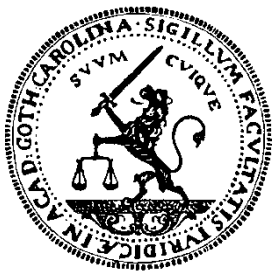

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Informal Readmission Agreements
- Beyond the reach of the law?

JURM02 Graduate Thesis

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Contents

Summary

During the last years, there has been a shift in the European Union's migration policy towards an increased use of informal readmission agreements. A common criticism of informal readmission agreements is that the informality obstructs parliamentary and judiciary reviews. This can have serious consequences because the negative impact informal readmission agreements can have on migrants' right to seek asylum.

Because of the impact informal readmission agreements have on migrants and the increased use of the informal format, it is important to understand the legal consequences of the informality. Therefore, this thesis intends to find out if the informal format makes it more difficult to annul informal readmission agreements under EU law and international law. The focus of the investigation is on two of the of most debated and criticized informal readmission agreements, the EU-Turkey Statement and the Joint Way Forward Declaration.

The investigation was conducted by examine the possibilities to annul the EU-Turkey Statement and the Joint Way Forward Declaration. An essential part of this investigation was to establish if the EU was a party to the Statement and the legal nature of the informal readmission agreements.

For an annulment to be possible under EU law the Union must be a party to the informal readmission agreements This became clear when the General Court dismissed three actions for annulment of the EU-Turkey Statement. The court argued that the Statement was not concluded by any EU institution but instead all 28 Member States and therefore the court lacked jurisdiction. The court orders have been criticised for ignoring international law and important principles in EU law. Thus, there are grounds for arguing, contrary to the orders of the court, that the EU is a party to the EU-Turkey Statement.

The legal nature of an agreement is primary determined by the intention of the parties. Due to the ambiguous character of the EU-Turkey Statement and the lack of public information about the circumstances surrounding its conclusion, it is difficult to determine if it is legally binding. On the other hand, there are no doubts regarding the legal nature of the Joint Way Forward Declaration since the parties stated in the document that it should have no legal effect.

The investigation concluded that the informality was an obstacle to annul the informal readmission agreements, but it did not completely prevent it. The investigation also identified different ways the informality posed problems for the annulment.

Sammanfattning

Under de senaste åren har det skett ett skifte i den Europeiska Unionens migrationspolitik mot ett ökat användande av informella återtagandeavtal. En vanlig kritik mot informella återtagandeavtal är att den informella formen är ett hinder mot parlamentarisk och juridisk granskning. Det kan ha alvarliga konsekvenser på grund av den påverkan informella återtagandeavtal kan ha på migranters rätt att söka asyl.

För att öka förståelsen för de juridiska konsekvenserna av informella återtagandeavtal utreds i denna uppsatts svårigheterna med att ogiltigförklara informella återtagandeavtal inom EU-rätt och internationella rätt. Det görs genom att analysera möjligheten att ogiltigförklara två av de mest kritiserade och debatterade informella återtagandeavtalen, EU-Turkiet överenskommelsen och Joint Way Forward-deklarationen. En oundviklig del av utredningen var fastställandet av de informella avtalens rättsliga status samt huruvida EU kan anses vara part i EU-Turkiet överenskommelsen.

För att en ogiltigförklaring av EU-Turkiet överenskommelsen ska bli aktuell inom EU rätten måste EU vara en part. Det blev uppenbart när EU-domstolen avvisade tre mål om ogiltigförklaring av EU-Turkiet överenskommelsen. Domstolens ansåg att EU inte var part till överenskommelsen utan att den var sluten av alla EU:s 28 medlemsländer och därmed hade inte EU-domstolen jurisdiktion. Avgörandes kan kritiseras för att inte vara förenligt med internationell rätt och EU-rätt. Det finns därmed grund för att, trots EU-domstolens dom, betrakta EU som part till EU-Turkiet överenskommelsen.

När den rättsliga statusen fastställs spelar parternas avsikt en avgörande roll. Det är svårt att avgöra om EU-Turkiet överenskommelsen är bindande på grund av bristen på offentlig information vid överenskommelsens ingående och textens tvetydighet. Det råder däremot inga tvivel om att Joint Way Forward-deklarationen är icke-bindande, i och med att parterna klargjorde sin intention att inte bli juridiskt bundna i deklarationens inledning.

Slutsatsen i uppsatsen är ett att en ogiltighetsförklaring av informella återtagandeavtal är möjlig men försvåras av den informella formen. Undersökningen identifierade också flera olika sätt som informaliteten försvårar en ogiltighetsförklaring.

Abbreviations

Charter	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
DARIO	Draft Articles on the Responsibility of International Organizations
EU	European Union
General Court	the General Court of the European Union
ICJ	International Court of Justice
Refugee Convention	the Convention relating to the Status of Refugees and the Protocol relating to the Status of Refugees
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UNHCR	United Nation High Commissioner for Refugees
VCLT	Vienna Convention of the Law of the Treaties
VCLT-IO	Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations

1 Introduction

One of the most important and visible responses to the so-called "refugee crisis" in Europe 2015 was the adoption of the EU-Turkey Statement[1] (hereinafter the "Statement").[2] The adoption of this statement was controversial and has attracted a lot of criticism. The criticism has arisen due to several reasons, including that the Statement violates the international protection of refugees, the lack of legal review prior to the adoption of it and that the European Union (hereinafter the "EU" or the "Union") has sidestepped the democratic procedure for treaty adoption.[3]

These controversies around the Statement have concerned the unconventional form of the Statement. The Statement does not have the traditional form of an international agreement but was published on the webpage of the European Council as a press-release.[4] Although the format is different, the content resembles that of a readmission agreement, an agreement facilitating the return process for migrants whom are staying as irregulars in a country.

The informal form has led to an uncertainty surrounding the Statement and it is unclear under which procedures it should have been adopted and if it can be subjected to parliamentary and judicial review.[5] The EU institutions have been criticized for creating this unconventional form with the purpose to circumvent the democratic and legal reviews provided in the EU treaties.[6] If true, the consequences of the Statement would be problematic

[1] European Council, (18 March 2016), *Press Release no 144/16 "EU-Turkey Statement*", http://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/ (accessed 1 August 2018)

[2] See e.g. European Commission, (7 June 2016) *Commission's Communication on the Migration Partnership framework*, COM (2016) 385 final, p. 2-4; European Council, (3 February 2017) *Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route*, http://www.consilium.europa.eu/en/press/press-releases/2017/02/03/malta-declaration/ (accessed 1 August 2018), final and N. Idriz,, The EU-Turkey Statement or the 'Refugee Deal': The Extra-Legal Deal of Extraordinary Times?, December 1, 2017, Forthcoming in: D. Siegel and V. Nagy (ed.), The Migration Crisis?: Criminalization, Security and Survival, Eleven Publishing, T.M.C. Asser Institute for International & European Law Research Paper No. 2017-06. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3080881 (accessed 1 August 2018), p. 1-2.

[3] Idriz, 2017, p. 1-2.

[4] European Council, (2016).

[5] C. Warin and Z. Zhekova, 'The Joint Way Forward on migration issues between Afghanistan and the EU: EU external policy and the recourse to non-binding law', *Cambridge International Law Journal*, Vol. 6 No. 2, 2017, p. 143.

[6] S. Carrera, L. den Hertog and M. Stefan, 'It wasn't me! The Luxemburg Court Orders on the EU-Turkey Refugee Deal', *CEPS Policy Insights*, 2017, No. 2017/15, summary. https://www.ceps.eu/publications/it-wasn%E2%80%99t-me-luxembourg-court-orders-eu-turkey-refugee-deal (accessed 1 August 2018).

as it has affected the rights of asylum seekers and has changed the union's migration policy.[7]

The Statement was viewed as a success by the EU and since its adoption the use of informal agreements has increased rapidly in the area of migration management, more specifically the area of readmission.[8] It is probable that the use of informal agreements in this field will become more common in the future.[9]

The EU has used the model of informal agreements in its cooperation with many countries in Africa and Asia. One example is the declaration between the EU and Afghanistan facilitating return to Afghans.[10] This declaration is called The Joint Way Forward on migration issues between Afghanistan (hereinafter the "Declaration") has the characteristics of a readmission agreement but is declared to be non-binding. Just like the Statement, the Declaration is informal in the sense that it diverges from the usual format for international agreements.

Since these informal readmission agreements are something between political statements and international agreements it is difficult to determine if they are applicable in a court of law. This is a cause for concern because of the possible violations to the of the rights of asylum seekers these agreements can lead to. It is therefore crucial to understand in what way these informal agreements can be legally challenged -if they can be challenged at all.

1.1. Aim and research questions

A common criticism of informal agreements is that the informality obstruct parliamentary and judiciary reviews.[11] However, it has not been further investigated which implications the informal format has on the possibility to challenge informal readmission agreements judicially. Considering the impact informal readmission agreements have on migrants and the increased use of an informal format it is important to understand the consequences of informality. This thesis aims to find out how the informality of informal readmission agreements affects the possibility to annul informal readmission agreements.

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[7] E. Roman, 'Cooperation on Readmission in the Mediterranean Area and its Human Rights Implications', PhD Thesis, University of Palermo, 2017, p. 229.
[8] J-P. Cassarino and M. Giuffré, 'Finding Its Place In Africa: Why has the EU opted for flexible arrangements on readmission', FMU Policy Brief No. 01/2017, 2017, p. 4.
[9] Roman, 2017, p. 229.
[10] European Union External Action, (2016), *Joint Way Forward in Migration Issues Between Afghanistan and the EU*.
[11] See e.g. M. den Heijer and T. Spijkerboer, *Is the EU-Turkey refugee and migration deal a treaty*, http://eulawanalysis.blogspot.com/2016/04/is-eu-turkey-refugee-and-migration-deal.html (accessed 1 August). 2016 and Carrera, den Hertog and Stefan, 2017, p. 2

The main research questions in this thesis is:

- Does the informality make it more difficult to annul the EU-Turkey-Statement and the Joint Way Forward Declaration under EU law and international law, and if yes, in which ways?

To answer the main research questions, the research in the thesis is broken down into three sub-questions. Each of them builds on the answer on the prior question and are necessary to give the full picture required to answer the main research questions. These are the sub-questions that will be answered:

1. Is the EU a party to the EU-Turkey Statement?
2. What is the legal nature of the EU-Turkey Statement and the Joint Way Forward Declaration?
3. Is it possible to annul the EU-Turkey Statement and the Joint Way Forward Declaration, either under:
   a) EU law?
   b) general international law?

1.2. Method

This research will be carried out by an investigation of two of the most debated and criticized informal readmission agreements: the EU-Turkey Statement and the Joint Way Forward Declaration. They two informal readmission agreements differ a lot in structure and in how they were concluded. The difference is meant to give a wider picture of the problems that might appear because of the informal format.

To find the answer to the research questions a legal dogmatic method will be used. The legal dogmatic method aims to determine the meaning of the law by systematizing and interpreting different legal sources.[12] The general sources of international law derives from Article 38 (1) ICJ Statute which list international conventions, international custom and general principles as sources, without any internal hierarchy. Subsidiary sources are judicial decisions and "the writings of the most highly qualified publicists". [13] These can be used to interpret the meaning of the law when it cannot be deciphered from the primary sources

[12] C. Sandgren *Rättsvetenskap för uppsatsförfattare – ämne, material, metod och argumentation*, 3rd ed., Stockholm, Nordstedts Juridik, 2015, p. 43–45.
[13] Article 38 (d) ICJ Statute.

mentioned.[14]

The main sources of EU law are primary and secondary law. Primary law is composed by the EU treaties[15] and secondary law is constituted by the legal instrument based on the treaties, general principles of EU law, case law developed by the Court of Justice of the European Union (hereinafter the "CJEU") and international law.[16]

To interpret international agreements, the Articles 31-33 of the Vienna Convention of the Law of the Treaties (hereinafter the "VCLT") and the same articles in 1986 Vienna Convention on the Law of Treaties with or between International Organization (hereinafter the "VCLT-IO") will be used. This means that a treaty should be interpreted in good faith and with respect to the ordinary meaning in its context and in accordance with the object and purpose.[17] Neither the VCLT nor the VCLT-IO are directly applicable to the EU or on non-legally binding agreements so when the VCLT is used it will be done as an analogy and to the extent it reflects customary law. The relationship between EU and international law will be expanded on.

1.3. Delimitations

The focus of the research will be on the form of the agreements and how the informality affect the possibility of annulment. This thesis does not aim to do a complete assessment of all material rights allegedly violated by the two informal readmission agreements. To actually annul the informal readmission agreements a court needs to do a full assessment including the material assessment of all rights. Neither will this thesis when assessing the annulment under international law consider if there is an international court having jurisdiction but if the informal readmission agreements could have been subjected to the court's review under the existing international framework if there were one. There are many different ways to challenge an agreement but only the notion of annulment will be explored in this thesis.

1.4. Outline

The thesis will start by setting the scene by summarizing the Statement and the Declaration, the circumstances surrounding the adoption of the agreements and the significant

[14] Article 38 (d) ICJ Statute.
[15] C-F. Bergström and J. Hettne, *Introduktion till EU-rätten*, 1st ed., Studentlitteratur, Lund, 2014, p. 20 and 30.
[16] Article 288 TFEU.
[17] Article 31 VCLT.

developments after their conclusion. The shift in the policy of the EU to use informal agreements will briefly be accounted for.

Since the thesis will explore the possibility to annul the agreements both from an international law and EU law point of view these perspectives will be investigated separately but in close connection with each other. The same goes for the two different informal readmission agreements with the exception of Chapter 3 which only concern the Statement.

The thesis will be divided in to four main sections, three dedicated to answering the sub-research questions and in the end the main research questions will be answered based on the investigations of the three sub-questions.

The first research question concerns the determination of the parties to the Statement. In a case brought to the General Court of the European Union (hereinafter the "General Court") regarding an annulment of the Statement the court concluded that the Statement is not an act attributable to any EU institution but to all the Member States. Because of this judgment it is necessary to investigate who is a party to the Statement, this will be done in Chapter 3. This investigation is crucial because if the EU is not a party to the Statement the annulment procedure under EU law will not be accessible.

If an instrument is not considered legal or having legal effects, it will not be applicable in any court under EU or international law. Therefore, Chapter 4 will focus on establishing the legal nature of the Statement and the Declaration.

After the parties to the informal readmission agreements and the legal nature has been established the possibilities for annulment will be explored. In Chapter 5 the process of annulment under EU law will be explored and in Chapter 6 the same question will be answered but from an international law perspective.

At last the main research questions will be answered in Chapter 7 and the difficulties posed by the informality of the agreements will be analyzed. The examination in this chapter will be based on the outcome of the research of the three sub-questions.

1.5. Definitions

1.5.1. Informal agreements

In this thesis, the term informal agreements will be used. There are a number of terms these kinds of arrangements go under, i.e. Memorandum of Understanding, political agreements,

gentlemen's agreements or non-legally binding agreements.[18] All terms come with their issues but the main problem with the term informal agreement is that the word agreement could signify a legally binding nature. However, in this thesis the term informal agreements will be used on both legally binding agreements and non-legally binding instruments and if the legal status is particularly relevant this will be specified. In some situations, the term instrument will be used when a more neutral term is needed. Regarding "formal" agreements, the term international agreement or treaty will be used. There are differences between the two terms but in this thesis they will be used synonymous.

There is a need to define what makes an agreement informal. In the anthology *Informal International Lawmaking*[19] Pauwelyn et al argue that an agreement is informal when it lacks the traditional formalities usually linked to treaty making.[20] They summarize the informality as coming from the output, the process or the actors involved in the creation process of the instrument.[21] The informal readmission agreements examined in this thesis have an informal output since the agreements lack the traditional formality of a formal treaty.

1.5.2. Readmission agreements

Readmission agreements establish cooperation on the return of irregular migrates between the EU and a third country.[22] The agreements set up procedures and obligations for the authorities in the union and the third country on the removal or expulsion of persons who no longer fulfil the right to enter, stay in or reside in the EU.[23] The third country does not have to be the country of origin but could also be a transit country where the migrant passed through on the way to the EU.[24] The two informal readmission agreements being investigated in this thesis have not been defined as readmission agreements by the EU. However, the Statement and the Declaration set up obligations and procedures dealing with readmission similar to those in

[18] A. Aust, 'Alternatives to Treaty-Making: MOUs as Political Commitments', in D.B. Hollis (ed.) *The Oxford Guide to* Treaties, New York, Oxford University Press, 2012, p. 46.
[19] J. Pauwelyn, R.A. Wessel, and J. Wouters (red.), *Informal international lawmaking*, Oxford University Press, Oxford, 2012.
[20] J. Pauwelyn, 'International Informal Lawmaking: Framing the Concept and Research Question,', in J. Pauwelyn, R.A. Wessel, and J. Wouters (red.), *Informal international lawmaking*, Oxford University Press, Oxford, 2012, p. 15.
[21] C. Lipson, 'Why are some International Agreements Informal?', *International Organization*, Vol. 45, No. 4, 1991, p. 498.
[22] European Commission, (2002), *Green paper on a Community Return Policy on Illegal Residents*, COM/2002/0175 final, p. 26.
[23] European Commission, *Return and Readmission*, (last update 2 August 2018), https://ec.europa.eu/home-affairs/what-we-do/policies/irregular-migration-return-policy/return-readmission_en (accessed 1 August 2018).
[24] European Commission, (5 October 2005), *Readmission Agreements MEMO/05/351*, http://europa.eu/rapid/press-release_MEMO-05-351_en.htm (accessed 1 August 2018).

formal readmission agreements and they will therefore be called informal readmission agreements throughout this thesis.[25]

[25] Warin and Zhekova, 2017, p. 151.

2. Background

In this chapter, a summary of the Statement and the Declaration and the circumstances surrounding their adoptions will be laid out. Neither the EU, Turkey nor Afghanistan have revealed the reason for choosing an informal format for the agreements. However, the most common reasons for states choosing this format will be accounted for in this chapter as an attempt to understand the most possible reasons. The Statement and the Declaration are two of many informal readmission agreements concluded by the EU. The informality is a deliberate policy decision by the EU and this chapter will put this in a larger context. Ultimately, this will shed a light on the importance of understanding the whether the informal readmission agreements can be annulled.

2.1. Summary of the EU-Turkey Statement and the Joint Way Forward Declaration

2.1.1. The EU-Turkey Statement

On March 17 and 18, 2016, the heads of state of the EU Member States, the President of the European Council and the European Commission met president Erdoğan of Turkey to discuss the so-called migration crisis in Europe. The meeting resulted in a press release which was published on the website of the European Council and the Council of the European Union with the title "EU-Turkey Statement".[26] The Statement's primary goal was to prevent irregular migration coming to the EU from Turkey. In short, the parties to the Statement agreed to:

- Return all irregular migrants crossing from Turkey into Greek island to Turkey. The cost of the returns would be covered by the EU.[27]
- For every Syrian readmitted from Greece to Turkey another Syrian would be resettled in the EU (the one-for-one scheme).[28]
- Accelerate the dialogue on lifting visa requirements for Turkish citizens in the EU.[29]

[26] European Council (2016), point. 1.
[27] Ibid., point 2.
[28] Ibid., point 5.
[29] European Council (2016), point 5.

Since its release the Statement has been criticized for the unclear nature of the agreement, the sidestepping of the procedure for treaty adoption and for being a violation of international human rights law and the EU Charter of Fundamental Rights.[30] Even if the Statement has been immensely criticized from a human rights perspective[31] it has been celebrated as a success by the EU.[32]

Three asylum seekers who, due to the Statement, risked being sent back to Turkey after arriving to Greece from Turkey brought a claim of annulment of the Statement to the General Court. The General Court published its decision on 28 February 2017[33] where it found that the Statement was not attributable to the European Council or any other EU institution but instead to all Member States. As a result of this the General Court declared that it did not have jurisdiction to assess the legality of the Statement.[34] The orders by the General Court has been appealed to the CJEU.[35]

2.1.2. The Joint Way Forward Declaration

The Declaration developed on the side of the negotiations of the formal cooperation between Afghanistan and the EU on migration facilitation. When the formal negotiations halted, the dialogue continued in a different form and resulted in the development of an informal declaration.[36]

The Declaration is essentially a strategy on how the readmission to Afghanistan to the EU should be facilitated. It includes cooperation for issuing travel documents and cooperation on transportation. In certain areas, the Declaration sets up very specific rules for

[30] See e.g. Amnesty International, *A Blueprint for Despair: Human Rights Impact of the EU-Turkey Deal*, Index number: EUR 25/5664/2017, (2017), https://www.amnesty.org/en/documents/eur25/5664/2017/en/ (accessed 1 August 2018); Amnesty International, *Turkey: Illegal Mass Returns of Syrian Refugees Expose Fatal Flaws in EU-Turkey Deal*, (2016), https://www.amnesty.org/en/latest/news/2016/04/turkey-illegal-mass-returns-of-syrian-refugees-expose-fatal-flaws-in-eu-turkey-deal/ (accessed 1 August); Committee on Migration Refugees and Displaced Persons of the Council of Europe by rapporteur Ms. Tineke Strik, *The Situation of Refugees and Migrants under the EU-Turkey Agreement of 18 March 2016*, Resolution 2109/2016 adopted on 20 April 2016 (2016), http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=22738&lang=%20en (accessed 1 August 2018) and United Nations High Commissioner for Refugees (UNHCR), *Redefines Role in Greece as EU-Turkey Deal comes into Effect*, (2016), http://www.unhcr.org/news/%20briefing/2016/%203/56f10d049/unhcr-redefines-role-greece-eu-turkey-deal-comes-effect.html (accessed 1 August 2018).

[31] See no. 27

[32] T. Spijkerboer, 'Bifurcation of Mobility, Bifurcation of Law. Externalization of migration policy before the EU Court of Justice', *to be published in Journal of Refugee Studies*,p.10.

[33] Judgement of the General Court of 28 February 2016, *NF v European Council*, T-192/16, EU:T:2017:128; Judgement of 28 February 2016, *NG v European Council*, T-193/16, EU:T:2017:129; Judgement of 28 February, *NM v European Council*, T- 257/16, EU:T:2017:130.

[34] i.e. *NF v European council*, para. 71.

[35] Appealed case of *NF v European Council*, C-208/17 P, appealed case of *NG v European Council* C-209/17 P and appealed case of *NM v European Council*, C-210/17 P.

[36] Warin and Zhekova, 2017, p. 145.

the cooperation, for instance it sets up a limit on maximum 50 forced expulsions per flight. The Declaration also includes awareness-raising campaigns, reintegration assistance and introduce common efforts to tackle human smuggling.[37]

The Declaration has raised concerns about the respect of human rights especially in regard to the return process for unaccompanied children and women.[38] Another aspect is its connection to the EU development funds. The Declaration was signed 2 October 2016 right before the Brussel Donor Conference.[39] There are suspicions that the renewal of the development funds to Afghanistan was made conditional to the adoption of the Declaration.[40]

At the time the Declaration was signed, the security situation in Afghanistan had been worsening for the last two years and NGO's had raised concerns about the signing of a readmission agreement in such a situation.[41] The European Commission and the European Asylum Support Office expressed their concerns about the trend of security violations in a restricted non-paper, an unofficial document put forward in closed negotiations, which was sent to the Council's Permanent Representatives Committee before the conclusion of the Declaration.[42] In the end the raised concerns did not affect the finalization of the informal agreement.

2.2. Why do States use informal agreements

In the Statement and the Declaration an informal format was chosen but no explanation to this choice has been given by any of the parties. There are usually three main reasons for a state to choose to conclude informal agreements. It gives the parties more flexibility and it makes the agreements more easily modified. Lengthy adoption processes can be avoided which makes the adoption process much faster. The agreement become less public which reduces the

[37] European Union External Action, (2016), part II-I.
[38] Warin and Zhekova, 2017, p. 145.
[39] European Council, (5 October 2016), *Brussels Conference of Afghanistan: main result*, http://www.consilium.europa.eu/en/press/press-releases/2016/10/05/bca-main-results/ (accessed 1 August 2018).
[40] Council of the European Union, (2016), *Council Conclusion on Afghanistan*, General Secretariat to the Delegations, 11245/16, note 3 and Warin and Zhekova, 2017, p. 145.
[41] A. Shea, 'Europe is betraying Afghanistan by Sending Its Refugees Home', *Time*, 5 October 2016, https://www.amnesty.org/en/latest/news/2017/10/europes-great-betrayal/ (accessed 1 August 2018) and European Council on Refugee and Exiles (ECRE), *EU Migration Policy and Returns: Case Study on Afghanistan*, 8 November 2017, https://www.ecre.org/wp-content/uploads/2017/11/Returns-Case-Study-on-Afghanistan.pdf (accessed 2 August 2018).
[42] European Commission and European External Action Service (EEAS), (March 2016), *Joint Commission-EEAS non-paper on enhancing cooperation on migration, mobility and readmission with Afghanistan*, p. 2.

publicity surrounding the agreement.[43] Ultimately, informal agreements are convenient for states to circumvent accountability by keeping it out of the public and parliamentary scrutiny.[44]

2.3. Informal agreements: an increasing trend

The Statement and the Declaration are two recent examples of the EU's strategy to externalize the migrations policy.[45] However, this increasing trend to use informal readmission agreements had been noted before the conclusion of the Statement. The amount of informal agreements concluded by the EU almost doubled from 52 in 2007 to 98 in 2015.[46] The shift from readmission based on formal readmission agreements to more informal alternative has been a deliberate policy decision by the EU.[47] The trend of informalization became more explicit when the Commission launched the EU Action Plan on Return in September 2015. This led to a drastic change in the return policy of the EU with a higher focus on the operational side of readmission instead of the formal conclusion of readmission agreements. This changed policy focus was given attention in interviews done by Roman in her PhD research 2017[48]. The answers she got in these interviews attributed this change to the aftermath of the so-called refugee crisis in Europe and the interest of the new commission taking office after the 2014 election.[49]

[43] Lipson, 1991, p. 500-501.
[44] Pauwelyn, 2012, p. 15-16.
[45] T. Spijkerboer, 'Bifurcation of Mobility, Bifurcation of Law. Externalization of migration policy before the EU Court of Justice', *to be published in Journal of Refugee Studies,* 2017, p. 1.
[46] Cassarino, 2015, p. 77.
[47] Roman, 2017, p. 229.
[48] Roman, E. 'Cooperation on Readmission in the Mediterranean Area and its Human Rights Implications', PhD Thesis, University of Palermo, 2017.
[49] Roman, 2017, p. 222.

3. Is the EU a party to the EU-Tukey Statement?

An unexpected problem regarding annulment of the Statement appeared when the General Court declared that the EU was not a party to the Statement. The Statement has been thoroughly discussed by NGOs and international law scholars, but not until the court order did anyone question the EU being a party. This also include the European Ombudsman which in its decision 18 January 2017 found the European Council to be a party in the Statement and thus responsible for carrying out a human rights impact assessment.[50] Even the EU institutions had until the General Court's order acted as if they were the authors of the Statement by taking part in the negotiation,[51] the implementation[52] and by showcasing the Statements as a success for the EU.[53]

To determine the party to the Statement is important, not only to know who is obliged to fulfil the obligation in the agreement, but to know if it falls within the jurisdiction of the CJEU. The court order *NF, NG and NM v European Council* made it clear that the annulment procedure within the EU legal framework is not accessible if the EU is not a party. To establish the parties of the Statement is therefore a crucial first step in the investigation on whether the Statement can be annulled or not.

In this chapter the court order will be presented, the conclusion to not consider the EU as a part will be discussed and there will be an assessment if EU, regardless of the court's order, should be considered a party to the Statement. This will be done by studying how binding obligations arise under international law and how the parties to an international agreement is established. Later, the same question will be examined but according to internal EU law. Since this particular issue only applies to the Statement, the Declaration will be left out of this chapter.

[50] 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.
[51] *NF, NG and NM v European Council,* para. 63.
[52] European Commission, (2016), 'First Report on the progress made in the implementation of the EU-Turkey Statement' 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 2 August 2018).
[53] Spijkerboer, 2017, p.10.

3.1. NF, NG and NM v European Council

The legality of the Statement was challenged by two Pakistani nationals and one Afghani national who arrived to Greece from Turkey. The General Court released the three court orders *NF, NG* and *NM v European Council* on 28 February 2017.[54] The General Court concluded that the Statement is not an act or international agreement attributable to the European Council or any other EU institution. Instead the author of the Statement is Turkey and all EU Member States. The consequence of this finding was that the General Court did not have any jurisdiction to assess the legality of the Statement.[55] The General Court recognized that the Statement appeared to be an EU act since the European Council prepared the meeting, published the press release on its webpage and the Statement refers to the EU as the counterpart to Turkey.[56] However, it did not put any value of this appearance of EU authorship. Instead, it focused solely on the intent of the heads of state or government. To investigate the intent the General Court reviewed the preliminary documents of the meetings.[57] The NGO Access Info Europe requested these documents, which the General Court based its decision on, but the request was denied.[58] The decision in the cases *NF, NG and NM v European Council* has been appealed to the Court of Justice.[59]

3.2. Who is bound by the EU-Tukey Statement according to international law?

To examine if the EU is a party to the Statement, the rules under international law will first be consulted. In the order of the General Court in *NF, NG and NM v European Council*, the court only supported its decision on EU law and international law was mostly ignored. However, international agreements are subjected to international law and should therefore be applied to

[54] Judgements of the General Court 28 February 2017, *NF, NG and NM v. The European Council*.
[55] *NF, NG and NM v. The European Council,* para. 71.
[56] Ibid., para. 5-8.
[57] NF v. The European Council, 28 Februrary 2017, para. 60-65.
[58] Judgement of the General Court of 7 February 2018, *Access Info Europe v Commission*, T-851/16, ECLI:EU:T:2018:69.
[59] Appealed case of *NF v European Council,* C-208/17 P, appealed case of *NG v European Council* C-209/17 P and appealed case of *NM v European Council,* C-210/17 P.

define the parties to the Statement. More specifically, the author of an international instrument should be identified on the international rules on attribution.[60] This will be done in this section by investigating the international rules on treaties and the rules on international responsibility. This will later be applied to the Statement. First, it is important for the forthcoming investigation to understand to which extent it can rely on the VCLT, VCLT-IO and the articles on the responsibility of international organizations (hereinafter "DARIO"). This will be done by examine the relationship between the EU and international law, more specifically the previously mentioned conventions and articles.

3.2.1. EU and international law

The EU has a legal personality[61] and is thud a subject under international law. The CJEU has recognized that the Union is bound to the international agreements it has concluded by international law.[62] Consequently, if the Statement or the Declaration turn out to violate EU law the EU is still obligated under international to fulfil the agreement. However, the agreement would not have any effect within the union.[63]

The Vienna Convention of the Law on Treaties is the leading instrument on the law of treaties.[64] However, the application of the VCLT is not easy in this case or in the Declaration. There are two reasons for these difficulties 1) neither the EU, Turkey or every EU Member State are parties to the VCLT[65] and, 2) the VCLT does only apply to international agreements concluded between states thus international organization are excluded. The EU could be described as having a federalistic character but it is still an international organization and the VCLT is therefore not applicable.[66] In 1986 the International Law Commission drafted the VCLT-IO to be a complement to the VCLT. VCLT-IO has not entered into force yet but reflects customary international law to a large

[60] E. Cannizzaro, 'Denilism as the Supreme Expression of Realism a Quick Comment on NF v. European Council', *European Papers*, Vol. 2, No. 1, (2017), http://www.europeanpapers.eu/en/europeanforum/denialism-as-the-supreme-expression-of-realism-comment-on-nf-v-european-council (accessed 1 August 2018), p. 253.
[61] Article 47 TFEU.
[62] Judgement of 30 May 2006, European Parliament v Council, joined cases C-317/04 and C-317/04, ECLI:EU:C:2006:346, para. 73.
[63] Judgement of the Court of 28 July 2016, *Council v Commission (*Swiss MoU), C-660/13, ECLI:EU:C:2015:787, para 69.
[64] J. Klabbers, International Law, 2nd ed., 2017, p. 44.
[65] United Nations, *United Nations Treaty Collection*, https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en (accessed 1 August 2018).
[66] M. Cremona, 'Who Can Make Treaties? The European Union', in D.B. Hollis (ed.) *The Oxford Guide to* Treaties, New York, Oxford University Press, 2012 p. 94.

extent and has almost the same wording as the VCLT.[67]

The CJEU has consistently argued that the provision of the treaties which reflects customary international law are binding to all EU institutions and is an integrated part of the EU legal order.[68] The VCLT partially reflects customary law[69] and specific provisions have been considered as reflecting it completely, for instance the rules on interpretation,[70] material breach[71] and fundamental changes of circumstances.[72] Yet, the ICJ has not found any provision of the VCLT not reflecting customary law.[73] The CJEU has considered itself bound by VCLT provisions[74] as well as VCLT-IO provisions[75]. In this thesis, the VCLT and the VCLT-IO will be used to the extent it represents customary law and thus is binding to all parties including the EU.

International organizations were for a long time considered exclusively exercising functions of its Member States and the Member States were held responsible for their wrongful acts according to the Draft Articles on State Responsibility. This changed with the failure to hold the Member States in the International Tin Council responsible.[76] This led to the adoption in 2011 by the International Law Commission of a set of articles on the responsibility of international organizations [77]. The articles follow the Articles on State Responsibility and to the extent they do so they are authoritative and are customary law.[78]

3.2.2. Determining the party to the EU-Turkey Statement according to the VCLT

The only requirement for a party to be bound by an international agreement according to the VCLT and the VCLT-IO is the consent to be bound. The consent can be expressed in a

[67] Klabbers, 2017, p. 45.
[68] See e.g. Judgement of the Court of 25 February 2010, *Firma Brita GmbH v Hauptzollamt Hamburg-Hafen, C*-386/08, ECLI:EU:C:2010:91, para 42.
[69] See e.g. *the Namibia Case*, Advisory Opinion, [1971], ICJ Reports, para. 16, 47; *the Fisheries Jurisdiction case (the United Kingdom v Norway)*, judgement, ICJ Reports, [1973], para. 3 and 18.
[70] See e.g. The *Beagle Channel Arbitration Award (Argentina v Chile)*, Arbitration Award, HMSO, [1977], para. 7.
[71] See e.g. The *Namibia Case*, para. 16 and 47.
[72] See e.g. *the Fisheries Jurisdiction case*, para. 2-3.
[73] A. Aust, 'Vienna Convention of the Law of the Treaties', *Oxford Public International Law*, http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1498#law-9780199231690-e1498-div1-6 (accessed 1 August 2018), F.1.16.
[74] See e.g. *Firma Brita GmbH v Hauptzollamt Hamburg-Hafen*, (2010), para 42; Judgement of the Court of 16 June 1998 *A. Racke GmbH & Co. v Hauptzollamt Mainz*, C-192/16, EU:C:1998:293, para 24, 45- 46.
[75] Judgment of the Court of 9 August 1994, *France v Commission*, C-327/91, EU:C:1994:305, para 25.
[76] Klabbers, 2017, p. 147.
[77] Draft Articles on the Responsibility of International Organizations (2011).
[78] Klabberm, 2017, p. 148-149.

variety of ways including signature, exchange of instruments, act of formal confirmation, acceptance, approval or accession, or by any other means if so agreed.[79] The latter phrase signifies that the list is non-exhaustive, and the expression of consent is not limited to the option mentioned in the convention.[80]

Moreover, anyone cannot bind an international organization to a treaty. In the VCLT-IO there are provisions which determines who can produce full powers to bind the organization.[81] Full powers can be given due to the position of the person in the organization.[82] In certain situations, an organization can be bound without producing full powers based on how it appears from the circumstances. This is specified in Article 7 (3) (b) VCLT-IO. An organization can be bound by a person without full powers if it appears from the circumstances that the intention of the organization was to entrust full powers on the person representing the organization.[83]

3.2.3. Determining the party to the EU-Turkey Statement according to the DARIO

Later in this thesis the legal nature of the Statement will be determined and if the Statement cannot be considered a binding international agreement the rules in the VCLT and the VCLT-IO will not be applicable.[84] In that case it would not be possible to support the argument that the EU is a party to the Statement on the VCLT or VCLT-IO. Instead, international rules on attribution could be used to establish the party. The basic principle in international responsibility is found in Article 6 (1) DARIO and declares that a conduct of an organ or an agent of an international organization is an act of the organization. DARIO include provisions, similar to those found in the VCLT and the VCLT-IO, which provide for situations when the organ or agent exceeds the authority given by the organization, but still binds the organization based on its appearance.[85]

[79] Article 11-17 VCLT-IO.
[80] M. Fitzmaurice, 'Consent to be Bound- Anything new under the Sun', *Nordic Journal of International law,* 45, 2005, p. 485.
[81] Article 7 (1) (a) VCLT-IO.
[82] Article 7 (2) VCLT-IO.
[83] Article 7 (3) (b) VCLT-IO.
[84] Article 2 VCLT-IO.
[85] Article 8 DARIO.

3.2.4. Is the EU bound by the EU-Turkey Statement according to international law?

The Statement did not go through any of the formal procedures normally associated with the adoption of international agreements but was directly published in the form of a press release. None of the methods mentioned in Articles 11-17 VCLT-IO was used. However, this does not mean that the EU did not consent to be bound because the list is non-exhaustive and other means to consent can be used. This does not give much guidance on who the party is but at least one can conclude that the lack of formal expressions of consent does not prevent the EU to be considered a party to the Statement.

Since the EU did not express consent in any of the ways the VCLT-IO provides for, it needs to be examined if the EU can be considered a party based on other rules. The DARIO and the VCLT-IO does both include situations when a party can be bound depending on the appearance of intent.[86] There are some circumstances at the conclusion of the EU-Turkey Statement which make it appear like the representatives at the meeting on 17-18 March were representing the Union. The meeting took place in the Justus Lipsius building which is the building of the European Council and the Council. It was held in close connection with the ongoing European Council meeting with the president of the European Council present.[87] Furthermore, the Statement did set up commitments only the EU could deliver on.[88] This all suggest that the EU appeared to be the counterpart of Turkey at the conclusion of the Statement.

With the information at hand the EU appears to being a party to the Statement according to international law. However, the lack of information inhibits a fair assessment of the circumstances. In the case *NF, NG and NM v European Council*, the court based its decision on a number of documents which are not public. The NGO Access Info Europe has later requested these documents from the European Commission but were denied access. They brought the issue to the CJEU which upheld the decision of the Commission regarding all but one document.[89] With such a constraint in information it is difficult to make a complete evaluation of the circumstances.

[86] DARIO Art 8, VCLT-IO Art 7(3) (d).
[87] *NF v European Council*, para. 63.
[88] See e.g. European Commission, *Fact sheet on EU facility for Refugees in Turkey* (last update July 2018) https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/frit_factsheet.pdf (accessed 1 August 2018).
[89] *Access Info Europe v Commission*, para. 80, 96, 113 and 124.

This approach taken by the General Court in *NF, NG and NM v. The European Council* and the CJEU's decision to deny the documents to Access Info Europe are contradictory. If the Statement, like the General Court established in *NF, NG and NM v. The European Council*, is not an act made by any EU institution do they still have the jurisdiction to decide over these documents? The documents would, if the Member States are the actual parties, be a question of domestic rules on public information. Consequently, the document might fall under the jurisdiction of the Member States whereof some, for instance Sweden, have generous laws regarding freedom of information which would make the documents more accessible than under EU law.[90] Unfortunately, due to the scope of this thesis there will be no further inquiry in this issue.

3.3. Who is bound by the EU-Turkey Statemenet according to EU law?

The conclusion from the last section was that the EU probably can be considered a party to the Statement based on the appearances of the Union's representation when it was concluded. The General Court failed to take international law into consideration. The court might also have missed crucial elements of EU law when not investigating the actual author further in *NF, NG and NM v European Council*. In the CJEU case *Parliament v Council*[91] the Council urged the court to declare the Parliament's claim for annulment inadmissible because the contested decision was taken by the Member States and not the Council. The CJEU clarified that before dismissing a case based on it being concluded by the Member States the court needs to assess if the Council is not the actual author. In the assessment the court should regard the content of the international agreement and all circumstances need to be accounted for. The actual party to the international agreement was then determined by CJEU by considering the division of competence.[92]

The decision in *NF, NG, NM v European Council* is mainly based on the intention of the heads of state or government present at the meeting.[93] By focusing on the intent of the heads of state or governments the General Court ignored the fact that the

[90] Judgement of the Court 30 June 1993, *Parliament v Council and Commission*, joined cases C-181/91 and C-248/91, EU:C:1993:271.
[91] *Parliament v Council and Commission*, para. 14.
[92] Ibid., para 16.
[93] *NF v European Council*, para. 62-63.

Member States do not have unrestricted options to choose in which capacity they act.[94] The fundamental structure of the EU limits the Member States' power to act as sovereign entities in certain situations.[95] To find out if the Statement was concluded by the EU or the Member States, or possibly both, it is necessary to investigate if the heads of state or government present at the meeting March 17-18 acted as representatives of their states or as Members of the European Council. As previously mentioned the CJEU has in previous judgements determined which capacity the agents where acting under by considering the division of competence between the EU and the Member States.[96]

The following section will examine the division of competence between the EU and its Member States in regard to the conclusion of international agreements in the field of migration. The EU can have competence in a field either based on EU treaties or because it is implied based in the existence of internal powers.[97] These different methods to determine the competence will be examined after each other.

3.3.1. Division of competence through explicit powers

The EU only has the competence which has been entrusted upon the union. For the EU to have the competence to conclude international agreements it must have been conferred to the union by the Member State on the subject matter of the agreement.[98] The EU has the competence to enter into international agreements with third states according to Article 2(2), 3(2) and 216 (1) Treaty on the Functioning of the European Union (hereinafter "TFEU").

The Statement has the aim to return "[..] all irregular migrants".[99] Thus, it is an issue of migration and readmission which falls under the field of freedom, security and justice. This is a field of shared competence between the EU and the Member States according to Article 4 (2) (j) TFEU. The field of migration is further developed in Article 78 and 79 TFEU and includes the development of a common policy and a common migration policy. The shared competence in migration issues does also include the conclusion of readmission agreements according to Article 79 (g) TFEU.

[94] *Parliament v Council and Commission*, para. 16.
[95] *Commission v Council* (ERTA), para. 17.
[96] Judgement of the Court 31 March 1971, *Commission v Council (ERTA)*, 22/70, EU:C:1971:32, para 42 and *Parliament v Council and Commission*, para. 16.
[97] *Commission v Council* (ERTA), para. 17..
[98] Cremona, 2012 p. 96.
[99] European Council (2016).

3.3.2. Division of competence through implied powers (ERTA-doctrine)

The competence to conclude international agreements is not only given to the EU by expressed provisions in EU treaties but can also be implied.[100] The implied competence has been developed by the CJEU and widens the EU's exclusive competence to areas where the EU has already put down legislation even if the area to begin with was shared. This was first established in the *ERTA-case*[101] and has later been called the ERTA-doctrine or the pre-emption doctrine but is now codified in Article 3 (2) TFEU:

> The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or insofar as its conclusion may affect common rules or alter their scope.[102]

The result of this is that a Member State may only exercise its competence in areas with shared competence to the extent the EU has not exercised its competence. Hence, an area which is shared can turn into an area with exclusive competence for the EU if there is a risk for the measures to interfere or change the meaning of EU law. This was explained in the CJEU case *Parliament v Council* where the court stated that "[…] the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules". [103] The regulation put down by the EU does not have to completely overlap to give the EU exclusive competence.[104]

3.3.3. Is the EU a party to the EU-Turkey Statement according to EU law?

Migration is an area of shared competence but due to the ERTA-doctrine the Member States might not have the right to conclude international agreements with third states if the field is

[100] Opinion of the Court of 7 February 2006, *Opinion pursuant to Article 300(6) EC*, Opinion 1/03, ECLI:EU:C:2006:8, para 114-115.
[101] *Commission v Council (ERTA).*
[102] Article 2 (2) TFEU.
[103] *Commission v Council (ERTA)*, para. 17.
[104] A. Delgado Casteleiro, *The international responsibility of the European Union: from competence to normative control*, Cambridge University Press, Cambridge, 2016, para. 28.

already covered by EU legislation. For this reason, it needs to be examined to which extent the obligation in the Statement overlaps with EU legislation. If the area is heavily regulated by the EU, the shared competence could have changed to exclusive competence for the EU.[105]

First, the Statement regulates parts of the asylum application process which is already regulated in the Directive on common procedures for granting and withdrawing international protection[106] (hereinafter "Asylum Procedures Directive").[107] Second, the Statement sets up rules on readmission by agreeing that Turkey should accept the migrants which have arrived in Greece from Turkey.[108] This collides with the already existing formal readmission agreement the EU and Turkey concluded in 2014.[109] Moreover, the readmission agreement between the EU and Turkey specifically take precedence over contrarious readmission agreements concluded by the Member States if they are incompatible.[110] Third, the Statement opened up for a dialogue between the EU and Turkey about visa liberation for Turkish citizens coming to the EU with the ambition to lift the visa requirement by July 2016.[111] The Visa Code is an EU directive which regulates the procedure and condition for issuing visas for the EU territories.[112] This leads to the conclusion that the visa liberation scheme is also already covered by existing EU legislation. At last, the finances of the implementation of the Statement and the financial support the EU agreed to give to Turkey will have to be taken from the EU budget. The Member States do not have competence over the EU budget outside of the structure of the EU.[113]

This illustrates that the content of the Statement is, to a large extent, covered by EU legislation. With Article 3 (2) TFEU and the ERTA-doctrine in mind this would probably mean that the EU has exclusive competence in this area. The consequences of this being that the heads of state were acting as members of the European Council and therefore EU is bound by the Statement according to EU law.

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[105] *Commission v. Council (ERTA-case)*, para. 17.
[106] 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 'Asylum Procedure Directive'
[107] Article 6, 'Asylum Procedure Directive' and European Council (2016), point.
[108] European Council (2016), point. 1-2.
[109] Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorization, *EU-Turkey Readmission Agreement*, December 16 2014, L143/3, Article 4, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22014A0507(01)&from=EN (accessed 2 August 2018) and European Council (2016), point. 1.
[110] Article 21, EU-Turkey Readmission Agreement.
[111] European Council, (2016), point. 5.
[112] Regulation (EC) No. 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas, *the Visa Code*.
[113] European Commission, *Fact sheet on EU facility for Refugees in Turkey* (last update July 2018) https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/frit_factsheet.pdf (accessed 1 August 2018).

3.4. Conclusion

This chapter has examined if the EU is a party to the Statement by studying international law and EU law. According to the rules on attribution and the VCLT the EU can probably be considered bound by the Statement since the union appeared to be the party at the time of conclusion. However, due to of lack of information about all circumstances surrounding the conclusion it is difficult to establish anything with complete certainty.

To define who is the party to the Statement under EU law it is necessary to investigate the competence division between the EU and the Member States. This investigation resulted in the conclusion that the EU has exclusive competence since the area is already covered by EU legislation, which according to the ERTA-doctrine changes a field with shared competence to a field with exclusive EU competence. Ultimately, this means that the EU should be considered a party to the Statement because the heads of state or governments were acting as Members of the European Council.

4. The legal nature of the informal readmission agreements

The previous chapter established that the annulment procedure under EU law can be applied to the Statement since the EU, contrary to the General Court's decision, probably should be considered a party to the Statement. Equally important to establish before the possibilities of an annulment can be examined, is the legal nature of the two readmission agreements. The legal nature, with other words whether the act is legally binding or not, has a significant effect on the prospect of annulling an instrument under both international and EU law. An international instrument which is not legally binding cannot, in most cases, be applied in a court of law. The legal review in EU law is one exception where all acts with legal effect can be subjected to annulment. Depending on the legal nature different assessments are needed under EU law. For these reasons, the legal nature of the informal readmission agreements must be established before the possibilities to annul them can be investigated.

An international agreement is legally binding[114] and if the informal agreements fall under that category, so will they. Therefore, this chapter will examine how international agreements are defined in international and EU law. The designation of an instrument and the authors intent will be examined to find out in which way it affects the instruments classification as an international agreement. The result will then be applied on the Statement and the Declaration to determine if they are legally binding or not. In this chapter, international law and EU law will be analyzed together since there are no big divergences between the two legal frameworks.

4.1. Designation

At first glance the agreements do not appear to be binding due to their titles. Neither one of the two informal readmission agreements are called treaties or international agreements. Instead they have the non-committing titles statement and declaration. It is made clear in the VCLT that an instrument is not excluded from the definition of a treaty based on the designation of the document. The definition of a treaty is found in Article 2(1)(a) VCLT-IO:

[114] Article 26 VCLT.

> "treaty" means an international agreement governed by international law and concluded in written form: (i) between one or more States and one or more international organizations; or (ii) between international organizations, whether that agreement is embodied in a single instrument or in two or more related instruments and whatever its particular designation"[115]

The definition of a treaty is a part of customary international law[116] and consequently it is binding upon the EU. Besides the definition in the VCLT-IO a similar wording has been recognized within the EU legal framework in Opinion 1/75[117] and in the CJEU judgement *Commission v. Council*[118].

The irrelevance of the designation of international agreements has been confirmed by the International Court of Justice (hereinafter "ICJ") in the cases *Aegean Sea Continental Shelf*[119] and *Qatar v Bahrain*[120]. In *Aegean Sea Continental Shelf* from 1978 the ICJ regarded if a joint communiqué could be considered a treaty. The Court stated that "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 […]"[121]. This decision was upheld in *Qatar v Bahrain* where the ICJ had to determine if an unusual form of documentation coming out of a meeting could be considered a treaty. The instruments scrutinized were minutes from a meeting between two foreign ministers and the court held that neither the form nor the title of the agreement changed the fact that it constituted an international agreement.[122]

4.2. Intent

The form of the instruments is not enough to determine if informal readmission agreements can be classified as international agreements and thus be considered legally binding. One of the most recognized methods, but not undisputed, to define the legal nature of an instrument is

[115] Article 2 (1) (a) VCLT-IO.
[116] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening*), judgement, ICJ Report [2002], para. 263.
[117] Opinion of the Court of 11 November 1975, Opinion given pursuant to Article 228 (1) of the EEC Treaty, Opinion 1/75, ECLI:EU:C:1975:145, p. 1360.
[118] Judgment of the Court of 26 November 2014, *Parliament and Commission v Council*, Joint Cases C-103/12 and C-165/12, ECLI:EU:C:2914:2400, para 83.
[119] *Aegean Sea Continental Shelf (Greece v Turkey*), judgement, [1978], ICJ Reports.
[120] *Bahrain v Qatar*, judgment, [1994], ICJ Reports.
[121] *Aegean Sea Continental Self*, para. 96.
[122] *Qatar v Bahrain*, para 23.

by establishing the intent of the parties.[123] The relevance of intent is supported by the commentary of the International Law Commission on the draft of what later became the VCLT. The requirement that a treaty should be "governed by international law" should be interpreted as entailing the element of intent.[124] The consequence being that an instrument will not be considered an international agreement if the state or international organization did not intend for it to be governed by international law.[125] The importance of intent has also been repeated in the previous mentioned ICJ cases the *Aegean Sea Continental Shelf* and *Qatar v Bahrain.*[126] This is in line with the CJEU decision in *France v Commission*[127] where the court stated that the decisive criteria when establishing if an instrument has legal force is the intent of the parties.[128]

The intent can be either explicit or implied[129] which sometimes makes it difficult to identify. The interpretation can easily be infested with notions which were never intended.[130] With that difficulty recognized, the following section will make an attempt to find out how intent can be established. To find the intention in an instrument different elements of it are usually studied.[131] The following elements will be examined: the form chosen, the terminology, the establishing of mutual obligation and the circumstances when the agreement was concluded.

As previously concluded the form of an instrument does not determine the status but it could be an indicator of the parties' intent. The form an agreement takes is carefully chosen and can therefore be a signal about the intention behind the instrument. Moreover, the terminology in an international agreement can be an indication on whether the parties have the intentions to be bound by the instrument or not. There is a certain terminology which most states and international organizations use when concluding treaties that are so commonly used it can be considered a standard. Words like for instance "agree", "shall" and "undertake" could be considered mandatory and thus signal willingness to be legally bound.[132]

One of the most important functions of a treaty is the expression of mutual

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[123] J. Pauwelyn, 'Is It International Law or Not, and Does It Even Matter?', in J. Pauwelyn, R.A. Wessel, and J. Wouters (red.), *Informal international lawmaking*, Oxford University Press, Oxford, 2012, p. 134.
[124] A. Watts, *The International Law commission 1949-1998*, Vol. 1, The treaties, Oxford University Press, Oxford, 1999, p. 621-624.
[125] Aust, 2012, p. 48.
[126] *Aegean Sea Continental Shelf*, para. 96 and *Qatar v Bahrain*, para. 24.
[127] Judgement of the Court 23 March 2004, *France v Commission*, C-233/02, ECLI:EU:C:2004:173.
[128] *France v Commission*, para. 42–45.
[129] Pauwelyn, 2012, p. 134.
[130] J. Klabbers, *The concept of treaty in international law*, Kluwer Law International, Hague, 1996, p. 65-66.
[131] Aust, 2012, p. 48-54.
[132] Aust, (2012), p. 49.

obligations.[133] Some international law scholars argue that the confirmation of a mutual obligation is in itself is enough to create a legally binding agreement even without an intent to be bound.[134] One of the scholars who hold this view is Klabbers who argues that because of the nature of the internationally recognized principle of "Pacta Sunt Servanda"[135], non-legally binding agreements setting up obligations cannot exist. The result of this argument is that all agreements which sets up mutually obligations are legally binding.[136] The ICJ has in its case law pointed out the importance of the terms in the agreement. In 1978 in the *Aegean Continental Sea Shelf* case the court stated that "[…] in determining what was indeed the nature of the act or transaction embodied in the Brussels Communiqué, the Court must have regard above al1 to its actual terms and to the particular circumstances in which it was drawn up"[137].

It was also recognized in the ICJ cases *Aegean Continental Sea Shelf* and *Qatar v Bahrain* that the circumstances when the document was concluded could show the binding nature of the agreement.[138] If the drafting of an international agreement clarifies the intention to conclude a treaty this could compensate for facts pointing in any other direction.[139]

4.3. Assessment of the informal readmission agreements

4.3.1. The EU-Turkey Statement

The Statement was released as a press release with the title "EU-Turkey Statement".[140] However, to argue that the Statement is merely a statement because of the designation of the informal agreement would be contrary to the definition found in VCLT and VCLT-IO and the case law from the CJEU and the ICJ reviewed above.

The form of an international agreement is usually a cautious decision by the

[133] Lipson, 1991, p. 498.
[134] Aust, 2012, p. 65 and Klabbers, 1996, p. 53.
[135] Agreements must be kept.
[136] Klabbers, 1996, p. 53.
[137] *Aegean Sea Continental Shelf*, para 96.
[138] *Qatar v Bahrain*, para. 23.
[139] Aust, 2012, p. 52.
[140] European Council (2016).

parties.[141] It is therefore probably not coincidental that the Statement has the informal character it has. This indicates intent not to create a legally binding agreement.

The terminology in the Statement is a mix between mandatory and non-mandatory vocabulary. One example of non-mandatory language in the Statement is the use of the word "will". It can be noted in one of the action points "All new irregular migrants crossing from Turkey into Greek islands as from 20 March 2016 will be returned to Turkey".[142] The use of the word "will" is common in non-binding agreements and could be an expression of the two parties' intention not to be legally bound by the agreement. In legally binding instruments the use of more assertive words are customary.[143] The most noteworthy use of mandatory language in the Statement is the use of the word "agree".*[144]* This is frequently used in binding documents to signal that an obligation has been created. [145] Due to the ambiguous language in the Statement it is difficult to draw any conclusion based on the terminology.

Even if the terminology does not reveal the legal nature it could give the rise of mutual obligations which can be an indicator of intent. The Statement sets up a regime that will regulate the action of the EU and Turkey in the future. Some examples of the EU's obligations are to accept the Syrians sent from Turkey and that the Union will cover the cost for the return operations.[146] The Statement also sets up obligations for Turkey, one example being the acceptance of migrants being sent back from Greece.[147] Thus, the Statement sets up obligations for both parties with the expectation of their fulfilment.

It could be argued that the Statement does not create obligations for the parties but only reconfirms already existing obligations. However, previous to the Statement the readmission of migrants to Turkey from the EU was regulated in a formal readmission agreement but this agreement did not include the one-for-one scheme nor did it concern the return of "all irregular migrants".[148] The European Commission proposed amendments to a Council's decision to make the Statement compatible with EU legislation which gave the Council the right to adopt provisional measures for the benefit of Member States.[149] This

[141] Aust, 2012, p. 48.
[142] European Council (2016).
[143] Aust, 2012, p. 49.
[144] European Council (2016).
[145] Aust, 2012, p. 49.
[146] European Council (2016).
[147] Ibid.
[148] EU-Turkey Readmission Agreement.
[149]European Commission, Proposal for a Council Decision (EU) 2016/0089 of 21 March 2016 amending Council Decision EU 2015/1601 of 22 September 2015 establishing provisional measures in the area of international

change of the Council's decision indicates that the EU did not consider the Statement to be merely a confirmation of existing obligations.

The particular circumstances around the meeting can also give some insight into the intent. The meeting on the 17-18 of March 2016 on which the publication of the Statement followed was the third meeting since November 2015 between the heads of state or government of the Member States, the European Council and Turkey dedicated to the deepening of the co-operation on migration between the parties.[150] The previous meetings had resulted in a joint action plan (the EU-Turkey joint action plan) but without any binding obligations.[151] The different characteristics of the Statement compared with the outcome of the earlier meetings indicates that the intention at the meeting 17-18 of March was different from the previously non-binding documents.

Not much can be said about the circumstances at the conclusion of the Statement since there is not much information from the meeting. The conclusion of the agreement happened at a European Council meeting which are not open for the public. However, the NGO Statewatch has published a leaked draft of the Statement where the EU specifically mentioned that "The agreement will be formulated as an EU-Turkey Statement."[152] An interpretation of this formulation is that it was the intention of the EU and Turkey to create a binding agreement and the title the EU-Turkey Statement was given for the benefit for the public to give them the impression that it was a non-legally binding agreements.

In this section the legal nature of the Statement has been analyzed. It is difficult to get a definite answer regarding the legal nature, partly because of the lack of information concerning the negotiations but mostly because the ambiguity of the Statement. The form and the title of the Statement and to a certain degree the terminology could indicate a will not to be bound. On the other hand, the Statement gives a rise to mutual obligations which changes the future behavior of the parties. There are no guidelines in international law or EU law on how to weight these contradictive aspects against each other and whether any aspects should be given priority before the other. There might be some more indicators, especially based on

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protection for the benefit of Italy and Greece, COM/2016/0171 final -2016/089 (NLE), Date of end of validity: 29/09/2016.

[150] European Council (2016).

[151] European Council, (29 November 2015), Statements and Remarks 870/15 'Meetings of Head of States or Government with Turkey – EU-TUkrey Statement 29/11/201' https://www.consilium.europa.eu/en/press/press-releases/2015/11/29/eu-turkey-meeting-statement/ (accessed 1 August 2018) and European Commission (15 October 2015) *Fact Sheet 'EU-Turkey Joint Action Plan'*, http://europa.eu/rapid/press-release_MEMO-15-5860_sv.htm (accessed 1 August 2016).

[152] European Council, (18 March 2016) *EU-Tukrey 18/32016* 'non-paper', http://statewatch.org/news/2016/mar/eu-turkey-tusk-non-paper.pdf , (leaked by Statewatch).

the leaked documents from Statewatch, of there being an actual intent to be legally bound. This could mean that the Statement is legally binding. However, this inquiry is so inconclusive that the coming investigation of the possibility to annul the Statement will do so from both the perspective of the Statement being legally binding and from the perspective of it being non-legally binding.

4.3.2. The Joint Way Forward Declaration

Compared to the Statement the Declaration is much more consistent in its vocabulary and all commitments are expressed in a non-mandatory language. One example is the re-occurring use of the word "will" which signifies a non-binding commitment. This can be seen on the Afghani side, for instance by declaring that "[…] the Government of Afghanistan will take necessary measures to sensitize the population to the dangers of irregular migration, including through information and awareness raising campaigns"[153]. This is also recognizable in regard to the EU. The Declaration establishes, among other things, that "[…] the EU will contribute to finance such information campaigns".[154] A non-mandatory language is also used when expressing the commitment of the parties. Instead of using words which could indicate the creation of an obligation, vaguer expressions are used. Two examples being that the parties have the "intend to cooperate"[155] and "declare their intentions".[156]

The intention in the Declaration not to create any legal obligation is clearly expressed in the introduction. It is declared by the following statement *"*The JWF is not intended to create legal rights or obligation under international law*"*.[157] This leaves no room to doubt the intent of the parties. Consequently, if the intent of the parties is the sole determinant of the legal nature the Declaration is not legally binding. As previously mentioned, the role of the authors intent in determining the legal nature of an international agreement is not undisputed by international law scholars.[158] Two of the scholars downplaying the importance of intent are Pauwelyn and Klabbers. Pauwelyn highlights the impossibility of contracting yourself out of a legal system.[159] Klabbers argues that situations where international customary law exists have president over the intent of the parties.[160]

[153] European Union External Action, (2016), part III.2
[154] Id.
[155] Ibid., part I.1.
[156] Ibid., part VII.
[157] European Union External Action, (2016), introduction.
[158] i.e. Klabbers, 1996, p. 53.
[159] Pauwelyn, 2012, p. 136.
[160] Klabbers, 1996, p. 53.

Moreover, Klabbers argues that there should be a presumption that international agreements are legally binding. The presumption will only be broken with a clear statement expressing the opposite.[161] Even with this presumption theory in mind the proclamation in the introduction of the Declaration is probably enough to break such a presumption. Given the reasons above it can be concluded that the Declaration is a non-legally binding instrument.

4.4. Conclusion

Based on the jurisprudence of the ICJ and the CJEU it can be concluded that the designation of an international instrument does not affect its classification as an international agreement. Instead, the question of the legal nature of the two informal readmission agreements has to be answered by examining the intent of the authors. It is easy to conclude that the Declaration is non-legally binding due to the statement in its introduction. The legal nature of the Statement is much more ambiguous and therefore no clear conclusion has been found. Instead the next question in this thesis will be addressed with regards to the Statement both as a legally binding agreement as well as a non-legally binding one.

[161] J. Klabbers, 'International Courts and Informal International Law', in J. Pauwelyn, R.A. Wessel, and J. Wouters (red.), *Informal international lawmaking*, Oxford University Press, Oxford, 2012, p. 226.

5. Annulment under EU law

This chapter aims to answer if it is possible to annul the Statement and the Declaration under EU law. The role of the EU in the signing of the Declaration was never questioned and in Chapter 3 it was concluded that the EU also should be considered a party to the Statement. The EU being a party is necessary because the CJEU does not have the jurisdiction to review international agreements concluded by the Member States.[162]

International agreements concluded by the EU is governed by both EU law and international law. Since the Statement and the Declaration are governed by international law any non-compliance with internal EU law does not annul the agreement but merely changes the effect in the EU.[163] This chapter begins with a general presentation of the annulment process under Article 263 TFEU and then it will be applied on the Statement and the Declaration.

5.1. Annulment according to Article 263 TFEU

There are four grounds for judicial review according to Article 263 TFEU.[164] These grounds are: lack of competence, infringement of an essential procedural requirement, infringement of the Treaty or any rule of law relating to its application and the misuse of power.[165]

The EU institutions and individuals are eligible to seek the annulment of an EU act, but their right to do so differ. The Commission, the Council, the European Council, the European Parliament, the European Central Bank and the Member States are privileged applicants which means that they always are considered having a direct interest in a legal review.[166] Natural and legal persons on the other hand are non-privileged applicants and have limited possibilities to bring an act for annulment forth since they need to be able to demonstrate a direct and individual concern in the matter.[167] For the act to be a direct concern it needs to have an immediate legal effect on the individual without any implementation

[162] Judgement of the Court of 5 May 2015, *Spain v Parliament and Council*, C-146/13, EU:C:2015:298, para. 101.
[163] *Council v Commission (*Swiss MoU), para 69.
[164] T.C. Hartley, *The foundations of European Union law: an introduction to the constitutional and administrative law of the European Union*, 7. ed., Oxford University Press, Oxford, 2010, p. 437.
[165] Article 263 TFEU.
[166] Article 263 (2) TFEU, described in M. Horspool and M. Humphreys, *European union law*, 8. ed., Oxford University Press, Oxford, 2014, p. 222.
[167] Article 263 (4) TFEU.

needed.[168] Individual concern means that the act changes the legal status of the applicant in a defined and immediate way by limiting the applicants' rights or obligations. The CJEU has in the past interpreted this requirement restrictively[169] with a couple of exceptions and therefore the exact scope is still unclear and changes depending on the case.[170]

According to Article 263 (6) TFEU, to challenge an act there is a two-month time limit which begins the day of official publication. The adoption of the Declaration was 2 October 2016 and the publication of the Statement was 18 March 2016. The two-month timeframe has, in both these cases, long since passed and no new cases of annulment can be brought in front of the CJEU.

The form a decision takes is not relevant under the legal review and the legal review is thus not limited to legislative acts but available to all acts intended to produce legal effect on a third party. [171] To determine if an act is intended to give legal effect the substance of the contested act needs to be examined. The act must be "[…] capable of affecting the interest of the applicant by bringing about a distinct change in his legal position" [172] for it to be subject to legal review.

5.2. Assessment of the informal readmission agreements

5.2.1. The EU-Turkey Statement

To find out if the Statement can be annulled according to Article 263 TFEU there has to be an assessment if any grounds for annulment are present in the Statement. There might have been an infringement of procedural requirements at the adoption of the Statement. International agreements should be concluded following the procedure in Article 218 TFEU. The Council is responsible for concluding international agreements but before the conclusion of the agreement the European Parliament has to consent to it.[173] The failure to adopt the correct

[168] C.F. Bergström and J. Hettne, *EU:s grundfördrag och annan primärrätt*, 1 ed., Studentlitteratur, Lund, 2014, p. 343.
[169] Judgement of the Court of July 15 1963, *Plaumann v Commission*, case 25-62, ECLI:EU:C:1963:17.
[170] Bergström and Hettene, 2014, p. 351.
[171] Article 263 (1) TFEU and further developed in the judgement of the General Court 13 June 2012, *Lito Maiefriko Gynaikologiko kai Cheirourgiko Kentro AE v European Commission* T-535/10, ECLI:EU:T:2011:589, para 22.
[172] Judgement of the Court of the 11 November 1981, IBM v. Commission, Case 60/81, ECLI:EU:T:1981:264, para. 9.
[173] M. Gatti, 'The EU-Turkey Statement: A Treaty that violates Democracy (part 2)'

legislative procedure has in previous cases been a ground for annulment.[174] The Statement was concluded by the European Council, not to be confused with the Council, and the European Parliament did not consent to it. To sum it up, there are two infringements of the procedure at the conclusion of the Statement: the lack of consent of the European Parliament and the involvement of the European Council which does not have the authority to conclude international agreements.

The EU institutions can enter into executive agreements without the approval of the parliament. This is particularly common practice in regard to more technical issues.[175] A closer study of the provision concerning migration and readmission dismisses the possibility to regard the Statement as an executive agreement because the TFEU provides for clear guidelines for the conclusion of readmission agreements. Readmission agreements cannot be concluded without the consent of the parliament since the ordinary legislative procedure applies.[176] If this procedure is not followed when adopting readmission agreements, the content of Article 218(6) TFEU would lose its meaning.

In the CJEU judgement *France v Commission* it was established that the procedure for adopting international agreements in Article 218 TFEU does not extend to agreements which do not create binding obligations.[177] Hence, if the Statement is considered a non-legally binding agreement the failure to follow 218 TFEU is not an infringement. On the other hand, if the Statement would be considered a legally binding international agreement this could be a ground for annulment. If the Statement is legally binding the infringement of the procedure set out in Article 218 TFEU could be a ground for annulment.

The most controversial part of the Statement are the possible breaches of the principle of non-refoulment,[178] the right to seek asylum,[179] the right to an effective remedy,[180] and the prohibition of collective expulsion.[181]These are all principles recognized in EU primary and secondary law.[182] All of these principles and their appliance to the Statement

[174] Judgement of the Court 30 September 1982, *Roquette Frères v Council,* C-138/79, ECLI:EU:C:1982:323, p. 3230-3231.
[175] Gatti, 'The EU-Turkey Statement: A Treaty that violates Democracy (part 2)'
[176] Article 79 (3) TFEU and Article 218(6) TFEU.
[177] *France v Commission*, para 25.
[178] Article 78, TFEU; Article 19, Carter of Fundamental Rights of the European Union, 2000/C 364/01; Article 21, Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted 'Qualification Directive'.
[179] Article 18, the EU Charter of Fundamental Rights.
[180] Article 46, Asylum Procedure Directive.
[181] Article 19, the EU Charter of Fundamental Rights
[182] Roman, 20117, p. 241.

would need to be examined to find out if there has been a violation of the treaties. This would require a thorough investigation which is not within the scope of this thesis. The focus lies on the informal format of the Statement which in this aspect does not pose any problems. It is not certain that the CJEU would find a violation of any of the treaties but there is a probable risk and it is worth being investigated in court.

The Statement did not have any official date when it would enter into force but sets up certain dates for when some of the actions should be taken. The Statement was published 18 March 2016 and the start date for the one-for-one scheme was 20 March of the same year. The first return due to the Statement took place 4 April 2016.[183] The two months limit has passed but the case of *NF, NG and NM v European Council* was filed in time and has now been appealed.[184]

If the Statement is a legally-binding instrument it can be subject to review on the grounds infringement of the Treaty or essential infringement in procedure without any further inquiries. However, if the Statement cannot be considered legally binding additional investigations are necessary before it is concluded that it can be subjected to legal review. Article 263 TFEU does not only apply to legal acts but to all acts which have legal effect and thus it needs to be examined if the Statement produces legal effect. To examine if it produces legal effect it will be necessary to investigate the substance of the act to see if the legal position of the individual has changed. An important difference between an asylum seekers rights in Greece and Turkey is that Turkey maintained its declaration of the geographical limitation of the Refugee Convention[185] when acceding to the 1967 Protocol and consequently only refugees from Europe can receive refugee status in Turkey.[186] Thus, the Statement changed the possibility for migrants to be acknowledged as refugees. Hence, the Statement has legal effect and can be reviewed by the CJEU even if it would not be legally binding.

In the case *NF, NG and NM v European Council* the applicants were three asylum seekers. For individuals to be applicants in a case of annulment against an act it needs to be of individual and direct concern for them.[187] The question is if one can argue that the

[183] European Commission, (2016), 'First Report on the progress made in the implementation of the EU-Turkey Statement'
[184]Appealed case of *NF v European Council,* C-208/17 P, appealed case of *NG v European Council* C-209/17 P and appealed case of *NM v European Council,* C-210/17 P.
[185] The Convention relating to the Status of Refugees and the Protocol relating to the Status of Refugees, 28 July 1951.
[186] United Nations High Commissioner for Refugees (UNHCR), 'States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol', http://www.unhcr.org/3b73b0d63.pdf (accessed 2 August 2018), p. 2.
[187] Article 263(4) TFEU.

changed situation for the applicants is directly caused by the Statement or if their rights are threatened by a possible wrongful implementation by Greece. The Statement does not address the applicants individually and thus it does not live up to the requirement of being an individual concern for the applicants. Consequently, it would be very difficult for individuals to bring an act of annulment to the court. The privileged applicants do not have the same requirements and could seek annulment of the Statement without similar problems.

The informality does not strictly block an annulment under 263 TFEU. Even if there are no formal obstacles for an annulment under EU law, the informality might still obstruct the actual possibilities for a legal review. This will be further developed in Chapter 7.

5.2.2. The Joint Way Forward Declaration

The cooperation set up in the Declaration begun the day of signature 2 October 2016[188] and the agreement has been active since then, resulting in numerous of returns since that date.[189] Much more than two months have passed since the adoption and it is too late for an annulment process by the CJEU. This analysis will investigate if there would be a theoretical possibility to annul the Declaration if it was done within the right time span.

Just like the Statement, the Declaration deals with migration and readmission which is an area of shared competence between the Member States and the EU.[190] The Declaration is not legally binding and because of that there are no requirements to follow the procedure for conclusion of international agreements in Article 218 TFEU.[191] The treaties do not set up any other procedure to follow at the adoption of non-legally binding agreements and thus there is no infringement of any procedure requirements.

The Declaration has raised similar problems as the Statement regarding the compliance with the EU treaties and international customary norms. [192] Some examples of rights which are at risk of being violated by the Declaration are the principle of non-refoulment[193] and the right to seek asylum[194]. There might be a conflict between the EU's obligation to respect these rights and the Declaration which could be a ground for annulment.

[188] European Union External Action, (2016), part. VIII: Start of cooperation.
[189] Parliamentary Question, 13 February 2018, Answer given by Mr Avramopoulos on behalf of the Commission, http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2017-007189&language=EN (accessed 2 August 2018).
[190] Article 4 TFEU and Article 78-79 TFEU.
[191] Judgement of the Court the 23 March 2004, *France v Commission,* C-233/02, ECR I-2759, para 40.
[192] Warin and Zhekova, 2017, p. 145.
[193] Article 78 TFEU; Article 19 the EU Charter of Fundamental Rights; Article 21 Qualification Directive.
[194] Article 18 the EU Charter of Fundamental Rights.

This will not be investigated any further in this thesis.[195] The court might not consider the Declaration in violation of the norms mentioned but it should be enough for an annulment procedure to be carried out.

Since the declaration is not legally binding it must have legal effect for it to be subjected to legal review. To find out if the Declaration creates legal effects it is necessary to investigate if the legal position of individuals have changed after its adoption. The situation for women and unaccompanied children from Afghanistan has been a reason of concern because of the Declaration. Part I paragraph 4-5 in the Declaration puts down safeguards for vulnerable groups:

> 4. Prior to returning Afghan nationals, the EU side will give fair consideration to humanitarian aspects in accordance with international law to unaccompanied minors, single women and women who are head of families, family unit, elderly and serious sick people. Special measures will ensure that such vulnerable groups receive adequate protection, assistance and care throughout the whole process.
> 5. Unaccompanied minors are not to be returned without successful tracing of family members or without adequate reception and care-taking arrangements having been put in place in Afghanistan.[196]

These provisions provide for the protection of vulnerable groups but there has been a concern by human rights NGOs that this instead would lead to a higher acceptance of expulsions of these groups.[197] Women and unaccompanied children have formally not been excepted from expulsion before but in practice there has been close to no expulsion of these groups to Afghanistan from the EU. The Declaration could potentially signal a shift in that practice.[198] Warin and Zhenkova highlights the risk of the Declaration being interpreted by the administration in the Member States as signal to start seeing Afghanistan as a safe country.[199] This would be a change in interpretation of the existing Asylum Process Directive[200] but not

[195] See the delimitation in Chapter 1.3.
[196] European Commission and European External Action Service (EEAS), para.
[197] Joint Statement to the Members of European Parliament, ' The European Parliament must immediately address the Joint Way Forward Agreement between the EU and Afghanistan', 24 October 2016, https://reliefweb.int/sites/reliefweb.int/files/resources/joint_statement_eu-afghanistan_deal.pdf (accessed 2 August 2018). (Undersigned organizations: Doctors of the World international network, World Vision, Save the children, Cordaid, Action Against Hunger, Jesuit Refugee Service, International Federation for Human Rights, Amnesty International, European Council on Refugees and Exiles, International Catholic Migration Commission Platform for International Cooperation on Undocumented Migrants, European Association for the Defense of Human Rights, Emergency, Organization Aid to Refugees , Terre des Hommes, PRO ASYL, NAGA, Actalliance, Slovenska Filantropija, Access Info Europe, European Network against Racism, Solidar, Demetra, Justice and Peace Netherlands , Migrant Rights Centre Ireland, MENEDEK, Oxfam.
[198] Roman, 2017, p. 232.
[199] Warin and Zhenkova, 2017, p. 155.
[200] Article 33-35, Asylum Process Directive.

the actual legal position of individuals. It might also be difficult to argue that this legal effect was intended. For these reasons the Declaration would most likely not be considered having legal effect. Given the above, the Declaration would probably, due to its non-legally binding status and lack of legal effect, not be possible to annul according to EU law.

5.3. Conclusion

The Statement could be annulled according to Article 263 TFEU based on an essential procedural requirement or infringement of the Treaty or any rule of law relating to its application. However, it would be difficult for an individual applicant to bring a case of annulment to court due to the strict requirements for individuals to be individually and directly concerned. However, there should not be any obstacle for any of the privileged applicants to bring a case of annulment to court.

Since the Declaration is non-legally binding it must have legal effect to be subject to annulment by the CJEU. The investigation showed that the Declaration is unlikely to be considered having legal effect. Thus, the Declaration cannot be annulled according to EU law.

6. Annulment under international law

International law does not provide for equally detailed provisions for annulment as EU law. However, there are a few possibilities to declare an international agreement invalid under international law. In regard to legally binding international agreements there are provisions in the VCLT and the VCLT-IO which could provide for the annulment of an international agreement. It is more difficult to find methods to challenge non-legally binding agreements. The VCLT or VCLT-IO are not directly applicable on non-legally binding agreements and the focus will instead be on terminating the legal consequences of the instrument. This chapter will show the importance of the legal nature of the informal readmission agreements. The assessment will differ depending on if the instrument is legally binding or non-legally binding and will be divided accordingly in the inquiry.

6.1. Legally binding agreements

There are no set procedures for annulment in international law but there are rules for when certain circumstances can lead to an international agreement being declared void.[201] The rules on this are found in Article 46-53 VCLT and VCLT-IO. Since the parties to the two informal readmission treaties examined probably have no interest in pronouncing them invalid[202] and no coercion has taken place[203] the focus will lie on Article 53 VCLT and VCLT-IO. Article 53 VCLT and VCLT-IO provides for invalidity in cases when the treaty conflicts with a peremptory norm of international law.

For this provision to be actualized and to declare the informal readmission agreements void the agreements has to be in conflict with peremptory norms. A norm is considered peremptory if it "is a norm accepted and recognized by the international community of States as a whole".[204] There is no complete consensus on which norms are considered peremptory but one of the few examples existing is the prohibition of torture and

[201] Article 46-53 VCLT.
[202] Article 46-51 VCLT.
[203] Article 52 VCLT.
[204] Article 53 VCLT.

other cruel, inhuman or degrading treatment or punishment.[205] The principle of non-refoulment is recognized in international human rights law as a fundamental component of the prohibition of torture.[206] Non-refoulment is the prohibition of direct and indirect forced removal of refugees or asylum seekers to a territory where they risk being subjected to human rights violations on account of their race, nationality or religion.[207] The Statement and the Declaration have both been criticized for violating the prohibition of non-refoulment and therefore the attention in this section will be on the possibility to annul the informal agreements because they violate this principle.

6.2. Non-legally binding agreements

The methods used on legally binding agreements are not applicable on non-legally binding agreements. Since non-legally binding agreements are not governed under international law the VCLT or VCLT-IO cannot be used directly.[208] The non-legally binding agreements cannot be applied directly in court, but it could influence the decisions indirectly. The ICJ confirmed this in the *Aegean Sea Continental Shelf* where the court found it not to have jurisdiction to rule in the case due to the non-legally binding nature of the agreement. Since non-legally binding agreements are not justiciable, there is a need of some sort of legal hook to make them applicable in international courts.

There seems to be a consensus about non-legally binding agreements being able to have legal consequences.[209] This could mean that non-legally binding agreements can affect the legal sphere without being a part of it. They could have the effect of legal facts and thus influence the interpretation of a legal act. Article 31 VCLT and VCLT-IO can be used analogous to challenge an interpretation. This could be done by arguing that the interpretation made with the support of the non-legally binding agreement goes against the object or purpose of the agreement.[210] This would not be an actual annulment, but it would restrict the use and influence of the non-legally binding agreement.

There are also certain cases when obligations set up in non-legally binding

[205] Human Rights Committee, General Comment No. 29: Article 4: Derogations during a State of Emergency, U.N. Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 11.
[206] United Nations High Commissioner of Refugees, (UNHCR), *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, para. 2.21.
[207] Ibid., para. 1.8
[208] VCLT is applicable on international agreements govern by international law according to Article 1-2 VCLT.
[209] Aust, 2012, p. 69; Klabbers 1998, p. 53; Pauwelyn,2012, p. 155 and Warin and Zekova, 2016, p. 154.
[210] Article 31 VCLT.

agreements can actualize general principles of international law and thus create binding obligations. [211] One example is the principle of legitimate expectations which could, depending on the intention of the state and the specific circumstances in the case, create binding obligations on the parties.[212]

6.3. Assessment of the informal readmission agreements

6.3.1. The EU-Turkey Statement

If the Statement violates a peremptory norm it is void according to Article 53 VCLT and VCLT-IO. Therefore, the Statement's compliance with the principle of non-refoulment has to be examined. The first action point in the Statement states that "All new irregular migrants crossing from Turkey into Greece islands as from 20 March 2016 will be returned to Turkey"[213]. To expel all migrants without a thorough examination of their individual asylum claims can amount to a violation of the principle of non-refoulment. The principle of non-refoulment is violated if the asylum seeker is sent back to a territory where they risk being subjected to human rights violations. This also includes sending back refugees to countries where the principle of non-refoulment risks being violated.[214] Turkey is considered a safe country by Greece[215] and is on the EU's list of safe countries[216]. This means that according to EU law, asylum applications can be considered inadmissible after only one interview since there is a first country of asylum which is safe.[217] All inadmissible applicants, which will be almost everyone, can then be sent back to Turkey. However, this is only the case if Turkey really can be considered a safe country which is disputed.[218]

[211] Pauwelyn, 2012, p. 157.
[212] Aust, 2012, p. 69.
[213] European Council (2016), point. 1.
[214] UNHCR (2007), para. 1.8.
[215] European Commission, 10 February 2016, *Communication from the Commission to the European Parliament and the Council on the State of Play of Implementation of the Priority Actions under the European Agenda on Migration*, https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-85-EN-F1-1.PDF (accessed August 2 2018), footnote no. 38.
[216] European Commission, Proposal for a Regulation of the European Parliament and of 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 the European Council on common procedures for granting and withdrawing international protection, and amending Directive 2013/32/EU, COM (2015) 452 final.
[217] Article 33 (c), 34 and 38 Asylum Procedure Directive.
[218] M. Gatti, 'The EU-Turkey Statement: A Treaty that violates Democracy (part 1)', *EJIL:Talk!*, 18 April 2016, https://www.ejiltalk.org/the-eu-turkey-statement-a-treaty-that-violates-democracy-part-1-of-2/ (accessed 2 August 2018).

The asylum system in Turkey has been criticized for being dysfunctional and for giving an unequal protection.[219] Furthermore, Turkey maintained the geographical limitation of the Refugee Convention when acceding to the 1967 Protocol.[220] The geographical limitation in the Refugee Convention 1951 excludes all refugees not coming from Europe. The result being that only asylum seekers from Europe can gain refugee status in Turkey.[221]

According to the Asylum Protection Directive the Member States are not required to examine applications if it is not the first country of asylum. A country outside of the union can be considered a first country of asylum if the asylum seeker has the chance to gain refugee status or "[…] otherwise sufficient protection".[222] An otherwise sufficient protection is not a sufficient standard of protection of asylum seekers from refoulment according to UNHCR.[223] Ultimately, only if Greece use the higher protection criteria, will the expulsion according to the Statement be compatible with international law.[224]

According to the wording of the Statement, expulsions should be executed in accordance with EU and international law and all migrants should be protected with relevant international standard and in respect of the principle of non-refoulment. [225] The current treatment of asylum seekers has led to doubts on whether these principles are respected.[226] The current situation however, should not be used to interpret an international agreement according to the rules on interpretation in Article 31 VCLT and VCLT-IO. An interpretation of the Statement should be done in according to the ordinary meaning of the text. Without regarding the current situation, the ordinary meaning of the Statement provides for an adequate protection for the asylum seekers. Thus, the result of an interpretation in accordance with Article 31 VCLT and VCLT-IO is that the Statement is not in violation of the principle of non-refoulment.

This far the assessment has been based on the Statement being legally binding

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[219] S. Peers and E. Roman, 'The EU, Turkey and the Refugee Crisis: What could possibly go wrong?' *EU Law Analysis,* 5 February 2016, http://eulawanalysis.blogspot.com/2016/02/the-eu-turkey-and-refugee crisis-what.html (accessed 2 August 2018).
[220] United Nations High Commissioner for Refugees (UNHCR), 'States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol', http://www.unhcr.org/3b73b0d63.pdf (accessed 2 August 2018), p.
[221] Peers and Roman, 'The EU, Turkey and the Refugee Crisis: What could possibly go wrong?'
[222] Article 33 (2) Asylum Procedure Directive refer to 35 (a) (b).
[223] United Nations High Commissioner of Refugees (UNHCR), (23 March 2016) *Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey as part of the EU-Turkey Cooperation in Tackling the Migration Crisis under the safe third country and first country of asylum concept,* http://www.unhcr.org/56f3ec5a9.pdf (accessed 2 August 2018), p. 3-4.
[224] B. Frelick, 'Is Turkey Safe for Refugees', *Human Rights Watch,* 22 March 2016, https://www.hrw.org/news/2016/03/22/turkey-safe-refugees (accessed 2 August 2018).
[225] European Counciol (2016), point 1..
[226] Gatti, 'The EU-Turkey Stament: A Treaty That Violates Democracy (Part 1)')

but, as concluded in Chapter 4, the legal nature of the Statement is unclear. The rest of the assessment will shift perspective and investigate the possibilities of annulment under international law if the Statement is non-binding. One possibility would be to use the VCLT and VCLT-IO analogously in the Statement to do the same assessment as above and regarding its compatibility with the principle of non-refoulment. Since this investigation would be similar to the already made assessment it will not be developed any further here.

If the Statement is non-binding it could still have legal consequences by influencing the interpretation of legal acts. One could argue that the Statement has affected the interpretation of the readmission agreement between the EU and Turkey. One example on how the Statement has changed the meaning of the formal readmission agreement is the expanded scope of readmission by Turkey. The Statement includes all irregular migrants coming to Greece from Turkey.[227] The readmission agreement was barely used until the Statement was published and entered into force[228] and has since been in active use which is a change attributable to the Statement. However, even if the Statement contribute to new interpretations of the formal readmission agreement it would be difficult to challenge the interpretation because the changed interpretation probably still would be considered to be in line with the object and purpose of the formal agreement.

6.3.2. The Joint Way Forward Declaration

The Declaration is non-legally binding as the investigation above has shown and the annulment only needs to be investigated from this perspective. An analogous application of Article 53 VCLT and VCLT-IO might be applicable but unlike the Statement, the Declaration does not provide for the expulsion of all migrants which makes it less likely to be conflicting with the peremptory norm of non-refoulment. The Declaration does also state its commitment to international human rights and the Refugee Convention[229] and similarly to the reasoning regarding the Statement this would probably be considered enough for the Declaration not to be a violation of the principle of non-refoulment.

Unlike Turkey, Afghanistan is not considered a safe country by the EU. However, there are concerns about the Declaration giving the administrative authorities in the Member States the impression that Afghanistan should be considered a safe third country.[230]

[227] Article 2, EU-Turkey Readmission Agreement.
[228] den Heijer and Spijkerboer, *Is the EU-Turkey refugee and migration deal a treaty?*
[229] European Union External Action, (2016), introduction.
[230] Warin and Zhekova, 2017, p. 155 and Roman 2017, p. 232.

This interpretation would give legal effect to the Declaration since it would influence the interpretation of the Asylum Procedure Directive. An interpretation can be contested if it goes against the object and purpose of the agreement.[231] The Asylum Procedure Directive provide for certain protection for unaccompanied minors but they are not excluded from expulsion.[232] The provision in the Declaration does not in any way off-set the protection for unaccompanied minors in the previously mentioned directive but merely confirm it. The confirmation of the protection cannot not be said to go against the object and purpose of the Asylum Procedure Directive, even if the long-term result of including it could lead to a worse situation for unaccompanied children.

Binding obligations could arise from the non-legally binding agreement though the creation of legitimate expectations. This could under certain circumstances be relevant for the Declaration but would most likely lead to an obligation to fulfil the obligation and not to its annulment.

The result of this investigation shows that there are no possibilities to annul the Declaration under international law. The two alternatives to give legal effect to non-legally binding agreements, changed interpretation of existing legal acts and the non-compliance of general international principles, are not enough to overcome the problems of the non-legality of the informal agreement and thus the Declaration cannot be annulled.

6.4. Conclusion

No matter if the Statement is legally binding or non-legally binding it will probably not be possible to challenge under international law. It cannot be annulled under Article 53 VCLT and VCLT-IO for colliding with the peremptory norm of non-refoulment. The Statement expresses that expulsions should take place in accordance with the principle of non-refoulment and according to the ordinary meaning and purpose of the agreement the Statement is therefore not a violation of the principle of non-refoulment. However, if the Statement was non-legally binding the legal effect must be examined. Since the Statement changed the interpretation of a legal act it has legal effect, but the interpretation cannot be challenged since it does not contradict the object and purpose of the legal act. The same goes for the Declaration. It could be said to have legal effect, but it could probably not be

[231] Article 31, VCLT.
[232] Article 25 Asylum Procedure Directive.

challenged since the interpretation still would be in line with the object and purpose of the Asylum Procedure Directive.

7. Difficulties to annul the agreements due to the informality

The investigation in Chapter 5 and 6 regarding the possibilities to annul the agreement displayed the complications of annulling the two informal agreements. These complications are not exclusively due to the informal format of the two instruments but some of the difficulties can be directly contributed to the format. The research has shown that there are, in most cases, theoretical possibilities to annul the agreements under EU law. In international law the non-binding nature poses a bigger problem and makes it very difficult to annul the informal agreements. Even if the annulment might be theoretically possible there are still more practical obstacles due to the informality of the agreements. In this chapter these problems will be examined and analyzed based on what has been brought to attention by answering the three sub-questions. This will be done by answering the second part of the main research question: In which ways does the informality make it more difficult to annul the EU-Turkey-Statement and the Joint Way Forward Declaration under EU law and international law?

7.1. Lack of transparency

The research in this thesis has showed that one of the consequences of informality is the lack of transparency it can lead to. The lack of transparency in itself is not a formal obstacle for annulment but makes it more difficult to initiate an annulment process in practice. The democratic system in the EU provides for transparency to make it possible for the public and different institutions to hold policy makers accountable.[233] By not concluding the agreements in a transparent way this can result in the policy makers are not being held responsible for their actions.

When stating that informality leads to a lack of transparence this is based foremost on two scenarios which have been noted in this thesis. First, the parliament is kept out of the conclusion process by not being invited to consent on the agreement and by not

[233] Judgement of the Court 24 June 2014, *Parliament v Council (Mauritius)*, C-658/11, ECLI:EU:C:2014:2025, para. 81 and Gatti,‘ The EU-Turkey Statement: A Treaty that violates Democracy (part 2)’

being informed about the process. The Second scenario is the role the European Council had in the conclusion of the Statement.

Neither the Statement nor the Declaration was concluded by the procedure set up for the conclusion of international agreements in Article 218 TFEU.[234] If the international agreement cover fields where the ordinary legislative procedure applies, the Council should obtain the consent of the European Parliament according to Article 218(a)(v) TFEU. Since the ordinary legislative procedure applies in the field of migration and readmission the Statement should not have been concluded without the consent of the parliament. The provision also requires the Council to keep the European Parliament "[…] immediately and fully informed at all stages of the procedure"[235]. However, this procedure does not have to be used when adopting non-binding agreements.[236] This means that the Declaration and possibly the Statement are excluded from this procedure. The non-binding legal nature can thus be problematic in the sense that the insight and democratic legitimacy of the instrument disappears. The lack of information prevents public debate which could potentially lead to a better agreement being formed. There are no rules applicable on the adoption of informal readmission agreements. Consequently, if the procedure in 218 TFEU is not applicable there are no other requirements. This can also have an impact on the annulment process since it hampers the information about the informal agreement. It could lead to an increased pressure on the EU institutions to initiate an annulment procedure. It could be seen in the examination in Chapter 5 that it is difficult for an individual to show a direct and individual interest, but the privileged applicant does not have such requirements.

It can be noted that by ignoring the procedure in Article 218 TFEU, the *ex ante* review by the CJEU will be more difficult for the EU institutions to access. An *ex antes* review cannot lead to the annulment even if the court finds the act to be incompatible with the treaties, but the international agreement cannot enter into force until the agreement has been amended or the treaties revisited.[237]

In the case with the Statement the situation is even more problematic by the fact that it was the European Council adopting it. According to Article 218 TFEU it is the Council and not the European Council who is responsible for opening negotiations, adopting negotiating directives, authorizing the signing of agreements and to conclude the international

[234] Cassarino and Giuffré, 2017, p. 4.
[235] Article 218 (10) TFEU.
[236] *France v Commission*, para. 25.
[237] Article 218 (11) TFEU.

agreements.[238] The European Council is composed of the heads of state or government whom are not accountable within the EU system but are "[…] themselves democratically accountable either to their national parliament, or to their citizens".[239] Except the fact that the European Council cannot be held accountable within the EU legal framework its work is non-transparent and there are no protocols from the meeting March 18 except the leaked document mentioned above. Therefore, neither European citizens nor the European Parliament can get any information about the deal. As stated before, this lack of transparency which covers the informal readmission agreements contribute to making an annulment procedure less likely since the lack of information is a hindrance to public debate and the institutions with a privileged interest will not be informed about the informal agreement. Consequently, the lack of transparency, which is created by the informality in the agreements, is an obstacle for annulling the Statement and the Declaration.

7.2. The unclarity

The legal nature of the Declaration was relatively easy to establish but it was significantly more difficult with the Statement. The unclarity of the law in this field together with the ambiguous character of the agreements made it difficult to define which rules apply to the Statement. Since the Statement and the Declaration, and probably many other informal agreements, did not follow the usual patterns of negotiation or conclusion of international agreements, unexpected problems can appear. There are no rules within international law or EU law applicable on this hybrid legal character that the informal readmission agreements take. They are not completely recognized as agreements, but still have legal consequences for individuals.

This creates a lot of uncertainties concerning numerous parts of the informal agreements. One example is the unexpected court order *NF, NG and NM v European Council* when the General Court established that it did not have any jurisdiction. This would probably be less likely to happen in a formal international agreement since they usually have more precise formulations and formalities. Since the legal nature of the Statement is ambiguous it could be used to circumvent the procedure of treaty adoption in Article 218 TFEU. Even if it later would have shown that the Statement actual were legally binding the procedure was already bypassed and the damage done. In this way the clarity surrounding the informal

[238] Article 218 (2) TFEU.
[239] Article 10 (2) TFEU.

readmission agreements makes it possible to avoid democratic and legal review even if it technically is not done according to the correct procedure.

7.3. The non-legally binding nature

The non-legally binding nature of the informal readmission agreements allow for the sidestepping of the procedure under EU law. The fact that the informal agreements are, or might be in the case of the Statement, non-legally binding have many consequences which has become obvious throughout the assessments. It places the agreements outside of the legal sphere in the international arena and complicates the procedure in the EU legal framework. The framework stipulating rules for international agreements are dependent on the instrument also classifying as such. In section 6.3.2. attempts were made to create a legal hook which could make the informal readmission agreements applicable in a court of law. In some specific situations it might be possible, but the assessment of the Declaration showed how difficult it is. An international court would most likely find it difficult to establish jurisdiction if the agreement is non-legally binding. One example is the ICJ decision in *Aegean Sea Continental Shelf* when the court concluded that since the communique between the Turkey and Greece did not amount to an international agreement the court did not have jurisdiction to rule in the case.[240] The non-legally binding informal readmission agreements have in this thesis shown to have an effect on the rights of migrants but are still difficult to reach legally. In the same time, it has become evident how easy it is for the parties to create this kind of instruments which are out of reach of courts. The assessment of the Declaration showed how the EU and Afghanistan with just one sentence could place the instrument almost beyond the reach of the law.

7.4. Conclusion

In this chapter it was concluded, based on the research in previous chapters, that the informality of the informal readmission agreements makes them more difficult to annul. The focus in this chapter was to investigate the second part of the main research question, in which way does the informality make it more difficult to the Statement and the Declaration. Chapter 7 highlighted three different problems were the investigation has shown that the informality is

[240] *Aegenan Sea Contintal Shelf*, para. 108.

an obstacle for annulling the informal readmission agreements. First, the informality leads to a lack of transparence which can impact the annulment. It does not change the assessment per se, but the lack of transparence could decrease chances of a privileged applicant to file for an annulment under EU law. Second, there are not many sets of rules for dealing with informal agreements and it leads to significant uncertainties both due to the law being unclear and because the ambiguity of the informal readmission agreements. Third, the non-legal nature makes it difficult for international courts to establish jurisdiction. Thus, the informal readmission agreements risk ending up not being justiciable.

The EU has been accused of purposefully avoiding the court's scrutiny by using informal agreements instead of formal.[241] The aim of this thesis has not been to investigate the reasons behind the Unions' increased use of the informal format, intended or not, the informality made the informal readmission agreements more difficult to challenge.

[241] Carrera, den Hertog and Stefan, 'It wasn't me! The Luxemburg Court Orders on the EU-Turkey Refugee Deal'.

8. Conclusion

The aim of this thesis was to investigate the implication informality has on informal readmission agreements. This was done by examine if it became more difficult to annul the Statement and the Declaration under international law and by identifying in which ways it became more difficult. To find the answer to that question different elements of the informal agreements had to be investigated. These elements were structured up in three sub-questions all necessary to give the full picture of the difficulties of annulling the informal readmission agreements under international and EU law.

1. Is the EU a party to the EU-Turkey Statement?

To answer the first sub-question the international laws on attribution and the division of competence between the EU and the Member States was examined. The investigation of international law concluded that it is probable that the EU would be considered a party according to international law because of the appearance of the union at the time of adoption of the Statement. This cannot be concluded with absolute certainty because of the lack of public information about the meetings 17-18 March. The party to the Statement under EU law is determined by the division of competence. The explicit and implied competence in the field of migration and readmission was examined which resulted in the conclusion that EU has exclusive competence. The competence in the concerned field was from the beginning shared but due to the ERTA-doctrine it became exclusive EU competence since it is covered with EU-legislation. To summarize, the EU can be considered a party according to EU law and probably also according to international law.

2. What is the legal nature of the EU-Turkey Statement and the Joint Way Forward Declaration?

The main determinant of the legal nature is the parties' intention to be or not to be bound by the instrument. The intention to not be legally bound is stated in the Declaration and thus its legal nature is easy to establish. The legal nature of the Statement is more complicated to determine because there are many contradictory elements in it. The chosen title and form indicate a will not to be bound but the establishment of mutual obligation indicate the opposite. The leaked non-paper from the European Council gives the impression that the title Statement was purposely chosen to be perceived as non-legally binding even

though the parties were meaning to create legal obligations. This ambiguity makes it impossible to give a certain answer to the legal nature of the Statement.

3. Is it possible to annul the EU-Turkey Statement and the Joint Way Forward Declaration, either under:

a) EU law?

The Statement fulfilled two of the grounds for annulment. It could be considered an infringement of a treaty and a breach of an essential procedural requirement since the European Parliament did not consent to the adoption. However, this is not applicable if the Statement is non-legally binding because non-legally binding agreements do not have to be adopted according to the procedure in Article 218 TFEU. One complication of the annulment under EU law are the strict requirements for individual applicants to be directly and individually concerned. However, there would not be any hinder for one of the privileged applicants to bring a case of annulment to the court. The declaration does probably not change the legal situations for any individual and thus has no a legal effect. The consequences of this is that the Declaration cannot be annulled under EU law.

b) general international law?

The legal nature of the informal readmission agreements determine which measures are available under international law. Yet, no matter the legal form of the Statement, it cannot be annulled. If the Statement is considered legally binding it could have been declared void because the non-compliance with the peremptory norm of non-refoulment. However, it is difficult to argue that the Statement is a violation of this norm since it is specifically expressed in the text that all expulsion should be done with respect to the principle of non-refoulment. If the Statement instead is considered non-legally binding it could still have legal consequences which could be challenged. The examination of this possibility showed that even if the Statement gives legal effect to the Asylum Procedure Directive it cannot be challenged since the interpretation still would be compatible with the object and purpose of the directive. This is also the case with the Declaration. Given the above it would probably not be possible to annul the Statement nor the Declaration under international law.

The examination the three sub-questions made it clear that the informality creates difficulties when annulling informal readmission agreements. This was expanded upon

to find out in which ways the informality posed a problem and three areas were identified. The informality can make the procedure less transparent which potentially could result in the privileged applicants being less inclined to bring a case of annulment to the court. The non-binding nature has many negative sides for an annulment which has been seen throughout the examination. It would for instance be difficult for a court to establish jurisdiction based on a non-binding informal readmission agreement. It is uncertain which rules applies to informal agreements which makes them hard to assess. The informality leads to an uncertainty surrounding the informal agreements which can obstruct the annulment of informal readmission agreements in unexpected ways.

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