, see Article 79(2) TFEU.
[50] Case T-192/16 *NF v European Council* EU:T:2017:128, para 27.
[51] Ibid, para 28.
[52] Ibid, para 32.

found this explanation reasonable and also held that the expressions 'EU' and 'Members of the European Council' are ambiguous terms.[53]

The Court then continued to examine the documents of the 18 March 2016 and found that the meeting consisted of two parallel events. One was held between the Heads of State and Government and Turkey while the other was with the European Council. These meetings were considered different in a legal, formal and organisational perspective, but took place on the same day and in the same building, due to reasons of costs, security and efficiency.[54] This was also indicated by the invitations for the meetings as well as a pdf version of the EU-Turkey Statement, submitted by the European Council in the proceedings. The General Court noted that both the President of the European Council and the President of the Commission were present during the meeting between the Member States and Turkey, but this did not allow for any other conclusion.[55] Since the Statement was not considered an EU act, the General Court dismissed the action without making a finding on whether the Statement constitutes a legally binding treaty or merely a political arrangement.[56] The orders were appealed on 21 April 2017 and is currently pending before the CJEU.

2.3.2.3 Critique of the Case

The reasoning by the General Court is not very convincing and leaves us with several unsolved issues. It was very unexpected that the Court would consider the Statement attributable to the Member States rather than the European Council. As an example, just one month before the General Court declared the case inadmissible, the European Ombudsman issued a decision where they found that the Statement, regardless of whether it was legally binding, had been entered by the European Council.[57]

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[53] Case T-192/16 *NF v European Council* EU:T:2017:128, para 61.
[54] Ibid, para 63.
[55] Ibid, paras 67-68.
[56] Ibid, para 71.
[57] European Ombudsman, *Decision of the European Ombudsman in the joint inquiry into complaints 506-509-674-784-927-1381/2016/MHZ against the European Commission concerning a human rights impact assessment in the context of the EU-Turkey Agreement*, 18 January 2017, para 26.

The concept brought forward by the European Council and the Commission might appear radical. However, the idea of the 28 Member States working through the framework of the European Council is not new in itself. A similar arrangement was also conducted in relation to the EU-Ukraine Association Agreement in 2016. Following a referendum in the Netherlands, Dutch politicians refused to ratify the Agreement, causing diplomatic issues within the European Council. The solution was to avoid adopting a declaration or a protocol, but instead a 'Decision of the Heads of State or Government of the 28 Member States of the European Union, meeting within the European Council'.[58] Also here, the decision was taken within the framework of the European Council, but did not require a legal basis in EU law.[59] According to the Legal Counsel of the European Council, this method has been used in the same situation previously, in December 1992 and in June 2009.[60] Similar arrangement have also been brought before the CJEU, for example in C-28/12 *Commission v Council* and C-22/70 *Commission v Council*. However, in both cases, the CJEU considered the acts to be attributable to EU institutions.

Moving on to the case at hand, the European Council's explanation on using the term 'EU' when actually referring to the Member States due to journalistic simplification is quite original. First, one might question how often the general public reads the European Council's press releases. Secondly, how many of those that do that are unable to understand the difference between the EU and its Member States. Thirdly, it is not clear how this would be made easier by using an incorrect term. In case the word 'EU' actually refers to the Member States, wordings such as 'The EU and its Member States' which can be found in the Statement, becomes difficult to explain. It is also questionable

[58] 'Decision of the Heads of State or Government of the 28 Member States of the European Union, meeting within the European Council, on the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part'. Annexed to European Council, *European Council Conclusions on Ukraine (15 December 2016)*, https://www.consilium.europa.eu/media/24151/15-euco-conclusions-ukraine.pdf (accessed 17 May 2018).
[59] Ramses A Wessels, 'The EU Solution to Deal with the Dutch Referendum Result on the EU-Ukraine Association Agreement' (2016) 1[3] *European Papers* 1305, 1306.
[60] European Council, *Opinion of the Legal Counsel*, EUCO 37/16 (Brussels, 12 December 2016) http://data.consilium.europa.eu/doc/document/ST-15-2016-INIT/en/pdf (accessed 17 May 2018).

why it would be necessary to shift between using the terms 'EU' and 'the Member States' if they refer to the same thing.

On the same note, the General Court seems to disregard the difference between the wording used in relation to the actors. When the Member States or the members of the European Council is mentioned, their role is consistently passive. They 'welcome' the Commission's proposal and they 'will contribute on a voluntary basis' to the Voluntary Humanitarian Admission Scheme. In comparison, the EU 'will' cover costs and mobilise additional funding. It is also the EU that has 'agreed', 'decided' and 'reconfirmed [its] commitment'. In case the Member States only contributes on a voluntary basis, it is difficult to understand who it is that 'will' activate the Voluntary Humanitarian Admission Scheme.

Moreover, the General Court noticed the two meetings held on 29 November 2015 and 7 March 2016 and accepted the argument that 'EU' is a journalistic simplification, but disregarded publications of other meetings. For example, in the memo of the meeting of 15 October 2015 which describes what has been agreed *ad referenda* on the progress of setting up a Joint Action Plan, the plan is claimed to have 'two parties', the EU and Turkey.[61] This plan was later activated on the Statement of 29 November 2015 and reconfirmed in the EU-Turkey Statement of 18 March 2016. The meeting of 15 October 2015 was, according to press releases of that day and the Statement of 29 November 2015, clearly a meeting of the European Council.[62] Also in a later Commission Decision, which is an official document without journalistic simplifications, the Joint Action Plan is described as 'the understanding between the European Union and the Republic of Turkey'.[63]

The General Court also appears to disregard previous case law. One example is *Parliament v Council and Commission*, which is a very similar

[61] European Commission, *EU-Turkey joint action plan*, 15 October 2015, MEMO/15/5860, part I.
[62] European Council, *Meeting of the EU heads of state or government with Turkey* (Brussels, 29 November 2016) http://www.consilium.europa.eu/en/meetings/international-summit/2015/11/29/ (accessed 17 May 2018).
[63] European Commission, *Decision of 10 February 2016 on the Facility for Refugees in Turkey amending Commission Decision C(2015) 9500 of 24 November 2015* (2016/C 60/03), preamble 2.

case to the one at hand.[64] The Member States, meeting as the Council, had decided to grant aid to Bangladesh. The decision had been written down in meeting minutes and its implementation was going to be coordinated by the Commission. When the Parliament brought an action for annulment before the Court, the Council plead the Court to declare the case inadmissible on grounds that the contested act was not an act of the Council but of the Member States. In this case, the CJEU stated that the form or description of an act is irrelevant for the question who its originator is. Rather, '[i]n order for such an act to be excluded from review, it must still be determined whether, having regard to its content and all the circumstances in which it was adopted, the act in question is not in reality a decision of the Council.'[65] Similar findings were made in *Commission v Council*, where the Court held that '[a]n action for annulment must therefore be available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects'.[66] This implies that the General Court should have begun its assessment by determining the effects of the Statement.

In both these cases, the CJEU assessed whether the agents were acting in EU capacity by considering the division of competence between the EU and the Member States. In *NF v European Council*, the General Court seems to regard the European Council's constitution to be a result of coincidences. We will therefore take a closer look at the division of competence between the EU and the Member States on this matter.[67] To begin with, the Area of Freedom, Security and Justice, which includes migration, is a field in which competence is shared between the EU and the Member States.[68] The competence on entering international agreements is regulated through Articles 2(2), 3(2) and 216(1) TFEU. While Member States may enter

[64] Joined cases C-181/91 and C-248/91, *Parliament v Council and Commission* EU:C:1993:271.
[65] Ibid, para 14.
[66] Case C-22/70, *Commission v Council*, EU:C:1971:32, para 42.
[67] See for example Enzo Cannizzaro, 'Denialism as the Supreme Expression of Realism – A Quick Comment on NF v European Council' (2017) 2 *European Papers* 251. In the following paragraphs I rely on the findings of Paula Garcia Andrade, 'EU External Competences in the Field of Migration: How to Act Externally When Thinking Internally' 55[1] *Common Market Law Review*, 157.
[68] Article 4(2)(j) TFEU, see also Art 79(3) TFEU on readmission agreements

international agreements by virtue of their sovereignty, this right is regulated for the EU in Article 216(1) TFEU. It holds that the EU may enter into international agreements in accordance with the Treaties, when it is necessary 'in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope'. Such agreements are then binding on the Member States as well as all EU institutions. According to Article 2(2) TFEU, when a competence is shared, Member States may only exercise their competence to the extent that the EU has not done so, or where the EU has ceased to exercise this competence. This is further specified by Article 3(2) TFEU, which codifies the ERTA doctrine laid down by the CJEU in 1971.[69] The case concerned an international agreement entered by six Member State which was incompatible with EU regulations. The CJEU then held:

> In particular, each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules.
>
> As and when such common rules come into being, the Community alone is in a position to assume and carry out contractual obligations towards third countries affecting the whole sphere of application of the Community legal system.[70]

In other words, when the EU legislates in an area with concurrent competence, the Member States lose their competence over that area. Before an international agreement is entered, the competence is still shared. However, when an agreement with a third country is signed, the Member

[69] Case C-22/70, *Commission v Council,* EU:C:1971:32,. The doctrine was later refined in several cases, e g case C-467/98 *Commission v Denmark* EU:C:2002:625; case C-476/98; *Commission v Germany* EU:C:2002:631.
[70] Case C-22/70, *Commission v Council,* EU:C:1971:32, paras 17-18.

States may no longer enter into bilateral agreements with that third country on the same issue.[71]

The EU-Turkey Statement contains several elements which are covered by EU legislation. For example, the procedure to determine inadmissibility is carried out under the Directive on common procedures for granting and withdrawing international protection (Asylum Procedures Directive).[72] Also, obligations regarding the Visa Liberalisation Roadmap for Turkish citizens should be done in accordance with the Regulation establishing a Community Code on Visas.[73] When the EU entered the EU-Turkey Readmission Agreement in 2013, a concurrent competence became an exclusive competence. This is stressed by Article 21 of the agreement, which holds that the new agreement takes precedence over previous bilateral agreements between Turkey and the Member States as far as they are incompatible. The role of the Member States is limited to drawing up implementation protocols.[74] As the competence becomes exclusive from the moment of signature, this is not affected by the three-year delay in applying the agreement on third country national.[75] While Article 18(7) holds that 'Nothing in this Agreement shall prevent the return of a person under other formal or informal arrangements', this only allows previously entered agreement, such as the Greece-Turkey Readmission Protocol.[76]

To summarize, according to the ERTA doctrine and EU primary law, the competence on entering readmission agreements with Turkey lies entirely with the EU. If the General Court had applied the reasoning established in *Parliament v Council and Commission*, it would have found the EU-Turkey Statement to be an EU act. This is also indicated by other circumstances of the Statement's conclusion, such as previous meetings and documents.

[71] Andrade (n 67) 170f.
[72] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection.
[73] Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code).
[74] Article 20 EU-Turkey Readmission Agreement.
[75] Andrade (n 67), 195.
[76] Ibid.

Besides internal law, EU institutions also has to follow international customary law in its relations to third countries.[77] Relevant legislation on attribution can be found in Article 7(3) of the VCLT II, which states:

> A person is considered as representing an international organization for the purpose of adopting or authenticating the text of a treaty, or expressing the consent of that organization to be bound by a treaty, if:
> (a) that person produces appropriate full powers; or
> (b) it appears from the circumstances that it was the intention of the States and international organizations concerned to consider that person as representing the organization for such purposes, in accordance with the rules of the organization, without having to produce full powers.

This may be divided into one internal and one external requirement. What is important is that the person, organ or agent was (1) connected to the organisation, and (2) appeared to be representing the organisation when entering the agreement.[78] This also follows from ICJ case law. In its advisory opinion on *Reparation for injuries suffered in the service of the United Nations* the Court considered the issue of attribution for the actions of UN agents. The ICJ then held:

> The Court understands the word 'agent' in the most liberal sense, that is to say, any person who, whether a paid official or not, and whether permanently employed or not, has been charged by an organ of the organization with

[77] This has been acknowledged by the CJEU (n 32). However, the CJEU has also indicated that the EU is not bound by international law, see e g joined cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* EU:C:2008:461; *Opinion 2/13 of 18 December 2014*, EU:C:2014:2454.

[78] In case the agreement entered was not legally binding, the issue of attribution cannot be assessed under the VCLT II, since it is only applicable to treaties. However, regardless of the agreement's legal status, the Draft Articles of Responsibility of International Organizations (hereafter IO Articles) may be considered by analogy. The subject of attribution can be found in Article 6, which states:
"1. The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization.
2. The rules of the organization apply in the determination of the functions of its organs and agents.
In both the definitions of the VCLT II and the IO Articles, the actual function of the agents according to internal rules is downplayed."
Again, what is important is how the actor, if connected to the organization, appeared externally.

> carrying out, or helping to carry out, one of its functions – in short, any person through whom it acts.[79]

As argued by Enzo Cannizzaro, the EU-Turkey Statement was negotiated by the Presidents of the two organs entrusted with the international representation of the EU – the European Council and the Commission. Moreover, the meeting took place in the headquarters of the European Council and its outcome was posted on the European Council's website. Since it must have appeared to Turkey as if the Heads of State or Government was acting as the European Council, the EU-Turkey Statement should be considered an act attributable to the EU.[80] From this perspective, the General Court could have chosen to base their reasoning on how the conclusion of the EU-Turkey Statement appeared for third parties, rather than the intentions of the EU institutions.

As shown above, there are several flaws in the General Court's reasoning as well as alternative interpretations which have not been considered. The General Court could easily have chosen other outcomes but decided to reach its current decision by complicated and far-fetched reasoning. According to Thomas Spijkerboer, the Court's ruling can be explained primarily by a desire to avoid the legal and political consequences of reaching any other outcome. If the Statement had been attributable to the EU, the Court would have been forced to take a stance on possible human rights violations. In case the Court would have found the Statement incompatible it would have to annul it, possibly causing an 'explosive political situation'.[81] If the Statement is not an EU act, this also blocks all future attempts by the Greek Courts to refer preliminary questions on the Statement to the CJEU. Another option for avoiding a judgment on human rights law would have been to consider the Statement to be a political agreement rather than legally binding. This would have required a narrow interpretation of the action for annulment, possibly

[79] ICJ *Reparation for injuries suffered in the service of the United Nations* (Advisory Opinion), ICJ Reports 1949, 177.
[80] Cannizzaro (n 67) 256.
[81] Thomas Spijkerboer, 'Bifurcation of Mobility, Bifurcation of Law. Externalization of Migration Policy Before the EU Court of Justice' in *Journal of Refugee Studies* (forthcoming) 9.

limiting the Court's future jurisdiction. The reasoning of the orders is very factual, and the specific details of the case are decisive. Thereby, it has low precedential value and will probably not limit the Court's jurisdiction in the future.[82]

2.3.3 Consequences of Different Standpoints

The Member States are currently considered the legal parties to the agreement. Nevertheless, the EU is still taking political credit for the Statement.[83] In order to try the hypothesis, the following section will explain how the issue of accountability is affected depending on whether the EU or the Member States are the parties. I will outline what the consequences are of these positions under different constitutional frameworks and show why neither of them are ideal.

2.3.3.1 The EU as the Party

If the General Court would have found the Statement to be attributable to the EU, it would have moved on to examine whether the Statement had legal effects. If that had been the case, the Court would have to make a decision on whether the agreement was entered in accordance with the TFEU and whether it is a violation of the Charter.

The applicants could have brought objections regarding the European Council's competence under primary law to bind the EU to international agreements. International agreements have to be concluded in accordance with Article 218 TFEU. The article outlines how the EU enters international agreements and contains several requirements which were not met in this case. To begin with, the European Council does not hold legislative powers or powers to enter international agreements on behalf of the EU with third parties.[84] As a consequence, it is not mentioned in the article. Instead, the

[82] [82] Thomas Spijkerboer, 'Bifurcation of Mobility, Bifurcation of Law. Externalization of Migration Policy Before the EU Court of Justice' in *Journal of Refugee Studies* (forthcoming), p 10.
[83] European Commission, (n 14) 2.
[84] Art 15 TEU.

procedure to negotiate and enter international agreements should be carried out by the Council and the Commission. Both institutions were involved in the meeting surrounding the EU-Turkey agreement but claim they were merely preparing and administrating the meetings. It is difficult to ascertain their involvement since the transparency surrounding the negotiations is very limited. Regardless, the European Parliament has to approve of some kinds of international agreements in order for them to be legally concluded under EU law.[85] This includes agreements which cover fields for which the ordinary legislation procedure applies, such as readmission agreements.[86] When negotiating with Turkey, no institutions asked for this approval. Moreover, the European Parliament should have been informed of the procedure at its every step.[87] Since the procedure was not respected, entering an international agreement with Turkey through the Statement would violate Article 13(2) TEU, which is reason for annulling the act.

Secondly, the applicants could have claimed that the agreement was incompatible with the Charter. Several human rights organisations have expressed concerns regarding the principle of non-refoulement and the prohibition of collective expulsions.[88] As the EU is not a Contracting State of the ECHR, a procedure before the CJEU is the only way to legally assess whether acts of its institutions are in accordance with human rights standards.[89] Since Greece and Turkey are Contracting States to the ECHR, migrants affected by the Statement (as implemented by Greek and Turkish authorities) may still appeal to the ECtHR regarding their treatment, under certain circumstances.[90] However, there is a major difference between the Strasbourg and Luxemburg Courts. The ECtHR is only empowered to find

[85] Art 218(6)(a) TFEU.
[86] Art 218(6)(a)(v) TFEU. On regulation of entering readmission agreements, see Article 79(2) TFEU.
[87] Art 218(10) TFEU.
[88] See Art 4 and Art 19(1) of the Charter. For human rights concerns, see Amnesty (n 15); Human Rights Watch (n 15).
[89] CJEU, *Opinion 2/13 of 18 December 2014*, EU:C:2014:2454
[90] See Article 35 ECHR on admissibility. The ECtHR has ruled on the Statement in *JR and others v Greece* App No 22696/16 (ECtHR, 25 January 2018, appealed to GC) but did not find a violation. *JB v Greece* App No 54796/16 (ECtHR, communicated on 18 May 2017) is currently pending.

violations in the application of a given legal instrument. It cannot render a legal act invalid in itself the way the General Court and the CJEU can. [91]

2.3.3.2 The Member States as the Parties

As shown above, the Member States have delegated the competence of concluding readmission agreements with Turkey to the EU. In case the Member States are parties to the Statement, this would mean that they have intruded on an exclusive area of competence. This is problematic regardless of whether the EU-Turkey Statement is legally binding or not.[92] If the Member States disregard the EU's exclusive competence they may be breaching several fundamental principles of the EU legal order, including the principle of conferral of powers and the duty of loyal cooperation.[93] Moreover, it is remarkable that the Commission has not reacted to this, but instead facilitated the conclusion of the agreement. This is in stark contrast to its assigned role as guardian of the treaties.[94]

In case the Statement is considered legally binding, this would also raise issues under each Member States' domestic constitutional frameworks.[95] In most democracies, parliamentary approval is required when entering a treaty. It does not seem like parliamentary approval has been given to the EU-Turkey Statement in any of the 28 Member States. What effect an unlawful entering of an international agreement may have under domestic law depends on each state's constitutional framework. A complete review of this is outside the scope of this thesis. However, the orders by the General Courts and the possibility that an international agreement has been entered by the states appears to have received very little attention.

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[91] Martin Kuijer, 'Fundamental rights protection in the legal order of the European Union' in Adam Łazowski and Steven Blockmans (eds) *Research Handbook on EU Institutional Law* (Edward Elgar, Cheltenham, 2016) 225.
[92] Case C-233/02 *France v Commission* EU:C:2004:173, para 40.
[93] Arts 5(2) and 4(3) TEU.
[94] Art 17 TEU.
[95] Note that in *JR and Others v Greece* (n 90) the ECtHR appears to imply that the EU-Turkey Statement is a treaty. It is repeatedly referred to as 'un accord' and the Strasbourg Court claims that Greece had to follow the agreement ('À la suite de la « Déclaration UE-Turquie », il a fallu réviser immédiatement le fonctionnement des centres d'accueil et d'enregistrement…', para 41).

Assuming the Member States and Turkey are the only parties to the Statement, and assuming the Statement is legally binding, the next issue is to understand the role of EU institutions under the Statement. EU institutions are in several ways involved in the readmission procedure. Greek authorities are assisted in assessing asylum applications by EASO and with the readmissions by the European Border and Coast Guard. The progress of implementing the Statement is monitored and reported by the Commission. Of the €3 billion initially allocated to Turkey through the Facility for Refugees in Turkey, €1 billion is from the EU budget and the other €2 billion from the Member States.[96] The Facility for Refugees is a coordination of both the EU's and the Member States' actions.[97] The decisions on which projects to fund is taken by the Steering Committee which is chaired by the Commission and composed of one representative of each Member State and two representatives of the Commission.

Regardless of whether the decisions to allocate funds and implement the Statement are taken by the EU or the Member States, the issue at hand is whether the EU is bound to do so. That is, whether states can confer obligations on an international organisation of which they are members. As previously mentioned, the EU is an independent legal persona under international law. It is an ancient general principle of law that an agreement cannot create rights or obligations for third parties without their consent.[98] This has also been codified in the Vienna Conventions.[99] While the VCLT I only protects third states from being bound, this protection is extended to third international organisations in the VCLT II.

However, this practice is not entirely uncommon. One example is Article 83 of the VCLT I which designates the Secretary-General of the United Nations as the depositor of all relevant instruments of accession, without a

[96] European Commission (n 63) para 2. See also joined cases C-181/91 and C-248/91 *Parliament v Council and Commission,* EU:C:1993:271, para 24, on how decisions concerning the Union's budget affects the cathegorisation of the act.
[97] European Commission (n 63) para 2; *Commission Decision of 24 November 2015 on the coordination of the actions of the Union and of the Member States through a coordination mechanism — the Refugee Facility for Turkey* (2015/C 407/07).
[98] *Pacta tertiis nec prosunt nec nocent* under Roman law.
[99] Arts 34-36 of the VCLT I and the VCLT II.

clear legal ground.[100] Our situation differs from the one of the VCLT I in one important aspect. While only 116 of the 193 UN Members are parties to the VCLT I, all of the EU Member States are parties to the EU-Turkey Statement. It would therefore be possible to argue that the EU has been bound through consensus. The EU does, after all, only consist of its Member States and can only exercise the power they have transferred. Another option is Article 35 of the VCLT II, which states:

> An obligation arises for a third State or a third organization from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State or the third organization expressly accepts that obligation in writing.

In case we consider Commission decisions of 24 November 2015 and 10 February 2016 on establishing the Facility for Refugees in Turkey to be an act of the EU, we might conclude that the EU has accepted to take up responsibilities with regard to the EU-Turkey Statement.

The problem with both these arguments lies in the second sentence of Article 35 of the VCLT II. It states that '[a]cceptance by the third organization of such an obligation shall be governed by the rules of that organization'. The EU has a framework in place in order to ensure democratic legitimacy. If we accept that the Member States could bind the EU by consensus, it would enable the European Council to side-track the constitutional procedures set out in the treaties. As a consequence, the EU has no obligation to implement the EU-Turkey Statement.

2.3.4 **Conclusion**

In this section I have shown that the reasoning of the General Court in *NF v European Council* was flawed. Other outcomes would have been more legally feasible, but the constitutional consequences would have been worse. If the

[100] Christian Tomuschat, 'International Organizations as Third Parties under the Law of International Treaties' in Enzo Cannizzaro (ed) *The Law of Treaties Beyond the Vienna Conventions* (Oxford, New York: Oxford University Press, 2011) 217.

General Court had found the EU-Turkey Statement to be attributable to the EU, they could also have found the Statement to violate human rights and the EU constitutional framework. As long as the Member States are the parties, the main issue is the absence of parliamentary consent, in case the Statement is legally binding. On the EU level, there has also been a breach of competence. However, this violation can only lead to an infringement action, which the Commission has no interest in initiating.

Returning to the hypothesis, this section has shown that the EU should be considered the party to the EU-Turkey Statement, rather than the Member States. Attributing the Statement to the Member States is one of two ways in which the EU attempts to avoid accountability for the Statement. In the next section, we will consider the other way: the legally binding nature of the Statement.

2.4 Is the Statement Legally Binding?

When the EU-Turkey Statement was released, a debate emerged on whether it could be a treaty under international law, and thereby legally binding for the parties. This is the second aspect in which the Statement deviates from the formalities of international law. In order to assert whether the EU should be considered accountable for the Statement, we need to examine whether the agreement is legally binding. Under international law, this is primarily relevant in relation to Turkey. Within the EU, the agreement's legal nature decides whether parliamentary consent was required for its conclusion and whether the decision to enter the agreement can be annulled by the CJEU.

This section begins by outlining the definition of a treaty under international law. The requirements are then applied to the EU-Turkey Statement in order to examine whether it is legally binding. Thereafter, I examine whether the Statement could be invalid under international law due to the deficiencies of its conclusion.

2.4.1 Is the Statement a Treaty?

2.4.1.1 Definition of a Treaty

In order to analyse the legal status of the EU-Turkey Statement, we need to define what a treaty is. One definition can be found in Article 2(1)(a) of the VCLT I:

> "Treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.

The ICJ has considered this definition to reflect customary law.[101] Nevertheless, this is only one definition. It is not exhaustive for treaties under international law.[102] Consequently, if an agreement falls within the definition of Article 2(1)(a), it is a treaty. If it does not meet the requirements of the article, it may still be considered a treaty.

From the definition of Article 2(1)(a) of the VCLT I, four requirements can be crystalized. The agreement has to be *international*, concluded *between states*, in *written form* and be *governed by international law*. The article also clarifies that the designation of the agreements or the number of instruments it is divided on is irrelevant. In the following section, these requirements will be applied to the EU-Turkey Statement in order to assess its legal status.

2.4.1.2 Application to the EU-Turkey Statement

To begin with, the requirement of the treaty to be *written* is clearly met in the case of the EU-Turkey Statement.[103] Secondly, the agreement should have an *international* character. This requirement is rather superfluous as it can mainly be assessed by considering the other requirements.[104] Nevertheless, the EU-Turkey Statement is an agreement between international actors.

[101] ICJ (n 22), para 263.
[102] See for example Article 3 of the VCLT I, concerning non-written agreements.
[103] However, if the agreement had been oral, it would not have been any less valid as a treaty under customary law, which explicitly follows from Article 3 of the VCLT I.
[104] Aust (n 36) 17.

Moreover, the elements of the Statement, e g readmission and EU accession, all belong in the international sphere.

Thirdly, the agreement should be *concluded between states*. This question relates to the previous discussion, on who the parties are to the EU-Turkey Statement. In case it is the Member States, this requirement is clearly met. However, the EU cannot be considered a state. Again, the definition in the VCLT I is not exhaustive for all treaties. According to the VCLT II, a treaty may be concluded 'between one or more States and one or more international organizations, or between international organizations'.[105] As follows, the term 'treaty' is not reserved for agreements between states. It also covers agreements entered by other actors of international law, such as the EU, but not for example agreements concluded between companies.[106]

Even before the final Statement was released, the argument was raised that the agreement would not be legally binding since it was headed 'Statement'.[107] Therefore, no procedure of approval would be required, neither on EU nor on national level, and the Statement could not be legally challenged. This standpoint is not entirely without merit since the word 'Statement' usually indicates that the instrument is intended to be non-binding. However, it calls for further scrutiny.

It follows from Article 2 of the Vienna Conventions that the form or heading of the agreement is not relevant for its status as legally binding ('whether embodied in a single instrument or in two or more related instruments and whatever its particular designation'). This has also been repeatedly upheld by international courts and tribunals. For example, the ICJ has consistently found that the form of an agreement is not decisive, but rather to what act it gives impression.[108] In the ICJ case *Aegean Sea*, the situation was similar to the one

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[105] Article 2(1)(a) of the VCLT II.
[106] ICJ, *Anglo-Iranian Oil Company (United Kingdom v Iran)* (Preliminary Objections), ICJ Reports 1952, 89.
[107] Steve Peers, 'The draft EU/Turkey deal on migration and refugees: is it legal?' (*EU Law Analysis* 16 March 2016) http://eulawanalysis.blogspot.se/2016/03/the-draft-euturkey-deal-on-migration.html (accessed 16 May 2018); Karolína Babická, 'EU-Turkey deal seems to be schizophrenic' (*MigrationOnline* 22 March 2016) http://migrationonline.cz/en/eu-turkey-deal-seems-to-be-schizophrenic (accessed 16 May 2018).
[108] This view has also been adopted under EU law, see Olivier Corten and Marianne Dony 'Accord politique ou juridique : Quelle est la nature du "machin" conclu entre l'UE et la Turquie en matière d'asile?' (*EU Immigration and Asylum Law and Policy*, 10 June 2016)

at hand. Greece and Turkey had released a joint communiqué after a meeting and disputed in Court whether it constituted a treaty. The ICJ then held:

> On the question of form, the Court need only observe that it knows of no rule of international law which might preclude a joint communiqué from constituting an international agreement to submit a dispute to arbitration or judicial settlement (cf. Arts. 2, 3 and 11 of the Vienna Convention on the Law of Treaties). Accordingly, whether the Brussels Communiqué of 31 May 1975 does or does not constitute such an agreement essentially depends on the nature of the act or transaction to which the Communiqué gives expression; and it does not settle the question simply to refer to the form - a communiqué - in which that act or transaction is embodied. On the contrary, in determining what was indeed the nature of the act or transaction embodied in the Brussels Communiqué, the Court must have regard above all to its actual terms and to the particular circumstances in which it was drawn up.[109]

This position was repeated in another case, *Qatar/Bahrain*, where the only written text of an agreement was the minutes of a meeting held between the parties. The ICJ stated:

> …the Minutes are not a simple record of a meeting, similar to those drawn up within the framework of the Tripartite Committee; they do not merely give an account of discussions and summarize points of agreement and disagreement. They enumerate the commitments to which the Parties have consented. They thus create rights and obligations in international law for the Parties. They constitute an international agreement.[110]

The ITLOS has also assessed whether a disputed instrument constituted a legally binding agreement. In the case of *Bangladesh v Myanmar*, the Tribunal held that 'what is important is not the form or designation of an

http://eumigrationlawblog.eu/accord-politique-ou-juridique-quelle-est-la-nature-du-machin-conclu-entre-lue-et-la-turquie-en-matiere-dasile/ (accessed 16 May 2018); CJEU (n 46).

[109] ICJ, *Aegean Sea Continental Shelf (Greece v Turkey)* (Judgment) ICJ Report 1978, 3, para 96.

[110] ICJ, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)* (Judgment), ICJ Report 1949, 112, para 25.

instrument but its legal nature and content'.[111] In their assessment, the Tribunal considered four factors:

1. The language of the instrument
2. The circumstances in which the instrument was adopted
3. Competence to enter an agreement
4. Internal constitutional actions[112]

The reasoning by the courts and tribunal brings us to the fourth and most important requirement of the VCLT I definition; that the treaty should be *governed by international law*. Within this requirement lies the intention of the parties to be bound by the agreement.[113] Just like in the assessments of the courts and tribunal, the legal nature of the instruments has to be examined considering the *wording* and the *circumstances* of their conclusion.[114]

While no particular wording is required for an instrument to constitute a treaty, the terminology often indicates the intention to be bound.[115] In the EU-Turkey Statement, the word 'will' is repeatedly used. This differs from the wording normally used in legally binding treaties ('shall' or 'should') and indicates that the Statement is of a political nature rather than legal. There are however other words of the Statement that implies that it is a legally binding act. Most importantly, it states that EU and Turkey 'agreed on the following action points'. The use of the word 'agreed' indicates that the Statement constitutes an agreement, rather than a declaration of political principles. Other words that support this standpoint can be found throughout the Statement, such as 'decided' and 'reconfirmed'.

Regarding the second requirement, the circumstances of the agreement, anything which might indicate the intention of parties may be taken into consideration, such as registration and previous practice of the states. The

[111] ITLOS, *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar)*,(Judgment), ITLOS Reports 2012, 4, para 89.
[112] Ibid, paras 92-97.
[113] Though it is under discussion to what extent the actual intention of the parties is relevant. In *Qatar/Bahrain* (n 110) the ICJ held that it did 'not find it necessary to consider what might have been the intentions of the Foreign Minister of Bahrain or, for that matter, those of the Foreign Minister of Qatar' (para 29). On this discussion, see Aust (n 26) 49-52; Jan Klabbers, *The Concept of Treaty in International Law* (Martinus Nijhoff Publishers 1996).
[114] Aust (n 26) 22.
[115] ICJ *Temple of Priah Vihear* (Preliminary Objections), ICJ Report 1961, 26, paras 31-33.

subject of the agreement is not relevant since the elements of a legally binding agreement can be found in a non-legally binding as well.[116] The EU-Turkey Statement has not been registered with the Secretariat of the United Nations by any of the possible parties. However, while registration might indicate an intention of the parties to be legally bound, absence of registration does not affect the validity or binding nature of an agreement.[117] Turning to the previous practice, this again depends on who the parties are. There have not been any previous agreements between the 28 EU Member States and Turkey, but both the EU and Greece has previously entered agreements with Turkey on readmission. These agreements had similar content, but also a quite different form. There is therefore no established practice between the parties on entering agreements through press releases. The previous agreements were not very successful, which raises questions on why a similar agreement should take a non-legally binding form. The agreement would still be politically binding, but its implementation would be less foreseeable. The other circumstances of the EU-Turkey Statement are difficult to assess since, as previously mentioned, there is no public record of the discussions of the 18 March 2016. There is however a leaked draft of the Statement, according to which 'The agreement will be formulated as an EU-Turkey statement'.[118] This indicates that while the text was released as a statement for the press, the intention of the parties was to enter an agreement.

In the case law mentioned above, the ITLOS also considered the competence of the acting agent and the internal constitutional procedure. When the Statement was entered, several provisions of competence were disregarded, both under domestic law and EU law. However, if violations of internal constitutional frameworks would deprive an instrument of its status as a treaty, this would disregard the protection of third states acting in good faith. Moreover, Article 46 of the Vienna Conventions (discussed in the next section) which regulates these situations would become entirely superfluous.

[116] Aust (n 26) 34.
[117] ICJ (n 110) para 29; ITLOS (n 111) para 99.
[118] Statewatch, *EU-Turkey 18/3/2016 NON-PAPER*, published 16 March 2016 http://statewatch.org/news/2016/mar/eu-turkey-tusk-non-paper.pdf (accessed 16 May 2018).

This indicates that taking these factors into account is an incorrect application of law. I therefore choose to disregard this factor in my assessment.

To summarise these findings, the EU-Turkey Statement is in many ways an unusual instrument. Under customary law, several factors are accepted as indicators of an agreement's legally binding nature. The main issue is the intention of the parties to be bound by international law as expressed by the wording and circumstances of entering the agreement. Here, parts of the wording and the circumstances of the conclusion of the Statement indicate that it might be legally binding. However, the ambiguities on this subject open up for further discussion. While strongest support is given to the viewpoint that the EU-Turkey Statement is a treaty under international law, indications are not unitary, and the EU would, if necessary, also have a good chance at arguing that the agreement is not legally binding. Consequently, the informalities of the EU-Turkey Statement create legal flexibility.

2.4.2 Possible Invalidity

As has been explained so far, the EU-Turkey Statement is most likely a treaty but one with several obscurities regarding its conclusion. It is therefore relevant to consider whether the treaty might be invalid. Even if the Statement is legally binding under international law, it might still be possible to annul it. Of all situations in which a treaty may be invalid, the one most relevant for us is found in Article 46 of the VCLT I.

2.4.2.1 Article 46

Article 46 of the VCLT I concerns international agreements that have been entered in violation of provisions on competence to conclude treaties. As shown in section 2.3, this might be applicable both on the EU and most of the Member States. Paragraph 1 of the article states:

> A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation

> was manifest and concerned a rule of its internal law of fundamental importance.

The article is written with double negation (*may not, unless*) to accentuate that it is only applicable in exceptional cases. This is an attempt to balance state sovereignty and the principle of security of international agreements.[119] The requirements for invalidity are that the violated internal rule has to be of *fundamental importance* and that the violation has to be *manifest.* The second requirement is explained further in the article's next paragraph:

> A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

In other words, the violated provision can only invalidate a treaty if the other party knew or ought to have known that the provision was being violated.[120]

Regarding the other requirement, *fundamental importance*, this importance does not depend on whether the provision is considered constitutional or not under domestic law. Rather, it is defined by its role in the institutional and political structure of the State, and in the relationship between the State and the citizens.[121] Consequently, whether a provision is of fundamental importance depends on the specific characteristics of each state and has to be assessed on a case-by-case basis. There are however some general guidelines. In democracies, the requirement of parliamentary approval when concluding treaties is considered to be of fundamental importance. The same goes for the distribution of competence to enter treaties in federations.[122] The agreement only becomes invalid if Article 46 is invoked by the state whose provision was violated. In practice, this is very rare and the case law on invalidity of treaties is scarce.[123]

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[119] See also Arts 7 and 27 of the VCLT I.
[120] Thilo Rensmann, 'Article 46' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties* (Springer-Verlag Berlin Heidelberg 2012) 775, 784, para 27.
[121] Ibid, 789, para 39.
[122] Ibid, 790, para 40.
[123] Aust (n 26) 312.

At the time of its drafting, the article was considered a progressive development of international law. Previously, international practice surrounding invalidity issues was scattered. However, both Article 46 of the VCLT I and its counterpart in the VCLT II were adopted without dissenting votes and have since then been applied consistently. Therefore, both articles are today considered to reflect customary law.[124]

2.4.2.2 The EU as the Party

In case the EU is the party to the Statement, we need to turn to the EU *acquis* on conclusion of treaties. Several provisions were ignored when entering the EU-Turkey Statement. Most importantly, rules on competence were disregarded and the European Parliament did not approve of the agreement. As has been previously mentioned, the EU is sui generis in international law and may be described as a mixture of an international organisation, a supranational organisation and a federation. By analogy to states, both the requirement of parliamentary consent and the distribution of competence are in general considered to be essential. The violated provisions in relation to the EU-Turkey Statement was thereby clearly of fundamental importance under Article 46 of the VCLT I.

It is difficult to assess the *manifest* requirement under VCLT I, since the European Council does not have a clear counterpart in state organs, the way for example the European Parliament does. However, like most of the articles in VCLT I, a counterpart for international organisations can be found in the VCLT II. Here, Article 46 refers to 'the rules of the organization' instead of 'a provision of internal law'. In our case, this would be the treaties. The *manifest* requirement of Article 46 has either been met if the other party had actual knowledge of the violated provision or was negligently ignorant.[125] The only case law on how to assess this in relation to the EU comes from the CJEU. In *France v Commission* and *Parliament v Council and Commission,* EU institutions had entered international agreements with third countries in violation of the distribution of competence. In both cases, the CJEU

[124] Rensmann (n 120), 803, para 77.
[125] Ibid, 791, para 45.

considered the agreements to be binding for the EU under international law.[126] It therefore seems unlikely that the EU would invoke Article 46 in relation to non-members. The internal rules of the EU are quite complicated and, just like in relation to other states, non-members cannot be expected to familiarise themselves with the internal legal framework.[127] However, in our case, Turkey has negotiated on accession to the EU since 2005. While Turkey may not be expected to have knowledge on the competence of the institutions, it appears questionable that they *de facto* did not know.

2.4.2.3 The Member States as the Parties

In case the Member States are the parties, there might be domestic provisions limiting the Heads of State or Government from entering international agreements on behalf of their states. There is a variety of constitutional frameworks in the 28 Member States, but it does not seem like parliamentary consent to the EU-Turkey Statement has been given in any of them. In democracies, the requirement of parliamentary approval when concluding treaties is in general considered to be of fundamental importance.

However, Article 46 cannot be invoked in cases where the agreement was entered by the Head of State or Government. This is due to the explicit mention of Heads of State or Government in Article 7(2)(a) of the VCLT I as having indisputable authority to express consent.[128] Article 46 should only be used in exceptional circumstances due to the protection of states acting in good faith. As a consequence of Article 7(2)(a), a state that has entered an agreement with another state's Head of State or Government is considered to have acted in good faith. Therefore, the violation of the internal provision cannot be considered manifest in this case.

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[126] Case C-327/91, *France v Commission* EU:C:1994:305, para 25; Joined cases C-317/04 and C-318/04, *Parliament v Council and Commission* EU:C:2006:346, para 73.
[127] Rensmann (n 120), 801, para 73; Aust (n 26) 314. This also applies to situations when Member States enter international agreements which infringe EU obligations or encroach EU competence, see case C-466/98 *Commission v United Kingdom* EU:C:2002:624.
[128] Aust (n 26) 83.

2.4.3 Conclusion

In this section I examined whether the Statement could be considered legally binding under international law. The agreement differs in several ways from a traditional treaty, but this definition is very wide. After all, the Statement is written, between international actors and concerns an international subject. On the fourth requirement, on the intention of the parties to be bound, the indicators are divided. Some of the wording and the circumstances imply that the Statement is a political agreement, and other that it is legal. As the framework of the European Council lacks transparency, we do not have access to much information on the conclusion of the Statement. This opens up for further argumentation in case the question would be brought to court.

I also considered whether the parties of the EU-Turkey Statement could claim invalidity in order to avoid accountability. The answer differs depending on who the party is. In case the EU is the party, they could argue that Turkey had knowledge of their constitutional framework. This is more difficult for the Member States, since their Heads of State or Government are explicitly granted the right to enter international agreements under the VCLT I. In summary, the chances to claim invalidity are small with the EU as a party, but impossible with the Member States as the parties.

2.5 Concluding Remarks

In this chapter I have shown two different ways in which the EU-Turkey Statement differs from traditional treaties. The hypothesis formulated in the beginning of this chapter was:

The legal nature of the EU-Turkey Statement aims to divert the EU of accountability.

The avoidance of accountability through the agreement's legal nature consists of two parts: the parties and the form. As the parties of the EU-Turkey Statement, first believed to be the EU, are now the Member States, the legal

issues of the Statement have moved from the EU level to the national level. While the Member States have not followed their own requirements on parliamentary consent, approval by the European Parliament was not required. The issue that remains for the EU is the division of competence and the Member States' obligations towards the EU under the treaties. However, only the Commission can initiate an infringement procedure for this breach, which they have no interest in doing. For Turkey, the current situation is less than satisfactory, as it has now entered a multilateral agreement with 28 other countries. Moreover, the Statement does not specify how the obligations towards Turkey should be fulfilled by these 28 parties, especially since some obligations require action by EU institutions.

Another issue for Turkey would be to show that the Statement is a legally binding agreement. While it appears to be a treaty, the form of the Statement also makes it possible to argue for the opposite position. This is an issue for union citizens and migrants affected by the Statement as well, as an action for annulment only can be brought before the General Court on acts which have legal effects. Consequently, the conclusion of the Statement cannot be tried against the treaties or the Charter unless the legally binding nature of the Statement is established.

In general, there is a reluctance by institutions to assess the EU-Turkey Statement and bring clear answers on its legal nature. Despite resting on shaky grounds, the Statement is essential for political stability within the EU and is in practice an exercise of EU power. It was concluded within the EU framework by EU organs in order to solve an EU issue. However, keeping the EU accountable for the effects of the Statement is very difficult due to its form and the context of its conclusion. Therefore, I consider the hypothesis of this chapter confirmed.

3 Explaining Unconventional Form

3.1 Introduction

In the previous chapter, I argued that the legal form of the EU-Turkey Statement aims at detaching the EU from accountability. In this chapter I will answer my research question by examining why this form was chosen. As the previous chapter has shown, the legal nature of the EU-Turkey Statement is quite complex. In *NF v European Council*, the European Council argues that the unusual conclusion of the Statement was a result of mistakes and coincidences. However, the benefits of keeping the agreement in its current form indicates legal competence. The question of 'why' may first seem simple. Who would not want to avoid accountability of actions considered both legally and morally questionable? Nevertheless, not all readmission agreements are informal. So why was this form chosen in this particular context? I will begin this chapter by outlining the character of informal international agreements and the increasing trend of abandoning the traditional treaty form. Thereafter I will discuss how the context of the EU-Turkey Statement may have affected its form, first with regard to the relationship between the EU and Turkey and secondly by considering the 2015 migrant influx.

3.2 Informal Agreements

When entering an international agreement, the negotiating parties can always choose freely whether they wish to be legally bound. There is no subject regulated by a legally binding international agreement that could not be agreed upon in a non-legally binding form.[129] In several ways, a non-legally binding agreement comes with fewer obstacles, on the domestic as well as on the international level. In his article on the subject,[130] Charles Lipson identifies four main reasons for choosing informal agreements over formal:

[129] Aust (n 26) 37.
[130] Lipson (n 18).

1. *Avoid ratification*. When a democratic state enters a traditional treaty, approval by the legislative organ is normally required. However, this is not the case with legally non-binding agreements. The independence from parliamentary support can be a reason in itself for choosing to keep an agreement informal, but it also brings about the other three reasons stated below.
2. *Flexibility*. Informal agreements can easily be amended since they do not set out a regulated amendment procedure. As a consequence, the drafting procedure is also facilitated since there is no need to foresee and prevent all the future problems that may arise. This is convenient in situations that are complex or rapidly changing.
3. *Rapidity*. Since an informal agreement does not require any elaborate ratification procedure, it can be entered swiftly. This can be beneficial when a state needs to react fast to a situation.
4. *Invisibility.* Informal agreements are in general less public and prominent than their formal counterparts. Even if the agreement is not kept secret, the lack of a ratification debate reduces public discussion. This makes informal agreements more suitable for controversial subjects than formal agreements.

The main issue with choosing an informal agreement is the increased risk of abandonment. Compared to the domestic context, the difference between legally and non-legally binding agreements is smaller since there is no supranational with a monopoly of violence. In international law, no one can enforce an agreement except the states themselves. Instead, the parties' future reputation on the international scene is the main guarantee of compliance. However, as an informal agreement is considered less of a commitment, the political costs of abandoning an informal agreement is in general lower than of a formal agreement.[131]

For long, international law was seen as an ever-expanding area. International agreements and conventions were reoccurring solutions to

[131] Lipson (n 18) 534; Jean-Pierre Cassarino, 'Informalising Readmission Agreements in the EU Neighbourhood' (2007) 42[2] *The International Spectator* 179, 190.

problems which stretched across borders. However, in the last decades, international law-making has decreased in its traditional form. Agreements are still concluded, but they dispense with formalities connected to the output, process or involved actors. Terms such as 'treaty' or 'international agreement' are avoided, and the drafted documents are instead given titles such as 'conference', 'initiative' or 'strategy'.[132] The informalization trend is not the same as a resort to soft law. While soft law mainly refers to a different output, informalization also differs regarding the involved actors and processes. The new type of agreements is 'not only non-binding under international law, but outside of the traditional international law altogether'.[133]

In their study of the subject, Joost Pauwelyn, Jan Wouters and Ramses Wessels recognized three reasons for the development. First, society is becoming increasingly complex with regard to knowledge and structures. This requires further flexibility of international agreements. Secondly, the international network is becoming more diverse. The international scene has historically been dominated by states. Currently, there are new actors and networks appearing, such as corporative cooperations, NGOs and coalitions of farmers or consumers. As treaties can only be entered by states, informal law-making is required. Thirdly, there is an unwillingness among many states to give up the political power held in constitutions and elected politicians to the benefit of agreements entered by multilateral organisations. Since the 2008 financial crisis, this position has especially affected agreements that may turn out to be an economic burden.[134]

The use of non-traditional forms for readmission agreements has been met with criticism. Some have argued that informal readmission agreements tend to side-step human rights guarantees, lack transparency and be less controllable by democratic institutions.[135] Consequently, it is considered

[132] Joost Pauwelyn, Ramses Wessels and Jan Wouters 'When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking' (2014) 25[3] *European Journal of International Law* 733, 738.
[133] Ibid, 743
[134] Ibid, 739-742.
[135] Sergio Carrera, *Implementation of EU Readmission Agreements: Identity Determination Dilemmas and the Blurring of Rights* (Springer, Cham, 2016), 48; Tineke Strik, *Readmission Agreements as a Mechanism for Returning Irregular Migrants* (Council of

destructive for democracy and inter-state relations as well as from a perspective of migrant protection. While readmission agreements are reciprocal, the negotiating states usually have different interests in readmission. Formally, the parties of the agreement have equal rights of readmitting citizens or migrants to the other party. In practice however, migrant-receiving states benefit from the agreement to a larger extent than migrant-sending. Countries with a strong interest of entering readmission agreements are found in the Global North. For them, successful deportations lower the economic costs for detention and send a political message that the government has control over its border.[136] Migrant-sending countries, on the other hand, usually have little to win but much to lose from entering a readmission agreement. When migrants find employment in richer countries, they tend to send home revenues, providing their families with a higher standard of living. In small countries, revenues can make up a substantial part of the gross domestic product. Migration also lowers the pressure of domestic unemployment. [137] As a consequence, entering a readmission agreement is often an unpopular political decision in migrant-sending countries.

In his study from 2007, Jean-Pierre Cassarino found that the countries which entered formal readmission agreements with the EU were mainly situated in Eastern Europe and had future possibilities of EU accession. This included for example Romania, Bulgaria, Ukraine and Moldova. Often, promises on visa facilitation was involved in the negotiations. According to Cassarino, the hopes of accession and visa facilitation were the main incentives for entering these agreements.[138] Informal readmission agreements were usually entered with Southern or Eastern Mediterranean countries without chances of EU accession. These agreements required longer and more

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Europe, 16 March 2010) http://www.refworld.org/pdfid/4bdadc1c3.pdf (accessed 16 May 2018), para 35.

[136] Adam McKeown, *Melancholy Order: Asian Migration and the Globalization of Borders* (New York, Columbia University Press, 2011).

[137] Luigi Scazzeri and John Springford, *How the EU and third countries can manage migration* (Centre for European Reform, November 2017) 4.

[138] Cassarino (n 131) 179. On the bifurcation of visa policies between OECD and non-OECD countries, see Steffen Mau and others 'The Global Mobility Divide: How Visa Policies Have Evolved over Time' (2015) 41(8) *Journal of Ethnic and Migration Studies,* 1192.

complicated negotiations. Moreover, the invisibility factor was essential for choosing a non-traditional form, as the countries did not wish to appear as if they were bending to Europe's will on expense of their own citizens.[139]

In his article, Cassarino only considers the third countries' reasons for choosing to enter a formal or an informal agreement, implying that the EU always prefers to enter formal agreements. While this might have been correct when his study was conducted, EU representatives have made several statements encouraging more informal cooperation since the 2015 migrant influx.[140] In the discussions surrounding the creation of the EAM, the need for ensuring successful returns has been stressed as a main priority.[141] In the Action Plan concluded by the Member States on the Valletta Summit of 11-12 November 2015, this is stated as a need to 'develop practical cooperation arrangements and bilateral dialogues on implementation of returns with regard, in particular, to identification and issuance of travel documents'.[142] Also in its conclusions of 28 June 2016, the European Council called for the establishment of more 'legally non-binding working arrangement'.[143]

This appears to have been implemented, which corresponds with the informalization trend previously discussed. Of the 18 readmission agreements entered by the EU between 2012 and 2016, only four were in a traditional form. The informal agreements have been entered under headings such as 'Mobility Partnership', 'Common Agenda on Migration and Mobility', 'Joint Way Forward' or 'Good Practices for the Efficient Operation of the Return Procedure'.[144]

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[139] Cassarino (n 131) 189.
[140] Sergio Carrera (n 135) 7-12
[141] European Commission, *A European Agenda on Migration* COM (2015) 240, 13 May 2015.
[142] European Council, *Valletta Summit, 11-12 November 2015: Action Plan,* http://www.consilium.europa.eu/media/21839/action_plan_en.pdf (accessed 16 May 2018) s 5.
[143] European Council, *Draft Council conclusions on the expulsion of illegally staying third-country nationals* 8828/16 (Brussels, 11 May 2016), 4.
[144] Jean-Pierre Cassarino 'European Union's Agreements Linked to Readmission' http://www.jeanpierrecassarino.com/datasets/ra/european-union/ (accessed 16 May 2018).

EU Readmission Arrangements[145]

Informal Agreements		Formal Agreements	
Country	**Concluded**	**Country**	**Entered into force**
Afghanistan	02/10/2016	Albania	01/05/2016
Armenia	27/10/2011	Armenia	01/01/2014
Azerbaijan	05/12/2013	Azerbaijan	01/09/2014
Bangladesh	25/09/2017	FYROM (Macedonia)	01/01/2008
Belarus	13/10/2016	Georgia	01/03/2011
Cape Verde	05/06/2008	Hong Kong	01/03/2004
Cote d'Ivoire	16/04/2016	Macao	01/06/2004
Ethiopia	11/11/2015	Moldova	01/01/2008
Georgia	30/11/2009	Montenegro	01/01/2008
Ghana	16/04/2016	Pakistan	01/12/2010
Guinea	24/07/2017	Russia	01/06/2007
India	29/03/2016	Serbia	01/01/2008
Jordan	09/10/2014	Sri Lanka	01/05/2005
Mali	11/12/2016	Turkey	01/10/2014
Moldova	05/06/2008	Ukraine	01/01/2008
Morocco	07/06/2013		
Niger	03/05/2016		
Nigeria	12/03/2015		
Tunisia	03/03/2014		
Turkey	18/03/2016		

In this table, there is a connection between cultural and economic status and which type of readmission arrangement that is used. In the column to the left, on formal agreements, we find mainly countries that are either European or Westernized (such as Hong Kong). The other column, which lists the parties

[145] Jean-Pierre Cassarino 'European Union's Agreements Linked to Readmission' http://www.jeanpierrecassarino.com/datasets/ra/european-union/ (accessed 16 May 2018).

to informal readmission arrangement, is dominated by states in Northern Africa, Western Africa and Southwest Asia. By comparison, within the EU readmission of asylum seekers is even more formalized as it is legislated through a regulation.[146] There appears to be a connection between the level of formalization and whether the third country is considered European, or rather *how* European.[147] As noted by Cassarino, visa liberalisation has been one of the main incentives to enter readmission agreements with the EU. As shown elsewhere, there is a mobility divide between OECD and non-OECD countries, where citizens of rich countries enjoy visa freedom to a much larger extent than citizens of other countries.[148] The division between formal and informal agreements appears to correspond to this divide, but this would require further research.

Several countries in Eastern Asia can be found in both columns. Armenia, Georgia, Azerbaijan and Turkey have all entered both informal and formal agreements on readmission with the EU. However, except for in Turkey's case, the informal agreements were all entered before the formal readmission agreements. This reflects the EU strategy to use informal agreements to initiate cooperation in order to enter a formal agreement at a later stage.[149] With Turkey, the *EU-Turkey Readmission Agreement* was entered before the EU-Turkey Statement was released. In the following section we will consider this agreement further.

[146] Council Regulation (EU) 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2003] OJ L 180/31.
[147] On cultural understandings on Eastern Europe and Balkan, see Katherine Fleming 'Orientalism, the Balkans, and Balkan Historiography' (2000) 105[4] *The American Historical Review* 1218; Frank Schimmelfennig, 'Liberal Identity and Postnationalist Inclusion: The Eastern Enlargement of the European Union' in Lars-Erik Cederman (ed) *Constructing Europe's Identity: The External Dimension* (Boulder, CO: Lynne Rienner, 2001).
[148] Mau and others (n 138).
[149] Cassarino (n 131), 182.

3.3 EU-Turkey Relations

In several ways, Turkey holds a particular position in relation to the EU. The country is situated on Europe's border and has been a member of the Council of Europe since 1949. Formally, it has the potential of EU accession, but in practice this progress is slow. Turkey expressed interest in joining the EU (then the EEC) already in 1959 and signed the Ankara Agreement on accession in 1963. In the 70s and 80s, Turkey struggled economically as well as politically, which was an obstacle for its accession. However, since the middle of the 90s the EU-Turkey relationship has improved and in 1999 Turkey was given official candidacy status.

For long, negotiations were stalled since Turkey was required to fulfil the Copenhagen criteria to be eligible for membership. These criteria require candidate countries to hold a high standard of economic stability, democracy, rule of law, human rights and respect for minorities. The criteria were not fulfilled until 2005. The first chapter of accession was opened in 2006 but was closed on the same day. The reason was that EU asked Turkey to implement the Additional Protocol to the Ankara Agreement, which included an update of the ten Member States that joined the EU in 2004. However, this would require Turkey to recognise Southern Cyprus, which it refused. Since then, negotiations have been proceeding at a slow pace. Attempts have been made to reopen some of the accession chapters, but the negotiations were blocked, first by France in 2007 and later by Cyprus in 2009.[150]

Since Turkey first expressed a will to join the EU, almost 60 years ago, several other countries have gone through the accession procedure in much shorter time. However, none of them were Muslim. Since Turkey fulfilled the Copenhagen Criteria, the disinclination to access Turkey into the union has often been discussed in terms of orientalism.[151] Culturally, Turkey is

[150] Geddikaya Pal, 'The Effects Of The Refugee Crisis On The EU-Turkey Relations: The Readmission Agreement And Beyond' (2016) 12[3] *European Scientific Journal* 14, 23.
[151] On orientalism and 'Othering', see Edward W Said, *Orientalism* (New York, Pantheon Books, 1978). On Orientalism in EU-Turkey negotiations, see Bahar Rumelili 'Constructing Identity and Relating to Difference: Understanding the EU's Mode of Differentiation' (2004) 30[1] *Review of International Studies* 27; Meltem Muftuler-Bac and

considered to hold a 'liminal' position towards the EU. It is not a clearly defined 'Other' which Europe can reflect and define itself in relation to. Neither is it considered to be just another European country. Turkey is not quite out, but also never completely let inside.[152]

For example, in discussions on Turkey in the European Parliament, exclusion is often legitimized by referring to Europe's Christian tradition. This is put in terms of differences regarding 'culture' or 'values'.[153] Enlarging the EU to include Turkey brings the European identity into question and causes discussion on what is truly European. Within the EU, the attitude towards Turkey has always been divided. When the accession negotiations with Turkey were revitalized in 2005, several Member States opposed this development.[154] Turkey has however never been entirely excluded as a candidate. This can be compared to the response to Morocco's application in 1987 which was unequivocally negative. Unlike Turkey, Morocco was clearly not European.[155] Turkey on the other hand is situated in Europe's periphery, both in regards of geography and identity. This ambivalent position is also reflected in Turkey's relation to the EU. Unlike candidate countries in Eastern and Central Europe, Turkey has not been outright willing to accept the EU's conditions for accession. Within Turkey, there is a similar perception of Europe as a threat, which aims to weaken Turkey, in particular by strengthening Cyprus and the Kurdish community.[156]

The negotiations leading up to the conclusion of the 2014 *EU-Turkey Readmission Agreement* are well-documented. They began in 2005, at the same time as EU-Turkey relations improved. In this agreement, visa liberalization was also a central element. In previous discussions with

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Evrim Taskin 'Turkey's Accession to the European Union: Does Culture and Identity play a Role?' (2007) 6[2] *Ankara Review of European Studies*, 31; Juliette Tolay 'Discovering Immigration into Turkey: The Emergence of a Dynamic Field' (2012) 53[6] *International Migration* 57.

[152] Bahar Rumelili, 'Liminality and Perpetuation of Conflicts: Turkish-Greek Relations in the Context of Community-Building by the EU' (2003) 9 *European Journal of International Relations* 213.

[153] Muftuler-Bac and Taskin (n 151) 35.

[154] Frank Schimmelfennig, 'EU Membership Negotiations with Turkey' in Daniel Thomas (ed) *Making EU Foreign Policy. Palgrave Studies in International Relations Series* (Palgrave Macmillan, London, 2011) 113.

[155] Rumelili (n 151), 40

[156] Ibid, 45.

Member States, Turkey had primarily requested financial resources for border management. When the negotiations of the readmission agreement began, Turkey asked for visa liberalizations similar to those that had just been granted countries in Western Balkan. However, the EU ministers of interior were only willing to commit to a 'dialogue on visa, mobility and migration'.[157] As discussed above, the Member States had varied relationships to Turkey and some were not willing to begin a visa liberalization process. After continued negotiations, an actual dialogue was opened in 2011.[158]

Several of the EU Member States wanted to be certain that the readmission agreement would be used in practice before beginning to implement the visa liberalization roadmap. Possibly, this was due to the experience of the *Greece-Turkey Protocol* from 2002, which hardly resulted in any readmissions. Therefore, they required Turkey to ratify the readmission agreement before they committed to visa liberalizations. Turkey on the other hand had experienced discrimination in the past and had low trust that the visa liberalization roadmap would be completed.[159] The lack of clear answers and the divergent positions of the EU Member States increased the perception of the visa liberalization roadmap as weak and lacking credibility.[160]

As follows, the complex relationship between Turkey and the EU affected their ability to negotiate agreements. Moreover, the 2014 agreement was negotiated at a time when Euroscepticism was much lower than today, in Turkey as well as in the EU.[161] Taking these factors into account, entering an informal agreement might have been a simpler task for the European Heads of State and Government. From Turkey's perspective, it is questionable that it would have intended to enter into a, possibly non-binding, agreement with

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[157] Alexandra Stiglmayer, 'Visa-Free Travel for Turkey: in Everybody's Interest' (2012) 11 *Turkish Policy Quartely* 99, 102.
[158] Sarah Wolff, 'The Politics of Negotiating EU Readmission Agreements: Insights from Morocco and Turkey'(2014) 16 *European Journal of Migration and Law,* 69, 87.
[159] Ibid, 88.
[160] Ibid, 90.
[161] European Commission, Eurobarometer, *Taking everything into account, would you say that our country would benefit or not from being a member of the European Union?* http://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/Chart/getChart/themeKy/4/groupKy/313 (accessed 17 May 2018).

28 other parties. However, it is possible that the legal definition was not important to Turkey. It has been argued that international law holds a weak position in Middle Eastern countries due to orientalism in international relations. As international law has been applied in a different manner in the Middle East compared to the Western world, it has become considered instrumental rather than objective. As a result, international law lacks legitimacy in the region.[162] In a similar way, Turkey already considered itself to have been discriminated in its relations with the EU, also in formal relations. Moreover, if Turkey was skeptical of cooperating with the EU on migration matters, it appears to have been correct. While several returns of migrants from Greece have taken place, there has been slow or no progress of the EU's obligations towards Turkey flowing from the EU-Turkey Statement.[163]

The controversy of cooperating with Turkey most likely affected the choice to enter an informal agreement. However, there were also other factors involved. The pressing issue of the ongoing migrant 'crisis' required a swifter response than had been possible to reach through a formal procedure. The negotiations leading up to the 2014 *EU-Turkey Readmission Agreement* took in total ten years. By contrast, the discussions on the EU-Turkey Statement began in November 2015 and ended four months later. While the conclusion of the second agreement was probably facilitated by the existence of the first, this is nevertheless a major difference. Therefore, we need to how the context of the crisis affected the course of action.

[162] Jean Allain, 'Orientalism and International Law: The Middle East as the Underclass of the International Legal Order' (2004) 17[2] *Leiden Journal of International Law* 391.
[163] European Commission, *Seventh Report on the Progress made in the implementation of the EU-Turkey Statement COM(2017) 470 final* (Brussels, 6 September 2017) https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20170906_seventh_report_on_the_progress_in_the_implementation_of_the_eu-turkey_statement_en.pdf (accessed 16 May 2018).

3.4 Reaction to Migration Crisis

Over the last decades, there have been several deficits in EU migration policies which culminated in the 2015 migration crisis. The EU has tried to control and avert unwanted immigration through combining different preventive measures, such as carrier sanctions and visa obligations, while proposals for legal pathways have consistently been opposed. Between the Member States, the system for division of responsibility has been the recast Dublin Regulation which concentrates asylum seekers on the EU's external borders and coastal countries. Consequently, Italy, Greece and Hungary, which are all countries in unstable economic and political situations, receive a disproportionate amount of asylum applications compared to the other EU countries. The failure of the Dublin mechanism has been pointed out for long without any response.[164]

As mentioned in the first section of this chapter, informal agreements are chosen for their speed, flexibility, invisibility and the avoidance of a ratification procedure. These reasons correspond well to the situation of a crisis. In particular the factors of speed and flexibility are beneficial in a rapturing situation where circumstances change fast. The factor of invisibility is only partly applicable to our situation. On the one hand, the Statement has received much attention and the EU has portrayed it as the antidote of the migrant influx.[165] On the other, the agreement was never discussed in the European Parliament but instead kept secret until it was released. Thereby the European Council avoided a public debate on their relations with Turkey and on human rights concerns before the agreement was in force.

In political theory and legal theory, many have written on the actions of sovereign states at times of crisis.[166] Lately, the subject of state of emergency

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[164] Elspeth Guild and others, *Enhancing the CEAS and alternatives for Dublin* (European Parliament, 2015); Valsamis Mitsilegas, 'Solidarity and Trust in the CEAS' (2014) 2[2] *Comparative Migration Studies* 181; Matiada Ngalikpima and Maria Hennessy, *Dublin II regulation: Lives on hold* (ECRE, 2013).

[165] European Commission, *EU-Turkey Statement: Two years on* (April 2018) https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20180314_eu-turkey-two-years-on_en.pdf (accessed 17 May 2018).

[166] John Locke, *Two Treatises of Government*, Peter Laslett (ed) (Cambridge: UK, Cambridge University Press 2005); Carl Schmitt, *Politische Theologie* (Berlin: Duncker

has seen a revival, in particular following 9/11 and the 2008 financial crisis.[167] It is in general accepted that a sovereign power is allowed, to a certain degree, to set aside constitutional provisions and human rights guarantees at a time when it considers itself threatened. As a means for self-preservation, the sovereign assumes the role of the judiciary and suspends some of the rules of law.[168] This course of action can be traced back to the Roman Empire, and variations can be found in most constitutions and human rights conventions today.[169] Usually, this exceptional state is triggered by activating one particular provision. In order to protect the rule of law, lawlessness is then created by and included in the law. Consequently, the line between law and politics becomes blurred.

The procedure of a sovereign entering into a state of emergency is defined by the shift of power from the legislative to the executive. This is the same process that occurs when an international agreement is concluded informally rather than in a traditional form. Both these actions are characterized by a withdrawal of the legal to the benefit of the political. This reflects a standpoint that at times of crisis, constitutional frameworks and bureaucracy become shackles.

As the EU is no sovereign, it has no legal framework for entering a state of emergency. While it is possible to derogate from fundamental rights of the Charter under certain conditions, the principle of non-refoulement remains absolute. Moreover, high migration influx has not been considered a legitimate ground for exceptions under European human rights law.[170] Consequently, there is no way within the law to explicitly exempt migrants from protection at times of crisis.

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and Humblot, 1978); Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford, Stanford University Press, 1998).

[167] Bonnie Honig, *Emergency Politics: Law, Paradox and Democracy* (Princeton, NJ: Princeton University Press, 2009); Slavoj Zizek *Welcome to the Desert of Reality* (Verso, 2002).

[168] Though opinions differ on whether the state of exception is meant to protect society (and the people within that society) or the state structure itself. For first perspective, see Locke (n 166) for second perspective, see Agamben (n 166).

[169] See eg Art 15 ECHR.

[170] ECtHR, *MSS v Belgium and Greece* (GC) ECHR 2011-I 255, para 233; *Hirsi Jamaa and others v Italy* (GC), ECHR 2012-II 97, paras 122 and 176. The interpretation of the Charter should follow the interpretation of the ECHR according to Article 52(3) of the Charter.

However, as has been discussed previously, while the EU is not a sovereign, it resembles a sovereign in several ways. Since it is an important political actor on the European scene, its institutions hold a strong interest of self-preservation. Moreover, the checks and balances of the system are mainly between the Union and the Member States, similar to the construction of a federation. The Commission is supposed to promote the EU project, while the European Council should prevent it from growing too strong on behalf of the Member States.[171]

The constitutional framework and fundamental rights norms are also supposed to be upheld by the EU courts. The question of why the General Court decided to avoid a substantial judgment has already been discussed in a previous chapter. However, as a consequence of the orders, the action for annulment pathway is blocked. As the agreement is between the Member States and Turkey, it can no longer be tried on the EU level. The only possible consequence would be if the Commission would begin infringement procedures towards the Member States for disregarding the division of competence and thereby failing to fulfil their obligations. However, neither the Commission nor any other EU institution have an interest in interfering with the EU-Turkey Statement. From the position of the Member States, the Statement prevents migrants from entering the EU, which, they hope, will also prevent further spread of nationalism and racism within the European countries. From the position of the EU, the EU-Turkey Statement concealed internal conflicts and indicated unity as well as ability to take action at a time when Euroscepticism was rising. Consequently, the EU and the Member States have a mutual interest in shifting the burden of the migrants over on Turkey, at the expense of human rights protection.

Despite the lack of legal pathways for exempting the constitutional framework and fundamental rights norms, combining the mutual feeling of crisis and the reliance on division of power creates a similar effect. Rather than an exception from law within the law, this situation becomes an exception from law besides the law.

[171] Cf Arts 15-17 TEU.

The EU-Turkey Statement reflects the EU's position on the international scene. On the one hand, the EU has seized power over subjects traditionally connected to sovereignty and the self-determination of states, such as borders and migration.[172] Since the 2015 crisis, this control appears to increase. On the other hand, the EU cannot be held accountable for its migration policies. This is instead transferred to the Member States, as if the EU was not an independent legal actor at all.[173] This position poses a new case for international law. In an anarchical legal order, the sovereignty of all actors has to be absolute. Consequently, the privileged position of the EU as a *sui generis* actor enables it to create legal acts which does not fit the current system, such as the EU-Turkey Statement.

Returning to the theoretical framework laid out by political theorists, the main issue with the state of emergency is the risk of normalization. That is, what was first considered an exceptional and temporary shift of power soon becomes the normal state of affairs. The state of emergency becomes permanent. This change does not have to take the form of legislation but could also be a change in constitutional practices where the relation between different democratic institutions is gradually transformed. Historically, activating a state of emergency has often been a crucial step in a development a more centralized and authoritarian form of government.[174] In the EU, the EAM is continuously being developed. Even though migration to the EU's external borders has dropped,[175] new proposals for policies and legislation are still being made to manage the migration crisis. These proposals aim to minimise the differences in reception standards between the Member States and to develop a system for relocation of asylum seekers.[176] Consequently, the Member States' discretion on migration issues is being further narrowed.

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[172] McKeown (n 136).
[173] CJEU, joined cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* EU:C:2008:461; *Opinion 2/13 of 18 December 2014*, EU:C:2014:2454.
[174] Marc de Wilde, 'Just Trust Us: A Short History of Emergency Powers and Constitutional Change' (2015) 3[1] *Comparative Legal History* 110.
[175] UNHCR, *Nationality of arrivals to Greece, Italy and Spain - Monthly - Jan to Dec 2016* (2 February 2017), https://data2.unhcr.org/en/documents/download/53447 (accessed 16 May 2018) Figure 3.
[176] European Commission, 'Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection

As previously discussed, the EAM has also led to the conclusion of several readmission agreements between the EU and third countries in Western and Northern Africa. These agreements have primarily been informal, following the general trend of informalization of international law. In summary, the responses from the EU to the 2015 migration crisis has been to expand its control over Member States as well as third countries.

The aim of checks and balances is to prevent abuse of power and secure the democratic will. In the case of the EU-Turkey Statement, no democratic institution has opposed itself to the agreement. So, if everyone agrees, what is the problem? I would like to finish this thesis by stating two of the issues with the method of concluding the EU-Turkey Statement. This is necessary, as actions undertaken as an answer to emergencies tend to legitimise themselves by the need to restore order, without asking the question of which order that is restored.

First, the issue of accountability. In the words of Lipson, 'informality is best understood as a device for minimizing the impediments to cooperation, at both the domestic and international levels'.[177] To begin with, formal agreements require a ratification procedure, while informal agreements do not. As has been noted by Pauwelyn, Wouters and Wessels, this distinction does not make sense. Legally non-binding agreements can be just as constraining on individual freedom or as affecting on public policy and external relations as legally binding agreements. Considering the reasons for demanding parliamentary consent, the requirement for ratification should be dependent on the subject matter and the impact of the agreement, not its form.[178] International agreements are always a type of coercion, and all acts of coercion should be possible to hold accountable.[179]

(recast)' COM/2016/0465 final - 2016/0222 (COD); European Commission, 'Proposal for a Regulation of the European Parliament of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)' COM/2016/0270 final/2 - 2016/0133 (COD).

[177] Lipson (n 18) 500.

[178] Pauwelyn, Wessels and Wouters (n 132) 748.

[179] Joost Pauwelyn and George Pavlakos, 'Principled Monism and The Normative Conception of Coercion under International Law', in M. Evans and P. Koutrakos (eds), *Beyond the Established Orders: Policy Interconnections Between the EU and the Rest of the World* (Hart: Oxford, 2011), 317.

Moreover, the concept of democracy stretches past parliamentary consent. As was initially stated in this chapter, one of the benefits of informal agreements is their invisibility and the avoidance of public discussion due to the lack of a ratification debate. While there was a strong support of the EU-Turkey Statement when it was concluded, as well a general aversion against migrants,[180] we cannot know if a prior public discussion would have led to the same outcome. Both migration and the relationship to Turkey are controversial issues which divide the Member States.

The final accountability issue is that agreements such as the EU-Turkey Statement cuts off one legal remedy on human rights guarantees. As has been argued previously, the agreement was entered to serve EU interests. In the current situation, it is not possible to assess whether the Statement is in accordance with human rights norms on the same level as the agreement was concluded. Also, since the EU is not a Contracting Party of the ECHR, its actions cannot be tried by the Strasbourg Court. Nevertheless, both Turkey and Greece are parties to the Convention and the possibility still remains to appeal the returns to the ECtHR. While all EU Member States benefit from the agreement, the downgrading of the human rights record would only affect Greece. However, appealing to the ECtHR is in practice a very difficult and lengthy procedure, mainly available in theory.

Moreover, it is necessary to reflect over who it is that formulates a crisis, and what is considered to be its cause. Historically, the issue with state of emergency has been that the sovereign is the one entrusted with the power to activate the exception. If the sovereign itself can decide when to suspend democracy, democracy becomes an illusion as it is always dependent on the good will of the sovereign.[181] In our situation, the problem lies outside of the judicial sphere. The migrant influx of 2015 was consistently described as a 'migrant crisis' in media as well as in public discussion. However, the cause of the crisis could also have been framed as the lack of legal pathways or internal EU solidarity or even the issue of global economic injustice. Instead,

[180] European Commission, *Standard Eurobarometer 85: Spring 2016* (Brussels, July 2016) 36.
[181] Schmitt (n 166).

it was described as an external 'unprecedented pressure'.[182] In general, migration is a subject which is often described as a crisis. Over time, the depiction of migrants as a threat, using word such as 'flood' or 'crisis', has increased.[183] As Douglas Massey has shown in his studies on the subject, cultivating a 'politics of fear' against migrants can often be a strategy for achieving political and economic gains.[184]

To a certain extent this is just a drawback of democracy, which occur also in domestic contexts and in regular legislation procedures. Nevertheless, to shape a norm as an unclear agreement such as the EU-Turkey Statement increases the risk of basing it on erroneous grounds. As the use of informal agreements facilitates the conclusion procedure, avoids ratification debates and accountability procedures as well as occasionally keeps the whole agreement invisible, the scope for substantial discussion and scrutiny becomes limited. Consequently, it becomes difficult to dissect the basis of a decision.

3.5 Conclusion

In recent years, the EU has increasingly abandoned formal readmission agreements, in particular in relation to non-European countries. The main benefit of informalization is the avoidance of ratification. As no parliamentary consent is required, an informal agreement can be concluded much quicker and less visible compared to a formal agreement. As a result, informal agreements are particularly beneficial on controversial subjects, or as a reaction to a crisis.

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[182] European Commission (n 2).

[183] Leo Chavez, *Covering Immigration: Population Images and the Politics of the Nation* (Berkeley, University of California Press, 2001); Marisa Abrajano and Hajnal Zoltan, *White Backlash: Immigration, Race, and American Politics* (Princeton, NJ: Princeton University Press, 2015).

[184] Douglas Massey, 'A Missing Element in Migration Theories' (2015) 12[3] *Migration Letters* 279, 287-288; cf Corey Robin, *Fear: The History of a Political Idea* (Oxford, UK: Oxford University Press, 2006) and Daniel Gardner, *The Science of Fear: Why We Fear the Things We Shouldn't--and Put Ourselves in Greater Danger* (New York: Dutton, 2008).

When the EU-Turkey Statement was concluded, the EU found itself balancing both these situations. The 2015 migrant influx had caused political tension, both within Member States and towards the EU as a whole. When the first attempts to solve the crisis through internal cooperation had failed, the EU instead chose to shift the burden of migrants to an external actor; Turkey. Up until this point, EU-Turkey relations had been instable, in particular regarding Turkey's potential accession. Following the influx, the EU was increasingly willing to include Turkey in exchange for readmission of migrants and the general perception of the EU as a competent actor.

Within the EU constitutional framework, using informal agreements represents a shift from the legislative power to the executive. While this is a common reaction at times of crisis, the normalization of such measures tends to transform the balance between constitutional organs and have a detrimental effect on democratic safeguards.

4 Concluding remarks

By writing this thesis, I hope to provide an overview on how EU policy on migration is developing and why the EU-Turkey Statement has been subjected to so much discussion. I have done so by analysing the legal nature of the EU-Turkey Statement, the political landscape in which it was concluded and the interplay between these two. In this final chapter, I wish to give a summary of the argument of this thesis and a concise answer to the research question. Thereafter I will make some remarks on the need for further research on this subject.

The research question formulated in the initial chapter was:

Why does the EU-Turkey Statement have an unconventional form?

The purpose of Chapter Two was to explain in what ways the EU-Turkey Statement is unconventional and how this affects accountability. This chapter was divided in two sections, each focusing on an untraditional aspect of the EU-Turkey Statement. The first section concerned who the parties are to the Statement. Here, I argued that the EU is the actual party of the Statement. The main obstacle for this argument is the General Court order *NF v European Council*. In this case, the General Court found the Statement to be attributable to the Member States due to minor details and coincidences of its conclusion. This reasoning was in several ways flawed and disregarded previous case law, most importantly the established practice on considering division of competence. The argument of this section was written through the method of explaining outcomes by describing alternatives. As was shown, all outcomes would have generated problems. While there are several constitutional issues with the current status of the EU-Turkey Statement, these can no longer be tried on the EU level. The only conflict that risks reaching the CJEU is the violation of the division of competence, which would require the Commission to take action against all the Member States. As the Commission facilitated the conclusion of the EU-Turkey Statement, this seems very unlikely.

The next section focused on the other unconventional aspect of the Statement; its form. Several experts on migration law has provided convincing arguments both for and against the legally binding nature of the Statement. The Statement regulates a matter of international law and contains elements that resemble obligations. There are wordings that indicate a will to be legally bound, but also others that imply that the Statement is merely a political declaration. Also considering the previous agreements and leaked drafts of the Statement, both standpoints are plausible. In case the Statement is legally binding, another option is to claim that it was invalid due to the shortcomings of its entering. This cannot be done in case the Member States are the parties since the Heads of State and Government has indisputable competence to enter international agreements. If the EU is the party, it might succeed in annulling the agreement if it can show that Turkey knew of their constitutional framework. However, it is in practice very rare to invoke invalidity of a treaty.

The main argument in Chapter Two is that informalization and legal uncertainties creates flexibility. This facilitates avoiding accountability since it opens up for arguing that the agreement is not legally binding or not attributable to the EU.

Chapter Three took a broader perspective on the EU-Turkey Statement by considering the political context in which the agreement was entered. The basis for this analysis was Charles Lipsons four reasons for choosing an informal agreement; rapidity, flexibility, invisibility and avoidance of a ratification procedure. The characteristics of an informal agreement makes it more beneficial than a formal one in situations of crisis and controversy. In 2015, increasing numbers of asylum seekers were entering Europe through Turkey. Due to internal political tension, the EU had to cooperate with Turkey despite previous conflicts. The Statement had to be entered quickly to provide a solution to the migrant influx. In this situation, an informal agreement is easier to enter since it is flexible and a ratification debate is avoided. This shift from legislative to executive power is a common reaction to a crisis. Unfortunately, it tends to side-step democratic safeguards and bring about difficulties in attributing accountability.

So, why does the EU-Turkey Statement have an unconventional form? I would like to answer this as following: The form of the EU-Turkey Statement makes it possible for the EU to avoid accountability. This form facilitates the conclusion of controversial, flexible and quick agreements which was essential to the EU in its crisis at the time of the 2015 migrant influx.

The characteristics of the EU-Turkey Statement is a part of a larger development of informalization, both in international law in general and in EU readmission arrangement in particular. To make a complete overview of this development is outside the scope of this thesis, but I believe there is a need for further research of informalization in the field of migration. The latest study on the informalization of EU readmission agreements (to my knowledge) was undertaken in 2007. However, the development appears to have accelerated since 2015. The practice seems to affect Orientalized countries and former colonies in particular. I would therefore welcome a study on how this informalization is connected to cultural ideas of East/West or to global inequality, as reflected in the division of visa mobility.

Bibliography

Abrajano, M, and Zoltan, M, *White Backlash: Immigration, Race, and American Politics* (Princeton, NJ: Princeton University Press, 2015).

Agamben, G, *Homo Sacer: Sovereign Power and Bare Life* (Stanford, Stanford University Press, 1998).

Allain, J 'Orientalism and International Law: The Middle East as the Underclass of the International Legal Order' (2004) 17[2] *Leiden Journal of International Law* 391.

Amnesty International, *A Blueprint for Despair: Human Rights Impact of the EU-Turkey Deal* (London, 2017)

Ask the EU, *Legal advice and/or analysis of the legality on EU-Turkey agreements,* 17 March 2016 https://www.asktheeu.org/en/request/legal_advice_andor_analysis_of_t_2#outgoing-5620 (accessed 9 April 2018)

Aust, A, *Modern Treaty Law and Practice (*2nd ed, Cambridge University Press, 2007).

Babická, K, 'EU-Turkey deal seems to be schizophrenic' (MigrationOnline 22 March 2016) http://migrationonline.cz/en/eu-turkey-deal-seems-to-be-schizophrenic (accessed 16 May 2018).

Battjes, H, and Ulusoy, O, *Situation of Readmitted Migrants and Refugees from Greece to Turkey under the EU-Turkey Statement* (Migration Law Series, 2017)

Bengoetxea, J 'The EU as (More Than) an International Organization' in Klabbers, J, and Wallendahl, Å, *Research Handbook on the Law of International Organizations* (Northampton Publishing House 2011).

Cannizzaro E, 'Disintegration through law?' (2016) 1[1] *European Papers* 3.

-- 'Denialism as the Supreme Expression of Realism – A Quick Comment on NF v. European Council' in *European Papers*, Vol 2, Issue 1, 2017, European Forum, Insight of 15 March 2017, pp 251-257.

Carrera, S, *Implementation of EU Readmission Agreements: Identity Determination Dilemmas and the Blurring of Rights* (Springer, Cham, 2016),

Cassarino, J-P, 'European Union's Agreements Linked to Readmission' http://www.jeanpierrecassarino.com/datasets/ra/european-union/ (accessed 16 May 2018).

-- 'Informalising Readmission Agreements in the EU Neighbourhood' (2007) 42[2] *The International Spectator* 179

Chavez, L, *Covering Immigration: Population Images and the Politics of the Nation* (Berkeley, University of California Press, 2001)

Corten, O and Dony, M, 'Accord politique ou juridique : Quelle est la nature du "machin" conclu entre l'UE et la Turquie en matière d'asile?' (*EU Immigration and Asylum Law and Policy*, 10 June 2016) http://eumigrationlawblog.eu/accord-politique-ou-juridique-quelle-est-la-nature-du-machin-conclu-entre-lue-et-la-turquie-en-matiere-dasile/ (accessed 16 May 2018).

Crépeau, F, *Report of the Special Rapporteur on the human rights of migrants on his mission to Greece* A/HRC/35/25/Add.2 (UN General Assembly, 2017)

de Wilde, M, 'Just Trust Us: A Short History of Emergency Powers and Constitutional Change' (2015) 3[1] *Comparative Legal History* 110.

Dimitriadi, A, *The Impact of the EU-Turkey Statement on Protection and Reception : The Case of Greece* (Global Turkey in Europe No 15, 2016) http://www.iai.it/en/pubblicazioni/impact-eu-turkey-statement-protection-and-reception-case-greece (accessed 17 May 2018)

Ekşi, N, 'Readmission Agreement Between the European Union and Turkey: A Chain of Mistakes' in *International Community And Refugees: Responsibilities, Possibilities, Human Rights Violations* (2016, Istanbul: Amnesty International Turkey)

Eurostat, *Asylum applications (non-EU) in the EU-28 Member States, 2006–2017*, http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics (accessed 20 April 2018).

-- *Asylum and new asylum applicants by citizenship, age and sex, Annual aggregated data (rounded)*, http://ec.europa.eu/eurostat/data/database (accessed 17 May 2018).

-- *First instance decisions on applications by citizenship, age and sex, Annual aggregated data (rounded),* http://ec.europa.eu/eurostat/data/database (accessed 17 May 2018).

European Commission, *A European Agenda on Migration* COM (2015) 240, 13 May 2015.

-- *Draft Council conclusions on the expulsion of illegally staying third-country nationals 8828/16* (Brussels, 11 May 2016).

-- Eurobarometer, *Taking everything into account, would you say that our country would benefit or not from being a member of the European Union?* http://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/Chart/getChart/themeKy/4/groupKy/313 (accessed 17 May 2018).

-- *EU-Turkey joint action plan*, 15 October 2015, MEMO/15/5860

-- *EU-Turkey Statement: Two years on (April 2018)* https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20180314_eu-turkey-two-years-on_en.pdf (accessed 17 May 2018).

-- *Fact sheet - Implementing the EU-Turkey Agreement Questions and Answers* (Brussels, 15 June 2016) http://europa.eu/rapid/press-release_MEMO-16-1664_en.html (accessed 26 April 2018).

-- *First Report on the progress made in the implementation of the EU-Turkey Statement* (Brussels, 20 April 2016) https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160420/report_implementation_eu-turkey_agreement_nr_01_en.pdf (accessed 26 April 2018).

-- *Seventh Report on the Progress made in the implementation of the EU-Turkey Statement* (Brussels, 6 September 2017) https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20170906_seventh_report_on_the_progress_in_the_implementation_of_the_eu-turkey_statement_en.pdf (accessed 16 May 2018).

-- *Standard Eurobarometer 85: Spring 2016* (Brussels, July 2016)

European Council, *EU-Turkey statement* (18 March 2016) http://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/ (accessed 15 May 2018).

-- *European Council Conclusions on Ukraine* (15 December 2016), https://www.consilium.europa.eu/media/24151/15-euco-conclusions-ukraine.pdf (accessed 17 May 2018).

-- *Meeting of the EU heads of state or government with Turkey* (Brussels, 29 November 2016) http://www.consilium.europa.eu/en/meetings/international-summit/2015/11/29/ (accessed 17 May 2018).

-- *Opinion of the Legal Counsel*, EUCO 37/16 (Brussels, 12 December 2016) http://data.consilium.europa.eu/doc/document/ST-15-2016-INIT/en/pdf (accessed 17 May 2018).

-- *Valletta Summit, 11-12 November 2015: Action Plan*, http://www.consilium.europa.eu/media/21839/action_plan_en.pdf (accessed 16 May 2018).

European Stability Initiative, *The Refugee Crisis Through Statistics*, 30 January 2017, https://www.esiweb.org/pdf/ESI%20-%20The%20refugee%20crisis%20through%20statistics%20-%2030%20Jan%202017.pdf (accessed 15 May 2018).

Fitzmaurice M, 'Consent to Be Bound – Anything New under the Sun?' (2005) 74[3] *Nordic Journal of International Law* 483

Fleming, K 'Orientalism, the Balkans, and Balkan Historiography' (2000) 105[4] *The American Historical Review* 1218

Gardner, D, *The Science of Fear: Why We Fear the Things We Shouldn't--and Put Ourselves in Greater Danger* (New York: Dutton, 2008).

Garcia Andrade, P, 'EU External Competences in the Field of Migration: How to Act Externally When Thinking Internally' 55[1] *Common Market Law Review*, 157.

Guild, E, Costello, C, Moreno-Lax, V and Garlick, M, *Enhancing the CEAS and alternatives for Dublin* (European Parliament, 2015)

Honig, B, *Emergency Politics: Law, Paradox and Democracy* (Princeton, NJ: Princeton University Press, 2009)

Human Rights Watch, *EU: Returns to Greece Put Refugees at Risk* http://www.refworld.org/docid/584e767b4.html (accessed 17 May 2018).

Hunt, A, 'The Theory of Critical Legal Studies' (1986) 6[1] *Oxford Journal of Legal Studies* 1

Kelman, M, *A Guide to Critical Legal Studies* (Harvard University Press, 1987)

Klabbers, J, *The Concept of Treaty in International Law* (Martinus Nijhoff Publishers 1996)

Kuijer M, 'Fundamental rights protection in the legal order of the European Union' in Łazowski, A, and Blockmans, S, (eds) *Research Handbook on EU Institutional Law* (Edward Elgar, Cheltenham, 2016).

Lipson, C, 'Why Are Some International Agreements Informal?' (1991) 45[4] *International Organization*, 500.

Locke, J, *Two Treatises of Government*, Peter Laslett (ed) (Cambridge: UK, Cambridge University Press 2005)

Mangabeira Unger, R, *The Critical Legal Studies Movement* (Harvard University Press: 1986).

Massey, D, 'A Missing Element in Migration Theories' (2015) 12[3] *Migration Letters* 279

Mau, S, Gülzau, F, Laube, L and Zaun, N 'The Global Mobility Divide: How Visa Policies Have Evolved over Time' (2015) 41(8) Journal of Ethnic and Migration Studies, 1192.

McKeown, A, *Melancholy Order: Asian Migration and the Globalization of Borders* (New York, Columbia University Press, 2011).

Mitsilegas, V, 'Solidarity and Trust in the CEAS' (2014) 2[2] *Comparative Migration Studies* 181

Muftuler-Bac, M, and Taskin, E 'Turkey's Accession to the European Union: Does Culture and Identity play a Role?' (2007) 6[2] *Ankara Review of European Studies*, 31

Ngalikpima, M and Hennessy, M, *Dublin II regulation: Lives on hold* (ECRE, 2013)

Pal, G, 'The Effects Of The Refugee Crisis On The EU-Turkey Relations: The Readmission Agreement And Beyond' (2016) 12[3] European Scientific Journal 14

Pauwelyn, J and Pavlakos, G 'Principled Monism and The Normative Conception of Coercion under International Law', in Evans, M and Koutrakos, P (eds), *Beyond the Established Orders: Policy Interconnections Between the EU and the Rest of the World* (2011),

Pauwelyn, J, Wessels, R and Wouters, J, 'When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking' (2014) 25[3] *European Journal of International Law* 733

Peers, S, 'The draft EU/Turkey deal on migration and refugees: is it legal?' (EU Law Analysis 16 March 2016) http://eulawanalysis.blogspot.se/2016/03/the-draft-euturkey-deal-on-migration.html (accessed 16 May 2018)

Rensmann, T, 'Article 46' in Dörr, O, and Schmalenbach, K, (eds), Vienna Convention on the Law of Treaties (Springer-Verlag Berlin Heidelberg 2012) 775

Robin, C, *Fear: The History of a Political Idea* (Oxford, UK: Oxford University Press, 2006)

Rumelili, B, 'Constructing Identity and Relating to Difference: Understanding the EU's Mode of Differentiation' (2004) 30[1] *Review of International Studies* 27

-- 'Liminality and Perpetuation of Conflicts: Turkish-Greek Relations in the Context of Community-Building by the EU' (2003) 9 *European Journal of International Relations* 213.

Said, E W, *Orientalism* (New York, Pantheon Books, 1978)

Scazzeri, L, and Springford, J, *How the EU and third countries can manage migration* (Centre for European Reform, November 2017)

Schimmelfennig, F, 'Liberal Identity and Postnationalist Inclusion: The Eastern Enlargement of the European Union' in Cederman, L-E (ed) *Constructing Europe's Identity: The External Dimension* (Boulder, CO: Lynne Rienner, 2001).

-- 'EU Membership Negotiations with Turkey' in Daniel Thomas (ed) *Making EU Foreign Policy. Palgrave Studies in International Relations Series* (Palgrave Macmillan, London, 2011)

Schmitt, C, *Politische Theologie* (Berlin: Duncker and Humblot, 1978);

Spijkerboer T, 'Bifurcation of Mobility, Bifurcation of Law. Externalization of Migration Policy Before the EU Court of Justice' in *Journal of Refugee Studies* (forthcoming)

Statewatch, *EU-Turkey 18/3/2016 NON-PAPER*, published 16 March 2016 http://statewatch.org/news/2016/mar/eu-turkey-tusk-non-paper.pdf (accessed 16 May 2018).

Stiglmayer, A, 'Visa-Free Travel for Turkey: in Everybody's Interest' (2012) 11 Turkish Policy Quartely 99

Strik, T, Readmission Agreements as a Mechanism for Returning Irregular Migrants (Council of Europe, 16 March 2010) http://www.refworld.org/pdfid/4bdadc1c3.pdf (accessed 16 May 2018

Triandafyllidou, A, Migration in Greece: Developments in 2013, Report prepared for the OECD Network of International Migration Experts, 13 November 2013 http://www.eliamep.gr/wp-

content/uploads/2014/10/Migration-in-Greece-Recent-Developments-2013.pdf (accessed 23 April 2018)

Tolay, J, 'Discovering Immigration into Turkey: The Emergence of a Dynamic Field' (2012) 53[6] International Migration 57.

Tomuschat, C, 'International Organizations as Third Parties under the Law of International Treaties' in Enzo Cannizzaro (ed) *The Law of Treaties Beyond the Vienna Conventions* (Oxford, New York:Oxford University Press, 2011) 217

UNHCR, *Nationality of arrivals to Greece, Italy and Spain - Monthly - Jan to Dec 2016* (2 February 2017), https://data2.unhcr.org/en/documents/download/53447 (accessed 16 May 2018) Figure 3.

United Nations, *United Nations Treaty Collection, Vienna Convention on the Law of Treaties* https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en (accessed 9 April 2018).

-- *United Nations Treaty Collection, Vienna Convention on the Law of Treaties Between States and International Organizations* https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXIII-3&chapter=23&lang=en (accessed 9 April 2018).

von Bogdandy A, 'Neither an International Organization Nor A Nation State: The EU as a Supranational Federation' in Jones E, Menon A, and Weatherill S, *The Oxford Handbook of the European Union* (University of Pennsylvania, 2012).

Wessels, R A, 'The EU Solution to Deal with the Dutch Referendum Result on the EU-Ukraine Association Agreement' (2016) 1[3] *European Papers* 1305

Wolff, S, 'The Politics of Negotiating EU Readmission Agreements: Insights from Morocco and Turkey'(2014) 16 *European Journal of Migration and Law*, 69

Zizek, S, Welcome to the Desert of Reality (Verso, 2002).

Table of Cases

Court of Justice of the European Union

European Court of Human Rights

Golder v United Kingdom, App No 4451/70 (ECtHR, 21 February 1975)

Hirsi Jamaa and others v Italy (GC), ECHR 2012-II 97

JB v Greece, App No 54796/16 (ECtHR, communicated on 18 May 2017)

JR and others v Greece, App No 22696/16 (ECtHR, 25 January 2018)

MSS v Belgium and Greece (GC) ECHR 2011-I 255

European Ombudsman

Decision of the European Ombudsman in the joint inquiry into complaints 506-509-674-784-927-1381/2016/MHZ against the European Commission concerning a human rights impact assessment in the context of the EU-Turkey Agreement, 18 January 2017.

International Court of Justice

Advisory Opinions

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, ICJ Report 1971, 16.

Reparation for injuries suffered in the service of the United Nations, ICJ Reports 1949, 177

Case Law

Aegean Sea Continental Shelf (Greece v Turkey) ICJ Report 1978, 3

Anglo-Iranian Oil Company (United Kingdom v Iran), ICJ Reports 1952, 89

Kasikili/Sedudu Island (Botswana v Namibia) ICJ Report 1999, 1045

Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening) ICJ Report 2002, 303

Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain), ICJ Report 1949, 112

Temple of Priah Vihear, ICJ Report 1961, 26

International Tribunal for the Law of the Sea

Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), ITLOS Reports 2012, 4

South China Sea Arbitration (Philippines v China) CA Case No 2013-19, 116