

# BALANCING BORDER CONTROL WITH HUMAN RIGHTS OBLIGATIONS IN THE EU ASYLUM AND MIGRATION POLICY

The case of the EU-Turkey Statement

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## Chapter 1: Introduction

### 1.1. Framing the issues

The European Union's (EU) handling of migration and asylum policy has historically been characterized by the tension between the need to protect the EU's external borders and the respect of human rights obligations. The Schengen Agreement of 1985 and the 1990 Schengen Convention, by eliminating internal border checks, required the strengthening of external borders' protection and the introduction of common European measures to deal with the increase in migration pressure. Among these, the Dublin Regulations "established the criteria and mechanisms for determining the Member State responsible [for an asylum claim]"<sup>1</sup> and provided that "the first Member State in which the application for international protection was lodged shall be responsible for examining it."<sup>2</sup> On the other hand, the EU has often presented itself as a "normative power"<sup>3</sup> and a "beacon of human rights"<sup>4</sup> in the international arena, with the Member States (MSs) ratifying human rights treaties such as the UN Convention relating the Status of Refugees (Geneva Convention)<sup>5</sup> and the Protocol of 1967 related to the Status of Stateless Persons, and the EU Charter of Fundamental Rights (2007).<sup>6</sup> Moreover, the entry into force of the Lisbon Treaty in December 2009 marked a crucial milestone in European cooperation regarding migration and asylum policy, aiming at ensuring more robust democratic accountability, human rights protection and judicial control in these domains.<sup>7</sup>

Against this backdrop, the emergence of the EU refugee crisis in 2015 brought once again to the limelight the very foundations of EU cooperation in the fields of migration control and asylum policy. The EU immediate response focused on better managing migratory flows while ensuring shelter and assistance to those in need.<sup>8</sup> This strategy, however, elicited contrasting reactions in the various EU Member States. Notably, the Visegrad States, comprising the Czech Republic, Hungary,

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<sup>1</sup> European Union: Council of the European Union, Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), 29 June 2013, OJ L. 180/31-180/59; 29.6.2013, (EU)No 604/2013.

<sup>2</sup> *Ibid.*

<sup>3</sup> Ian Manners, "Normative Power Europe: A Contradiction in Terms?", *JCMS*, Vol. 40, No. 2(2002): 235-58.

<sup>4</sup> Roxana Barbulescu, "Still a beacon of human rights? Considerations on the EU response to the refugee crisis in the Mediterranean", *Mediterranean Politics* 22, issue 2 (2016): 301-308.

<sup>5</sup> UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137.

<sup>6</sup> European Union, Charter of Fundamental Rights of the European Union, 26 October 2012.

<sup>7</sup> Sergio Carrera, Juan Santos Vara and Tineke Srik, "The External Dimensions of EU Migration and Asylum Policies in Times of Crisis". Constitutionalizing the External Dimensions of EU Migration and Asylum Policies in Times of Crisis", *Edward Elgar Publishing* (2019): 1-19.

<sup>8</sup> European Commission, "EU-Turkey Statement-one year on", March 17, 2017, available at: [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/eu\\_turkey\\_statement\\_17032017\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/eu_turkey_statement_17032017_en.pdf).

Poland and Slovakia, opposed to the Union's strategy based on the idea of "sharing the responsibility" and, depicting migration as a security issue, firmly advocated for stronger protection of the common external borders. This lack of political willingness by many Member States to agree on solidarity-based solutions<sup>9</sup> to manage the migration crisis within the EU's borders made the idea of externalizing the issue appear. In this respect, Turkey soon became a very tempting partner. From September 2015, the EU Member States and Turkey started to conduct negotiations, that ultimately led to the conclusion of the EU-Turkey Statement on 18 March 2016. It entailed, *inter alia*, the return (forcibly if necessary) of all irregular migrants crossing from Turkey into the Greek islands as from 20 March 2016 and the resettlement of one Syrian from Turkey to the EU for every Syrian being returned to Turkey from Greek islands.<sup>10</sup>

While it rapidly came to be considered the most visible and successful EU response to the crisis, as well as a model for further migration compacts, the Statement has attracted harsh criticism from a number of academics,<sup>11</sup> by the UN High Commissioner for Refugees,<sup>12</sup> by non-governmental organizations<sup>13</sup> and by intergovernmental organizations (Council of Europe).<sup>14</sup> Most of this criticism regarded the violations of the refugees' fundamental rights under international and European human rights law, in particular with respect to the right to asylum, human dignity, collective expulsion and *non-refoulement*, as well as its dubious consistency with imperatives of public morality.<sup>15</sup> Furthermore, the EU-Turkey Statement allegedly marginalized the principles on which the EU is founded, including rule of law, democracy and sincere cooperation.

With this in mind, the EU-Turkey Statement represents a concrete illustration of the struggle the EU encounters when seeking to strike a fair balance between human rights' obligations and security concerns in the context of migration control and asylum policy.

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<sup>9</sup> Carrera, Santos Vara, and Srik, "Constitutionalizing the external dimensions".

<sup>10</sup> Council of the European Union, EU-Turkey Statement of 18 March 2016, Press Release 144/16: <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/>.

<sup>11</sup> James Hathaway, "Three legal requirements for the EU-Turkey deal: An interview with James Hathaway", *Verfassungsblog*, March 9, 2016, available at: <https://verfassungsblog.de/three-legal-requirements-for-the-eu-turkey-deal-an-interview-with-james-hathaway/>; Maarten den Heijer, Jorrit Rijpma, and Thomas Spijkerboer, "Coercion, Prohibition, and Great Expectations: The Continuing Failure of the Common European Asylum System", *Common Market Law Review*, Vol. 53(2016): 607-642.

<sup>12</sup> UNHCR, "UNHCR redefines role in Greece as EU-Turkey deal comes into effect", March 22, 2016, available at: <https://www.unhcr.org/news/briefing/2016/3/56f10d049/unhcr-redefines-role-greece-eu-turkey-deal-comes-effect.html>

<sup>13</sup> Amnesty International, "Turkey: No safe refuge. Asylum-seekers and refugees denied effective protection in Turkey", June 3, 2016, available at: <https://www.amnesty.org/en/documents/eur44/3825/2016/en/>.

<sup>14</sup> Report of the 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", Doc. 14028 of 19 April 2016.

<sup>15</sup> Enzo Cannizzaro, "Disintegration through law?", *European Papers*, Vol. 1, No. 1 (2016): 3-6.

## 1.2. Research question

Within this setting, the purpose of this thesis is to provide an answer to the following research question:

*“How did the EU cope with the tension between commitment to human rights and migration control in concluding the EU-Turkey Statement?”*

The relevance of the question lies in the social and legal repercussions of the EU-Turkey Statement. First, as several official reports from human rights organizations have shown, the EU-Turkey Statement has seriously impacted those returned to Turkey and the thousands of people who were averted from initiating their journey to Greece.<sup>16</sup> Second, the EU-Turkey Statement has been taken as an example to develop future agreements, or “compacts” with third countries in the migration policy field.<sup>17</sup> Third, recognizing the role that the EU plays as a global actor in the international system, such a deal sets a potentially dangerous precedent in relation to the implementation of international law about refugee protection and asylum policy in general. Even more important is the fact that the EU’s response to mass migration, embodied in the EU-Turkey Statement, represents a challenge for the role of the EU as a normative power.<sup>18</sup> According to Ian Manners, “the EU is founded on and has as its foreign and development policy objectives the consolidation of democracy, rule of law, and respect for human rights and fundamental freedoms.”<sup>19</sup> This implies that the EU is not only constructed on a normative basis, but that it is also predisposed “to act in a normative way in world politics.”<sup>20</sup> Proponents of political realism, conversely, regard international politics as a self-help system, where states are mostly concerned about their own security and survival and pursue their own national interests.<sup>21</sup>

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<sup>16</sup> De Vrieze, “The legal nature of the EU-Turkey Statement: putting NF, NG and NM v. European Council in perspective”, Faculty of Law and Criminology, Ghent University (2018): 8.

<sup>17</sup> European Commission, Press Release, “Commission announces New Migration Partnership Framework: reinforced cooperation with third countries to better manage migration”, 7 June 2016, available at: [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_16\\_2072](https://ec.europa.eu/commission/presscorner/detail/en/IP_16_2072)

<sup>18</sup> Lisa Haferlack and Dilek Kurban, “Lessons learnt from the EU-Turkey refugee agreement in guiding EU migration partnerships with origin and transit countries”, *Global Policy*, Vol. 8, Suppl. 4(2017): 86.

<sup>19</sup> Manners, “Normative Power Europe”, 241.

<sup>20</sup> *Ibid.*, 252.

<sup>21</sup> Adrian Hyde-Prince, “Normative power Europe: a realist critique”, *Journal of European Public Policy*, Vol. 13, No. 2(2006): 217-234.

Existing research has tended to investigate either the dubious compatibility of the Statement with refugee law and human rights in general,<sup>22</sup> or its legal nature,<sup>23</sup> *i.e.*, the question of whether it constitutes a non-binding political declaration or a binding international treaty. The vast majority of the works that have been produced regarding the EU-Turkey Statement failed to make the essential connection between its legal nature and the violations of human rights. On the contrary, these concerns are inherently linked, as assessing the legal nature of the EU-Turkey Statement serves really to determine if it can be subject to judicial scrutiny in order to establish potential violations of human rights.<sup>24</sup> Therefore, revealing the link between these issues, this dissertation is intended to disclose the way the European institutions involved used the ambiguity surrounding the Statement's legal nature to allow violations of human rights to go unpunished.

The main argument of this dissertation is that, instead of handling the crisis in a “normative way”, upholding international human rights principles and adhering to the European treaty-making procedures, the EU prioritized security interests: this makes its treatment of refugees appear a lot more like a realistic policy.<sup>25</sup> It is true that crisis normally calls for exceptional actions, with the inherent risk of disregarding the rule of law checks and balances provided by EU law.<sup>26</sup> However, when concluding the EU-Turkey Statement, the EU institutions not only overlooked EU law and international law pertaining to fundamental human rights, but also ignored the Treaty provisions regarding treaty-making. This hindered the power of the Court of Justice to scrutinize the Statement's compliance with the EU Charter of Fundamental Rights and with EU refugee rights commitments.<sup>27</sup> The EU institutions and MSs involved in the negotiations, in the name of a state-centered security approach to the problem, deliberately circumvented the Treaty-based procedural rules to conclude agreements with third countries and the system of judicial checks and balances that are aimed at ensuring the democratic rule of law and fundamental rights. The EU-Turkey Statement somewhat reproduced previously existing logics of EU cooperation on migration policy, focusing on the securitization and externalization of migration.<sup>28</sup> Yet, because of the way it was concluded, the Statement represented a quite revolutionary way to cope with the long-standing tension between

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<sup>22</sup> See, *inter alia*, Hathaway, “Three legal requirements”; Themistoklis Tzimas, “Two years After: Evaluation of the EU Refugee Policy from an International and EU law perspective”, *Geneva Jean Monnet Working Paper*, No.11 (2017)

<sup>23</sup> See, *inter alia*, Maarten den Heijer and Thomas Spijkerboer, “Is the EU-Turkey refugee and migration deal a treaty?”, *EU Law Analysis*, April 7, 2016, available at: <http://eulawanalysis.blogspot.com/2016/04/is-eu-turkey-refugee-and-migration-deal.html>

<sup>24</sup> De Vrieze, “The legal nature”: 2.

<sup>25</sup> Haferlack and Kurban, “Lessons learnt”.

<sup>26</sup> Carrera, Vara, and Srik, “Constitutionalizing the external dimensions”.

<sup>27</sup> *Ibid.*

<sup>28</sup> In this respect, notable is the example of policies towards Libya, whereby the EU granted the Gaddafi regime considerable support for action against migration towards the EU.

human rights and border control, which eventually undermined the power of judicial scrutiny of the Court of Justice of the European Union (CJEU).

### 1.3. Aim and methodology

The first aim of this dissertation is to show that the EU-Turkey Statement, because of its content and implementation, did cause gross violations of the fundamental human rights of the asylum seekers. The second aim is to make a coherent analysis of the legal nature of the Statement. This in order to demonstrate that the European institutions involved in the negotiations, following a realistic, security-oriented approach to the issue of migration, circumvented the Treaty-based procedures to allow such violations to escape judicial review of the Court of Justice. This argument is supported by the securitization theory as formulated by the Paris School of security studies, according to which securitization takes place through actual practices and actions. Moreover, as noted by several scholars,<sup>29</sup> securitization often clashes with human rights. That is because once an issue is regarded as capable of sidestepping ordinary and legal procedures, it can subsequently endanger the human rights of the individuals affected.

For what concerns the violations of human rights, this research first looks at European and international legislation. Whilst it is not possible, within this thesis, to scrutinize in detail every aspect of human rights law implicated in the EU-Turkey Statement, for reasons of brevity it focuses specifically on the principle of *non-refoulement*, which is of extreme relevance in the context of the relations between the EU and third countries in asylum and migration policy. In this regard, legal sources consist primarily of the Refugee Convention, the European Convention on Human Rights as well as primary and secondary law of the European Union. Furthermore, with the purpose of supplementing the legal sources, official reports from international human rights organizations will be used. It has been deliberately chosen to utilize mostly reports from Amnesty International and Human Rights Watch, as they were both rather outspoken about the human rights abuses caused by the EU-Turkey Statement.

The second part of this dissertation is aimed at scrutinizing the legal nature of the EU-Turkey Statement: hence, it undertakes a legal evaluation the Orders of the General Court of 28 February

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<sup>29</sup> Alessandra Buonfino, "Between unity and plurality: the politicization and securitization of the discourse of immigration in Europe", *New Political Science*, Vol. 26, No. 1(2004): 23-49; Didier Bigo, "Security and immigration: toward a critique of the governmentality of unease", *Alternatives: Global, Local Political*, Vol. 27, No. 1 Special Issue (2002): 63-92.



2017 in *NF*,<sup>30</sup> *NG*<sup>31</sup> and *NM v. European Council*<sup>32</sup>, where it was asked to review the legality of the Statement. It addresses, specifically, the question of the authorship of the EU-Turkey Statement and the question of whether it constitutes an international agreement or a mere political declaration (the so-called legal nature *sensu stricto*). The legal analysis is accompanied by a discourse analysis of official documents and statements delivered by members of the European institutions involved in the negotiations, mainly the Commission and the European Council. It has been decided to look at the Orders as they bluntly reflect the *mala fide* that inspired the actions of the European institutions involved in the negotiations. In the Orders, the Court held that, as the Statement cannot be viewed as a measure adopted by the European Council or by any other EU institutions, it lacked jurisdiction to rule on its legality. This way to confront the struggle between human rights protection and migration control, besides in practice frustrating the fulfillment of fundamental rights of the refugees, allows analogous deals to escape judicial review and potentially alters the course of the EU's external migration policy.

## Chapter 2: Theoretical Framework

### 2.1. The securitization of migration control

Following the signing of the Amsterdam Treaty in 1997, the Treaty of the European Union (TEU) states that is the aim of the Union to “maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures concerning external border controls, asylum and immigration.”<sup>33</sup> This combination of freedom, justice and humanitarian assistance with border controls and security concerns has ever since brought about a potential conflict between human rights and migration management. As the Justice and Home Affairs Commissioner Antonio Vitorino noted in 2000, when seeking to find a balance between freedom, security and justice, these concepts “are of equal importance: none is superior to the others. There is a particular link between freedom and security: freedom loses much of its meaning if it cannot be enjoyed in a secure environment.”<sup>34</sup> However, immigration has become one of the most significant security concerns of the 21<sup>st</sup> century, and the portrayal of migration as a

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<sup>30</sup> Order of the General Court *NF v. European Council*, T-192/16, (ECLI:EU:T:2017:128).

<sup>31</sup> Order of the General Court *NG v. European Council*, T-193/16, (ECLI:EU:T:2017:129).

<sup>32</sup> Order of the General Court *NM v. European Council*, T-257/16, (ECLI:EU:T:2017:130).

<sup>33</sup> Article 2 TEU, emphasis added.

<sup>34</sup> Antonio Vitorino, “Speech to the conference organized by the Union Indépendente des Syndicats de police on Public and Private Security,” Brussels, November 21, 2000.

“security problem” has been stereotyped in political discourses both at EU and domestic level:<sup>35</sup> this has led to what has been called “securitization of migration.” According to one of the most cited definitions of securitization, “when a securitizing actor uses a rhetoric of existential threat and thereby takes an issue out of what under those conditions is normal politics, we have a case of securitization.”<sup>36</sup> The idea that securitization is essentially played out in a speech act draws from the Copenhagen School’s theory of securitization, originally developed in the works written by Weaver, Buzan and De Wilde. In their view, securitization is a process of “socially constructed threats.”<sup>37</sup> The Paris School of security studies extended the theory of securitization put forward by the Copenhagen School by claiming that securitization does not occur merely as a speech act, but most importantly “security practices are enacted [...], through policy tools.”<sup>38</sup> This means that if a certain practice is perceived as diverging from ordinary measures, then the issue has, by its nature, been securitized. Bigo, one of the most prominent scholars of the Paris School, argued that the process of securitization has served the purpose of creating a dominant “truth” about the potential risks posed by irregular migration, that identifies unchecked entrants as “enemies” and severely endangers “the homogeneity of the State.”<sup>39</sup> Such suspicion provides a sufficient justification for the adoption of measures to manage this alleged “security threat” and legitimizes policies of “permanent exceptionality.”<sup>40</sup>

Huysmans has produced a lot of material about the securitization of migration control in the EU, linking this approach with the “Europeanization” of migration policy and the expansion of the Schengen area. He believes that the shift of asylum and migration policies from the Third to the First Pillar under the Treaty of Amsterdam generated an atmosphere of anxiety surrounding immigrants that fostered the process of securitization of migration. Moreover, he wrote that the freedom of movement granted to EU nationals and the subsequent deregulation of migration within the EU borders came at the expenses of those outside the EU’s external borders. Hence, the control of the external border became stronger and stronger, creating the idea of a “Fortress Europe.”<sup>41</sup> Addressing the way securitization works in practice, Huysmans noted that “securitization constitutes political unity by means of placing it in an existentially hostile environment and asserting an obligation to free

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<sup>35</sup> Violeta Moreno-Lax, “The EU Humanitarian border and the securitization of Human rights: the rescue through interdiction/Rescue without protection paradigm”, *JCMS*, Vol. 56, No.1 (2018): 121.

<sup>36</sup> Barry Buzan, Ole Weaver and Jaap de Wilde, *Security: a new framework for analysis*, (Lynne Rienner: Boulder, 1998).

<sup>37</sup> *Ibid.*

<sup>38</sup> Thierry Balzacq, *Securitization theory: how security problems emerge and dissolve*, (London, UK: Routledge, 2006), 15.

<sup>39</sup> Bigo, “Security and immigration”, 67.

<sup>40</sup> Moreno-Lax, “The EU Humanitarian border”, 121.

<sup>41</sup> Jef Huysmans, “The European Union and the Securitization of Migration”, *JCMS: Journal of Common Market Studies*, Vol.38, No. 5 (2000): 751-777.

it from threat.”<sup>42</sup> In this regard he added that “directly or indirectly, supporting strategies of securitization makes the inclusion of immigrants, asylum seekers and refugees in European Societies more difficult.”<sup>43</sup> In the same vein, Buonfino argued that with the creation of “boundaries between us and others, between inside and outside, issues of solidarity, ethics and human rights become secondary to issues of security.”<sup>44</sup> She also acknowledged this latent tension between security and the humanitarian principles that the EU constantly wishes to portray itself as protecting and promoting within but also outside its borders. Interestingly, she indicated that “in European discourses, [...] security is implied within discussions of humanitarian assistance, fundamental rights and protection.”<sup>45</sup>

During the refugee crisis, against the backdrop of increasing fatalities, the narratives of “tragedy” and “emergency” immediately blended with the securitization discourse, and the appeals for “urgent action” were permeated by “humanitarianism.”<sup>46</sup> Indeed, as Moreno-Lax stressed, by turning border control into a humanitarian issue, exceptional measures can be justified on compassionate grounds and appear more smoothly acceptable.<sup>47</sup> In this context, Pallister-Wilkins demonstrated that “humanitarianized” interventions intertwine with the securitization logic, generating a new form of “ethical policy” that “cares and controls”<sup>48</sup> at the same time. Moreover, linking the security discourse with human rights concerns has also served the purpose of focusing solely (or at least mostly) on the “here and now” of smugglers and shipwrecks, instead of directly addressing the broader structural deficiencies in the EU border control design.<sup>49</sup> The same “here and now” logic applies to the actual instruments employed to “solve” the crisis: indeed, as Moreno-Lax claimed, a rule of law-abiding understanding of human rights would have entailed the full respect of material and procedural legal obligations, instead of being simply limited to the mere physical survival.<sup>50</sup>

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<sup>42</sup> Jef Huysmans, *The Politics of Insecurity: Fear, Migration and Asylum in the EU*, *New International Relations Series*. (London, UK: Routledge, 2006): 50.

<sup>43</sup> *Ibid.*, 64

<sup>44</sup> Buonfino, “Between unity and plurality”, 24.

<sup>45</sup> *Ibid.*, 45.

<sup>46</sup> Moreno-Lax, “The EU Humanitarian border”, 121.

<sup>47</sup> *Ibid.*

<sup>48</sup> Polly Pallister-Wilkins, “The humanitarian politics of European border policing: Frontex and border police in Evros”, *International Political Sociology*, Vol. 9, No. 1 (2015): 53-69.

<sup>49</sup> Polly Pallister-Wilkins, “Interrogating the Mediterranean Migration Crisis”, *Mediterranean Politics*, Vol. 21, No. 2 (2016): 311-15; Moreno-Lax, “The EU Humanitarian border”.

<sup>50</sup> Violeta Moreno-Lax, “Accessing asylum in Europe”, Oxford Scholarship Online, 2017.

## 2.2. The externalization of migration control

In the framework of a security-oriented approach towards migration, externalization, *i.e.* “the range of processes whereby European actors and Member States complement policies to control migration across their territorial boundaries with initiatives that realize such control extra-territorially and through other countries and organs rather than their own,”<sup>51</sup> is the central platform of the EU’s response to the tension between the protection of fundamental rights and the control of migration flows.

Managing migratory flows through externalization is not a new strategy in the EU. Indeed, the basic components of such strategy in EU immigration and asylum policy started to emerge in the early 1990s, as a result of the perceived need to compensate for the inadequacy of domestic border controls.<sup>52</sup> However, in more recent years this kind of approach has severely intensified, and the cooperation with third countries has become the primary tool to tackle irregular immigration directed towards the EU. Justifications offered for externalization generally oscillate between discourses of securitized border control on the one hand and humanitarian concerns on the other hand.<sup>53</sup> In this respect, in its “Strategy for the External Dimension of JHA,” the Council of the European Union declared that, to respond to the security threats of terrorism, organized crime, corruption and unmanaged migration flows, the “development of an area of freedom, security and justice can only be successful if it is underpinned by a partnership with third countries on these issues which includes strengthening the rule of law and promoting the respect of human rights and international obligations.”<sup>54</sup>

From its inception, the Schengen system has been based on the intrinsic link between free movement of people within the EU borders and compensatory measures aimed at safeguarding the internal European space from risky flows coming from outside the borders.<sup>55</sup> Furthermore, in the Dublin III regulation’s framework, that has *de facto* created an asymmetric distribution of responsibilities within the EU Member States, allocating the task of processing the asylum claims to

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<sup>51</sup> Violeta Moreno-Lax and Martin Lemberg-Pedersen, “Border-induced displacement: The ethical and legal implications of distance-creating through externalization”, *Questions of International Law, Zoom-in* 56(2019): 5.

<sup>52</sup> Christina Boswell, “The external dimension of EU Immigration and Asylum Policy”, *International Affairs*, Vol. 79, No. 3 (2003): 619-638.

<sup>53</sup> Moreno-Lax, “The EU Humanitarian Border”; Jorgen Carling and Maria Hernandez-Carretero, “Protecting Europe and Protecting Migrants? Strategies for Managing Unauthorized Migration from Africa”, *The British Journal of Politics and International Relations*, Vol. 13, No. 43 (2011).

<sup>54</sup> Council of the European Union, “A Strategy for the External Dimension of JHA: Global Freedom, Security and Justice”, December 6, 2015, available at:

<https://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2015446%202005%20INIT>.

<sup>55</sup> Boswell, “The external dimension”.

countries situated at the external borders of the EU, externalization is portrayed as a remedy to the Dublin's ills and as a shield for the Schengen system; at the same time, it holds out promises of protection of the refugees' rights. This tension is also recognized by Lemberg-Pedersen, who claimed, however, that "externalization is [...] a flanking measure designed to safeguard the free circulation within Schengen by simultaneously excluding and subsuming migrants under the power of border control."<sup>56</sup>

In principle, externalization is not *per se* harmful: it can, in fact, lead to substantial improvements in protection capacity in transit countries and countries of first arrival.<sup>57</sup> Nevertheless, it is indisputable that the EU externalization policy often results in the violation of the refugees' rights in practice. First of all, as the main purpose of externalization measures is to prevent people from moving across borders, these frequently involve some degree of deprivation of individual liberty. Secondly, externalization indirectly provokes push backs carried out in breach of the *non-refoulement* principle or encourages *refoulement* by non-EU countries whose cooperation is being sought.<sup>58</sup> Thirdly, the mechanisms related to externalizations are based on the supposition that third countries, with their national laws, infrastructures, social and political situations, are fully capable of mimicking the Schengen "integrated border management system,"<sup>59</sup> which is not always the case. Also, as Moreno-Lax stressed, externalization shall not be understood only as a response to migration caused by factors such as conflict-induced displacement or development-induced displacement, but also as a cause in itself of forced migration and displacement. She called this specific phenomenon "border-induced displacement,"<sup>60</sup> where asylum seekers frequently find themselves in a state of quasi-permanent displacement, being constantly transferred between different control elements.<sup>61</sup> In Lemberg-Pedersen's view, this kind of "border-induced" displacement is not an incidental feature but is instead the underlying logic behind externalization.<sup>62</sup> According to the UN Special Rapporteur on Torture and Other Cruel, Degrading or Inhuman Treatment or Punishment, Nils Melzer, "[t]he primary cause for the massive abuse suffered by migrants [...] is neither migration itself, nor

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<sup>56</sup> Martin Lemberg-Pedersen, "Forcing flows of migrants: European externalization and border-induced displacement", in *The Border Multiple*, ed. DJ Andersen, M Klatt, M Sandberg (Ashgate, 2012): 35.

<sup>57</sup> Human Rights Watch, "Towards an effective and principled EU migration policy, recommendations for reform", June 18, 2018, available at: <https://www.hrw.org/news/2018/06/18/towards-effective-and-principled-eu-migration-policy>.

<sup>58</sup> Amnesty International, "The Human Rights Risks of External Migration Policies", June 2017, available at: <https://www.amnesty.org/download/Documents/POL3062002017ENGLISH.PDF>.

<sup>59</sup> Art. 77(1)(c) TFEU.

<sup>60</sup> Moreno-Lax and Lemberg-Pedersen, "Border-induced displacement".

<sup>61</sup> Lemberg-Pedersen, "Forcing flows of migrants".

<sup>62</sup> *Ibid.*

organized crime [...] but the growing tendency of States to base their official migration policies and practices on deterrence, criminalization and discrimination.”<sup>63</sup>

Moreno-Lax also sees externalization as being pragmatically utilized by the Member States to shift away legal duties and contributing to what she calls the “irresponsibilization” of the Member States in asylum and migration policies.<sup>64</sup> In the same vein, Liguori noted that these arrangements appear to have been created with the explicit purpose of avoiding accountability, in particular to exclude jurisdiction under the European Convention on Human Rights.<sup>65</sup> Whereas under international law “no State can avoid responsibility by outsourcing or contracting out its obligations,”<sup>66</sup> in practice the externalization of migration control allows the Member States to escape the task of fulfilling their responsibilities in a legal manner.<sup>67</sup> The “rulification of irresponsibility”<sup>68</sup> has therefore served the aim of protecting the EU external borders while laundering the pernicious side effects of externalization on asylum seekers’ rights into allegedly legal practices.

## Chapter 3: The facts

### 3.1. The EU-Turkey Statement

According to the UN High Commissioner for Refugees (UNHCR), in 2015 only, the European Union faced 1,032,408 arrivals by both land and sea, and 3,771 migrants died or went missing during the journey across the Aegean or the Mediterranean,<sup>69</sup> making 2015 the deadliest year for migrants and refugees risking these crossings.<sup>70</sup> Because of their particular geographical situation, frontline Member States Greece and Italy were the most affected by the influx but lacked the capacity and means for efficiently examining all arriving asylum seekers. Moreover, the Dublin III Regulation<sup>71</sup>

<sup>63</sup> Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Nils Melzer, UN Doc A/HRC/37/50 (2018), para. 64 (d).

<sup>64</sup> Moreno-Lax, “Accessing asylum in Europe”.

<sup>65</sup> Anna Liguori. *Migration Law and the Externalization of Border Control: European State Responsibility*. (London: Routledge, 2019).

<sup>66</sup> Guy Goodwin-Gill, “The Extraterritorial Processing of Claims to Asylum or Protection: The Legal Responsibilities of States and International Organizations”, *UTS Law review* (2007): 26-34.

<sup>67</sup> Moreno-Lax and Lemberg-Pedersen, “Border-induced displacement”.

<sup>68</sup> *Ibid.*

<sup>69</sup> UNHCR, operational portal, refugee situations, available at:

[https://data2.unhcr.org/en/situations/mediterranean#\\_ga=2.56553643.1692129023.1553350714-1574576641.1549976555](https://data2.unhcr.org/en/situations/mediterranean#_ga=2.56553643.1692129023.1553350714-1574576641.1549976555).

<sup>70</sup> IOM, Press Release, “IOM Counts 3,771 Migrant Fatalities in Mediterranean in 2015”, May 1, 2016, <https://www.iom.int/news/iom-counts-3771-migrant-fatalities-mediterranean-2015>.

<sup>71</sup> Council of the European Union, Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), 29 June 2013.

designated the country of first entry in the EU as the one responsible for processing the asylum requests, putting Greece and Italy in an even more uncomfortable position.

With a crisis of such magnitude, that has been defined as “the worst refugee crisis since the Second World War,”<sup>72</sup> the EU found itself incapable to implement adequate, comprehensive and long-term solutions to guarantee the respect of the asylum seekers and refugees’ fundamental human rights. In its May 2015 Agenda on Migration,<sup>73</sup> the European Commission proposed a series of immediate actions designed to tackle the large migrants’ influx within the EU borders, which included, among other things, the establishment of a Relocation Scheme and a Resettlement Scheme.<sup>74</sup> These measures were supposed to provide fair and balanced participation of all Member States, while sufficiently supporting those in clear need of international protection.<sup>75</sup> However, while a number of western European countries backed the Commission’s European Agenda on Migration, the members of the Visegrad group opposed any mandatory refugee quotas,<sup>76</sup> ultimately undermining the fulfillment of the Agenda’s objectives. Furthermore, after September 2015, several Schengen countries unilaterally decided to reintroduce temporary internal border controls.<sup>77</sup>

Due to the failure to come to a common solution to manage migration within the EU borders, the idea of shifting the burden of migration towards a third country began to powerfully emerge. Thus, from September 2015 the Heads of State or Government of the EU Member States and the Turkish Minister of Foreign Affairs started to conduct negotiations, seeking to manage irregular migration more thoroughly through the Aegean towards the Greek islands. On 15 October 2015, the EU and Turkey agreed on a “Joint Action Plan,”<sup>78</sup> that was aimed at strengthening their cooperation in the area of migration policies, supporting in particular Syrian nationals enjoying temporary international protection. The plan, warmly welcomed by the European Council,<sup>79</sup> was activated on

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<sup>72</sup> Dimitris Avramopoulos, “A European response to migration: showing solidarity and sharing responsibility”, 2015 (speech), available at: [http://europa.eu/rapid/press-release\\_SPEECH-15-5498\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-15-5498_en.htm).

<sup>73</sup> European Commission, “Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A European Agenda on Migration”, 13 May 2015, available at: [https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/communication\\_on\\_the\\_european\\_agenda\\_on\\_migration\\_en.pdf](https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/communication_on_the_european_agenda_on_migration_en.pdf).

<sup>74</sup> Sergio Carrera, Steven Blockmans, Daniel Gros, and Elspeth Guild, “The EU’s Response to the Refugee Crisis: Taking Stock and Setting Policy Priorities”, *CEPS*, No. 20 (2015).

<sup>75</sup> European Commission, “Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A European Agenda on Migration”, 13 May 2015, available at: [https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/communication\\_on\\_the\\_european\\_agenda\\_on\\_migration\\_en.pdf](https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/communication_on_the_european_agenda_on_migration_en.pdf).

<sup>76</sup> Eric Maurice, “Refugee quotas unacceptable for Visegrad states”, *EU Observer* (September 2015), available at: <https://euobserver.com/migration/130122>.

<sup>77</sup> European Parliament, “Internal border controls in the Schengen area: is Schengen crisis-proof?”, Directorate General For Internal Policies, Policy Department C: Citizens’ Rights and Constitutional Affairs, June 2016, available at: [https://www.europarl.europa.eu/RegData/etudes/STUD/2016/571356/IPOL\\_STU\(2016\)571356\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2016/571356/IPOL_STU(2016)571356_EN.pdf).

<sup>78</sup> European Commission, EU-Turkey Joint Action Plan, 15 October 2015, available at: [http://europa.eu/rapid/press-release\\_MEMO-15-5860\\_en.htm](http://europa.eu/rapid/press-release_MEMO-15-5860_en.htm).

<sup>79</sup> Council conclusions of 15 October 2015 European Council, Conclusions of 15 October 2015, EUCO 26/15, available at: <https://www.consilium.europa.eu/media/21693/euco-conclusions-15102015.pdf>.

29 November 2015. The worsening of the humanitarian situation in the Aegean brought together once again the Heads of State or Government of the EU MSs and the Turkish Prime Minister to discuss further and more drastic measures to “protect [the] external borders [of the European Union] and to end the migration crisis in Europe.”<sup>80</sup> In its communication of 16 March 2016 the Commission stated that “the return of all irregular migrants and asylum seekers from Greece to Turkey [was] an essential component in breaking the pattern of refugees and migrants paying smugglers and risking their lives,” and that “such arrangements should be considered as a temporary and extraordinary measure.”<sup>81</sup> A third meeting between the “Members of the European Council and their Turkish counterpart” was held on 18 March 2016. The outcome of that meeting was the Press Release No 144/16 (“the Statement”),<sup>82</sup> that was published on the website shared by the European Council and the Council of the European Union. Since then, the EU-Turkey Statement represented the cornerstone of EU policy to handle the growing refugee crisis and the most powerful tool to restrain refugee influxes directed towards the EU.

The EU-Turkey Statement was threefold in its formulation, aiming at “reducing both the number of persons arriving irregularly to the EU and the loss of life in the Aegean, whilst providing safe and legal routes to the EU for those in need.”<sup>83</sup> The most important point was the decision to return “all irregular migrants crossing from Turkey into Greek islands as from 20 March 2016,”<sup>84</sup> and the implementation of the so-called “one-for-one” scheme under which “for every Syrian being returned to Turkey from Greek islands, another Syrian will be resettled from Turkey to the EU.”<sup>85</sup> The readmission of irregular migrants to Turkey relies on the often challenged assumption that Turkey is a safe third country.<sup>86</sup> By considering Turkey a safe third country,<sup>87</sup> it was made possible to send back asylum seekers without examining the substance of the asylum application after a fast-track procedure by the Greek authorities.<sup>88</sup> This since the application should have been submitted in Turkey where, according to the European Commission,<sup>89</sup> the applicant could have received effective access to protection.

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<sup>80</sup> European Commission, “Next operational steps in EU-Turkey cooperation in the field of migration”, Communication COM(2016) 166 final of 16 March 2016.

<sup>81</sup> *Ibid.*

<sup>82</sup> Council of the European Union, “EU-Turkey Statement”.

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*

<sup>86</sup> Iris Goldner Lang, “Human Rights and Legitimacy in the Implementation of the EU Asylum and Migration law”, *SSRN*, January 24, 2018, 28.

<sup>87</sup> European Union: Council of the European Union, 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 (recast), June 29, 2013, OJ L. 180/60 -180/95; 29.6.2013, 2013/32/EU, hereinafter “Asylum Procedures Directive”, art. 38.

<sup>88</sup> European Commission, “Implementing the EU-Turkey Agreement – Questions and Answers”, 20 April 2016, available at: [https://ec.europa.eu/commission/presscorner/detail/en/MEMO\\_16\\_1494](https://ec.europa.eu/commission/presscorner/detail/en/MEMO_16_1494)

<sup>89</sup> Art. 33(1) and 33(2)b Asylum Procedures Directive.



### 3.2. The Lisbon Treaty innovations in the field of asylum and migration policy

For the purpose of this dissertation, it is important to recall some of the novelties that the Lisbon Treaty has produced in the field of asylum and migration policy.

First of all, the Treaty has granted the EU new competences in the Area of Freedom, Security and Justice (AFSJ), going well beyond the adoption of minimum standards on several aspects of asylum and migration policies. In fact, it enabled the EU to adopt measures concerning, to name some, a uniform system of subsidiary protection,<sup>90</sup> criteria and mechanisms for determining which MS is responsible for assessing the application for asylum or subsidiary protection,<sup>91</sup> standards on reception conditions<sup>92</sup> as well as partnership and cooperation with third countries for the purpose of managing inflows of people.<sup>93</sup> The Lisbon Treaty also enshrined the principle of “solidarity and fair sharing of responsibility between Member States”<sup>94</sup> in the EU asylum and migration policy and enabled the Union to adopt measures in order to adequately give effect to this principle.<sup>95</sup>

Secondly, the Lisbon Treaty has altered the institutional arrangements presiding over the EU asylum policy area, by reinforcing the role of the CJEU and of the European Parliament. In this regard, the ordinary legislative procedure,<sup>96</sup> with qualified majority voting in the Council and co-decision by the European Parliament, has become the typical decision-making procedure for the Area of Freedom, Security and Justice. This, in practice, has rendered the European Parliament a co-owner of the EU migration policy agenda.<sup>97</sup> Because of the implicit risk of being outvoted, extending qualified majority voting poses pressure on national interests to agree on compromises, with positive consequences on both the speed and the substance of the whole decision-making process.<sup>98</sup> Additionally, the Lisbon Treaty reforms have undoubtedly strengthened the European Parliament in the context of the external dimension of AFSJ, with co-decision or consent being required in almost all EU acts.<sup>99</sup> Concerning judicial control of the CJEU with respect to the AFSJ, the Lisbon Treaty has made it fully competent to interpret and review any EU legal acts or agreements concluded in this

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<sup>90</sup> Art. 78(2)b TFEU.

<sup>91</sup> Art. 78(2)e TFEU.

<sup>92</sup> Art. 78(2)f TFEU.

<sup>93</sup> Art. 78(2)g TFEU.

<sup>94</sup> Art. 80 TFEU.

<sup>95</sup> *Ibid.*

<sup>96</sup> Art. 294 TFEU.

<sup>97</sup> Sergio Carrera, “The impact of the Treaty of Lisbon over EU Policies on migration, asylum and borders: the struggles over the ownership of the Stockholm programme”, in *The First Decade of EU Migration and Asylum Law*, eds. E. Guild, P. Minderhoud and R. Cholewinski, (Martinus Nijhoff Publishers, 2012): 229–54.

<sup>98</sup> Jorg Monar, “The External Dimension of the EU’s Area of Freedom, Security and Justice: Progress, potential and limitations after the Treaty of Lisbon”, *SIEPS*, No.1 (2012): 31.

<sup>99</sup> *Ibid.*

area.<sup>100</sup> It is relevant to emphasize that in the years that followed the entry into force of the Lisbon Treaty, case law of the Court of Justice consistently showed “a trend of interpreting the law in order to accommodate the need for protection of fundamental individual rights.”<sup>101</sup>

Thirdly, the Lisbon Treaty has rendered the Charter of Fundamental Rights (CFR) legally binding in all the EU Member States, giving it the same legal value as the Treaties. The principles enshrined in the CFR apply both to the policies of the Member States and of the European institutions within the scope of EU law. Article 8 of the Charter states that “the right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees.”<sup>102</sup> This implies that all the EU secondary legislation must comply with the provisions laid down in the Geneva Convention and that, as a result of the binding character of the Charter, there is now “a subjective and enforceable right of individuals to be granted asylum under the Union’s law.”<sup>103</sup> Furthermore, a key passage in the CFR is the one dealing with justice, where fair trial and effective remedies before a tribunal in case of alleged violations of the rights and liberties guaranteed by the law of the Union<sup>104</sup> have been formally proclaimed as central ingredients in the adequate delivery of the rest of fundamental rights.<sup>105</sup>

All these innovations in terms of democratic control of the EP, judicial scrutiny of the CJEU and fundamental rights were part of the “Lisbonisation” or “Constitutionalization” of migration policy and, directly addressing the deficiencies in the EU policy-making under the former “Third Pillar,” were expected to have important repercussions concerning the promotion of the fundamental rights of asylum seekers.<sup>106</sup>

### 3.3. The principle of *non-refoulement*

The EU-Turkey Statement seeks to implement a mechanism that would result in the improvement of the position of Syrian refugees in Turkey and in the return to Turkey of those who do not require international protection. It is based on the presumption that Turkey is a safe third country that respects the principle of *non-refoulement*.

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<sup>100</sup> Carrera, Santos Vara and Srik, “Constitutionalizing the external dimensions”.

<sup>101</sup> Vassilis Hatzopoulos, “Casual but Smart: The Court’s New Clothes in the Area of Freedom, Security and Justice (AFSJ) after the Treaty of Lisbon”, in *The institutional Dimensions of the European Union’s Area of Freedom, Security and Justice*, ed. Jorg Monar, (Brussels, P.I.E. Peter Lang, 2010): 153.

<sup>102</sup> Art. 8 Charter of Fundamental Rights of the European Union.

<sup>103</sup> Maria Teresa Gil-Bazo, “The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union’s Law”, *Refugee Survey Quarterly*, Vol. 27, issue 3 (2008): 33.

<sup>104</sup> Art. 47 Charter of Fundamental Rights of the European Union.

<sup>105</sup> Carrera, “The impact”.

<sup>106</sup> Carrera, Santos Vara, and Srik, “Constitutionalizing the external dimensions”.

The principle of *non-refoulement* is the cornerstone of international refugee law.<sup>107</sup> It is recognized in article 33 of the Geneva Convention, which provides that a refugee or asylum seeker shall not be expelled to the frontiers of territories “where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”<sup>108</sup> The adoption of the wording “in any manner whatsoever,”<sup>109</sup> implicitly means that not only direct *refoulement*, but also “indirect” *refoulement* is prohibited under the Geneva Convention. Direct *refoulement* occurs when a state sends back an asylum claimant or refugee to a country where he can face persecution, while indirect *refoulement* takes place when a state sends an asylum claimant or refugee back, through the Dublin III rules in the EU context, to a receiving state, with the sending state knowing that the receiving state has inadequate asylum procedures to process the application.<sup>110</sup> For this reason, Greece is not allowed to expel a refugee to Turkey when there are reasonable grounds to suspect that Turkey would send this person back to a territory where his life or liberty would be at risk.

The European Convention on Human Rights prohibits torture or inhuman or degrading treatment or punishment.<sup>111</sup> It is settled case law of the European Court of Human Rights (ECtHR) that this provision entails a prohibition of *refoulement*, since expulsion may have the consequence of exposing asylum seekers to a “real risk of being subject to a treatment contrary to Article 3.”<sup>112</sup> The principle of *non-refoulement* is also explicitly sanctioned in EU law. Article 78(1) TFEU states that the EU policy on asylum, subsidiary protection and temporary protection “must be in accordance with the Geneva Convention [...] and the Protocol [...] relating to the status of refugees”<sup>113</sup> and comply with the principle of *non-refoulement*. Finally, *non-refoulement* forms part of the EU Charter of Fundamental Rights, in which is written that “no one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subject to death penalty, torture or other inhuman or degrading treatment or punishment.”<sup>114</sup> This quotation indicates that the *non-refoulement* principle applies to all persons, including irregular migrants. Therefore, migrants who do not want to apply for asylum in Greece must not face the risk of direct or indirect *refoulement* when relocated to Turkey.

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<sup>107</sup> UNHCR, “Advisory Opinion”.

<sup>108</sup> Art. 33(1) Geneva Convention.

<sup>109</sup> *Ibid.*

<sup>110</sup> UNHCR, “Advisory Opinion on the extraterritorial application of *non-refoulement* obligations under the 1951 Convention relating to the Status of Refugees and its Protocol”, January 26, 2007.

<sup>111</sup> Art. 3 European Convention of Human Rights.

<sup>112</sup> Paragraph 91 of *Soering v. United Kingdom*, Judgement of 7 July 1989, Appl. No. 14038/88, Series A, No. 161; See also *Cruz Varas and Others v. Sweden*, Judgement of 20 March 1991, Appl. No. 15576/89, Series A, No. 201, paras. 69–70; *Chahal v. United Kingdom*, Judgement of 15 November 1996, Appl. No. 22414/93, Reports of Judgments and Decisions 1996-V.

<sup>113</sup> Art. 78(1) TFEU.

<sup>114</sup> Art. 19(2) EU Charter of Fundamental Rights.

The *non-refoulement* principle can be analyzed together with the consideration of Turkey as a first country of asylum or safe third country as defined in the Asylum Procedure Directive (APD).<sup>115</sup> Article 33 of the APD allows an application to be seen as inadmissible, removing the need to verify whether the applicant qualifies for international protection, if “a country which is not a Member State is considered as a first country of asylum for the applicant”<sup>116</sup> or “a country which is not a Member State is considered as a safe third country for the applicant.”<sup>117</sup> Article 38 APD lays down a series of criteria and principles to define the concept of safe third country. According to art. 38(1) APD, in order for a country to be considered a third safe country, it must ensure that life and liberty of individuals are not threatened,<sup>118</sup> that there is no risk of serious harm as defined in Directive 2011/95/EU<sup>119</sup> and that the principle of *non-refoulement* is respected.<sup>120</sup>

### 3.4. The principle of *non-refoulement* in the EU-Turkey Statement

With regard to the Statement’s content, the first action point establishes that “all irregular migrants [...] will be returned to Turkey.”<sup>121</sup> This is undoubtedly the most controversial element since it concerns international refugee law, EU law and human rights law. Under international law, states are entitled to control their borders.<sup>122</sup> This encompasses, under certain specific conditions provided by law, expelling foreign nationals from their territories. In this respect, any border control measures adopted by the states must conform with their domestic, regional and international legal obligations.<sup>123</sup> In the case of the EU and its Member States, these include, *inter alia*, the European Charter of Fundamental Rights, the European Convention on Human Rights and the Geneva Convention. As previously noted, the Statement calls into question the prohibition of collective expulsion<sup>124</sup> and the respect of the principle of *non-refoulement*.<sup>125</sup> Against this background, the EU-Turkey Statement indicates that the return of irregular migrants to Turkey will be enforced in full accordance with EU and international law.<sup>126</sup> This would in theory signify that the Statement

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<sup>115</sup> Council of the European Union, 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 (recast), June 29, 2013, OJ L 180/60 -180/95; 29.6.2013, 2013/32/EU.

<sup>116</sup> Council of the European Union, “Asylum Procedures Directive”, art. 33(1)b).

<sup>117</sup> *Ibid.*, art. 33(1)c).

<sup>118</sup> *Ibid.*, art. 38(1)a).

<sup>119</sup> *Ibid.*, art. 38(1)b).

<sup>120</sup> *Ibid.*, art. 38(1)c).

<sup>121</sup> Council of the European Union, “The EU-Turkey Statement”.

<sup>122</sup> Amnesty International, “No safe refugee. Asylum seekers and refugees denied effective protection in Turkey”, June 3, 2016 available at: <https://www.amnesty.org/en/documents/eur44/3825/2016/en/>.

<sup>123</sup> *Ibid.*

<sup>124</sup> Art. 4 Protocol 4 ECHR.

<sup>125</sup> Art. 33 Geneva Convention.

<sup>126</sup> Council of the European Union, “EU-Turkey Statement”.

complies with the Geneva Convention, that Turkey is a safe third country and that the *non-refoulement* principle is respected in Turkey in order to prevent direct or indirect *refoulement*. However, there are several observable implications that allow for doubting that that is the case.

Even if Turkey has ratified the 1951 Geneva Convention, it applies a geographical limitation for non-European asylum seekers, recognizing refugees originating exclusively from Europe (*i.e.* from countries that are members of the Council of Europe). As noted by Peers, this limitation may not affect *de facto* the recognition of Turkey as a safe third country, as long as its laws and practices are in line with the substance of the Geneva Convention.<sup>127</sup> The same position was endorsed by the European Commission, which declared that the safe third country concept does not necessarily demand the full ratification of the Geneva Convention, as long as its requirements are met in practice.<sup>128</sup> For this reason, it is even more important to carefully assess the factual situation in Turkey.

The use of excessive force including beatings and shootings by border guards at the Turkish border are well documented.<sup>129</sup> There is also evidence that Syrian refugees returned from Greece to Turkey under the EU-Turkey Statement have been exposed to severe human rights violations in Turkey, including arbitrary detention.<sup>130</sup> Furthermore, the internal on-going conflict between Turkey and the Kurdish population may pose an additional threat to the lives and liberties of asylum seekers and refugees in the south-east of the country.<sup>131</sup> Concerning the definition of serious harm, the provisions laid down in the APD shall be read in conjunction with European Court case law. Directive 2011/95/EU establishes that “serious harm” may also consist in “torture or inhuman or degrading treatment.”<sup>132</sup> In the *Sufi and Elmi v United Kingdom* case,<sup>133</sup> the Court clarified that degrading and

<sup>127</sup> Steve Peers, “The final EU/Turkey refugee deal: a legal assessment”, *EU Law Analysis*, March 18, 2016.

<sup>128</sup> “In this context, the Commission underlines that the concept of safe third country as defined in the Asylum Procedures Directive [...] does not require that the safe third country has ratified that Convention without geographical reservation”. 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, 10.2.2016, COM (2016) 85 final.

<sup>129</sup> Human Rights Watch, “Turkey: Border Guards Kill and Injure Asylum Seekers,” May 10, 2016, available at <https://www.hrw.org/news/2016/05/10/turkey-border-guards-kill-and-injure-asylum-seekers>; Amnesty International, “Illegal mass returns of Syrian refugees expose fatal flaws in EU-Turkey Refugee deal”, April 1, 2016, available at: <https://www.amnesty.org/en/latest/news/2016/04/turkey-illegal-mass-returns-of-syrian-refugees-expose-fatal-flaws-in-eu-turkey-deal/>; Amnesty International, “Greece: Evidence points to illegal forced returns of Syrians refugees to Turkey”, October 28, 2016, available at: <https://www.amnesty.org/en/latest/news/2016/10/greece-evidence-points-to-illegal-forced-returns-of-syrian-refugees-to-turkey/>.

<sup>130</sup> Amnesty International, “Urgent Action: Syrians Returned from Greece, Arbitrarily Detained”, May 19, 2016, available at <https://www.amnesty.org/en/documents/eur44/4071/2016/en/>.

<sup>131</sup> Steve Peers and Emanuel Roman, “The EU, Turkey and the Refugee Crisis: What could possibly go wrong?”, *EU Law Analysis*, February 5, 2016, available at: <http://eulawanalysis.blogspot.be/2016/02/the-eu-turkey-and-refugee-crisis-what.html>.

<sup>132</sup> Council of the European Union, Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), art. 15(b).

<sup>133</sup> *Sufi and Elmi v. United Kingdom*, Applications nos. 8319/07 and 11449/07, Council of Europe: European Court of Human Rights, 28 June 2011.

inhuman treatment took place in Kenyan refugee camps, because they were overcrowded and unsafe. That being said, the situation in the Turkish refugee camps must be assessed as well. In this regard, episodes of inhuman or degrading treatment have been reported by NGOs and condemned by the ECtHR in a series of judgments.<sup>134</sup> Moreover, Turkey has consistently engaged in *refoulement* practices and push backs before and after the entry into force of the EU-Turkey Statement. In November 2015 Human Rights Watch<sup>135</sup> and Amnesty International<sup>136</sup> denounced an alarming increase in push backs, deportations, arbitrary detentions and physical abuse against asylum seekers trying to enter the EU from Turkey. With specific regard to the influx of Syrian refugees, shortly after the entry into force of the EU-Turkey agreement, Amnesty International argued that “it seems highly likely that Turkey has returned several thousands of refugees to Syria in the last seven to nine weeks. If the agreement proceeds as planned there is a genuine risk that some of those the EU sends back to Turkey will suffer the same fate.”<sup>137</sup> In a report of 2018, the European Commission also recognized the violation of the principle of *non-refoulement* perpetrated by Turkish authorities against Syrian nationals.<sup>138</sup> The refusal to process asylum applications from non-Syrians has been disclosed as well.<sup>139</sup> This signifies a breach of art.38(1)e) APD which foresees that “the possibility exists to request a refugee status and, if (an asylum seeker is) found to be a refugee, to receive protection in accordance with the Geneva Convention.” Article 38(2) APD additionally provides that the safety of a third country must always be assessed on a case-by-case basis, in order to check whether the notion is applicable in practice to the particular situation of the applicant concerned. Taking into account the deficiencies of the Greek asylum system, it is highly disputable that the Greek authorities have the actual capacity to implement an efficient system to examine and process all the asylum requests.

Given these factors it is difficult to consider Turkey a first country of asylum or a safe third country under the Asylum Procedures Directive. With this in mind, the return of refugees from Greece to Turkey entailed a breach of the Asylum Procedures Directive and of the principle of *non-refoulement*, both directly, since Turkey cannot be considered a safe country for refugees, and indirectly, since Turkey has been returning refugees to unsafe territories.

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<sup>134</sup> *S.A. v. Turkey*, Application no. 74535/10, Council of Europe: European Court of Human Rights, 15 December 2015; *Abdolkhani and Karimnia v. Turkey*, Appl. No. 30471/08, Council of Europe: European Court of Human Rights, 22 September 2009; *Asalya v. Turkey*, Application no. 43875/09, Council of Europe: European Court of Human Rights, 15 April 2014.

<sup>135</sup> Human Rights Watch, “Turkey: Syrians pushed back at the border”, November 23, 2015, <https://www.hrw.org/news/2015/11/23/turkey-syrians-pushed-back-border>.

<sup>136</sup> Amnesty International, “Refugees endangered and dying due to EU reliance on fences and gatekeepers”, November 17, 2015, <https://www.amnesty.org/en/latest/news/2015/11/refugees-endangered-and-dying-due-to-eu-reliance-on-fences-and-gatekeepers/>.

<sup>137</sup> Amnesty International, “Turkey: Illegal Mass Returns”.

<sup>138</sup> European Commission, “Commission staff working document. Turkey 2018 Report, accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on EU Enlargement Policy”: 48.

<sup>139</sup> Amnesty International, “No safe refugee”.

## Chapter 4: The Orders of the General Court

### 4.1. The matter at stake

On 31 May and 2 June 2016, the European Council was notified of three similar actions of annulment lodged before the General Court of the Court of Justice under article 263 TFEU. The applicants, one Afghan national and two Pakistani nationals, have arrived from Turkey to Greece and applied for asylum under pressure from the Greek authorities. Despite being openly unwilling to remain in Greece,<sup>140</sup> the three individuals submitted their requests out of fear of being forcibly returned to their respective country of origin where they would have risked persecution and serious harm. Considering the aftereffect of being returned to Turkey pursuant to the EU-Turkey Statement, they decided to challenge its legality by bringing actions for annulment before the General Court. The applicants claimed that the EU-Turkey Statement disregards the principle of *non-refoulement* and the prohibition of collective expulsion, making the wrong assumption that Turkey could be contemplated as a “safe third country.” They also went further, arguing that the Statement fails to comply with the EU Treaty procedures relating to international treaty-making laid down in article 218 TFEU. Notably, no decision to authorize the opening of negotiations or the signing of the agreement had been taken;<sup>141</sup> there was no procedure to obtain the consent from the European Parliament;<sup>142</sup> and the European Parliament was not informed at all stages of the process.<sup>143</sup>

The action was founded on the consideration that the EU-Turkey Statement constitutes a fully-fledged international agreement within the meaning of article 216 TFEU concluded by the European Council and that produces legal effects that can negatively affect the asylum seekers’ fundamental rights. Quite surprisingly, however, in three Orders of 28 February 2017, *NF*,<sup>144</sup> *NG*<sup>145</sup> and *NM*<sup>146</sup> v. *European Council*, the General Court dismissed the actions of annulment as inadmissible. The reasoning behind this controversial decision focused on the (questionable) belief that the EU-Turkey Statement cannot be acknowledged as an act of the European Council operating on behalf of the EU, but instead it was concluded by the Heads of State and Government of the EU MSs acting in their

<sup>140</sup> Order of the General Court *NF v. European Council*, T-192/16, (ECLI:EU:T:2017:128), para. 12.

For the sake of brevity, in the analysis that follows I will only refer to the Order *NF v European Council*, T-192/16, as the three Orders are basically identical.

<sup>141</sup> Art. 218(2) TFEU.

<sup>142</sup> Art. 218(6)(a)(v) TFEU.

<sup>143</sup> Art. 218(10) TFEU.

<sup>144</sup> Order of the General Court *NF v. European Council*, T-192/16, (ECLI:EU:T:2017:128).

<sup>145</sup> Order of the General Court *NG v. European Council*, T-193/16, (ECLI:EU:T:2017:129).

<sup>146</sup> Order of the General Court *NM v. European Council*, T-257/16, (ECLI:EU:T:2017:130).

capacity of organs of their respective States. Since none of the EU institutions whose measures can be reviewed featured among the authors of the EU-Turkey Statement, the General Court lacked jurisdiction to rule on the lawfulness of the Statement.

The Orders of the General Court have more recently been appealed before the Court of Justice of the EU that, in its Orders of 12 September 2018, dismissed them as manifestly inadmissible.<sup>147</sup> Since the rationale behind the CJEU's ruling is mainly based on the unclarity of the appeals' formulation, that allegedly did not enable the Court to exercise its powers of judicial review,<sup>148</sup> the analysis that follows will only refer to the Orders of General Court of February 2017.

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<sup>147</sup> Court of Justice (First Chamber), order of 12 September 2018 in *NF v European Council*, para. 30.

<sup>148</sup> *Ibid.*, para. 13.



## 4.2. The question of the legal nature *sensu stricto*

As noted in the introduction, the decision to adopt the EU-Turkey agreement in the form of a “Statement” poses fundamental problems regarding its legal nature under EU and international law and to the democratic and judicial scrutiny that it can be subject to.<sup>149</sup> In light of its contents and form, can it be contemplated as a binding international agreement within the meaning of article 216 TFEU or is it merely a non-binding political declaration?

It is essential to answer this question since the approach to the Statement as an international agreement would “upgrade” both its effects on asylum seekers and its significance in relation to the compliance with EU law and international law.<sup>150</sup> Obviously, the choice of instruments to conduct EU policy-making is not at the arbitrary discretion of the European institutions or of the Member States involved in the process.<sup>151</sup> This is even more so in the post-Lisbon Treaty legal framework, where EU law in the field of asylum and migration policy is subject to the full application of the “Community method” and to a number of material and procedural safeguards,<sup>152</sup> that are in fact in place to ensure the full compliance of EU law with human rights and democratic standards.

At first sight, literally because of its designation as a mere “Statement,” it can be argued that the EU-Turkey Statement is not an international agreement in the meaning of article 216 TFEU. This is the view of Peers, who wrote on his blog that “since the agreement will take the form of a Statement [...] it will not be legally binding.”<sup>153</sup> Therefore, it cannot “be legally challenged.”<sup>154</sup> The same attitude is shared by Babická, according to whom “the EU-Turkey Statement is not legally binding; it is only a politically binding joint declaration. Therefore, it is not challengeable as such but its implementation in practice will be possibly challenged in court.”<sup>155</sup> Moreover, as den Heijer and Spijkerboer noted, the Statement partly employs the terminology that is traditionally adopted for non-binding measures: for instance, it consistently uses the word “will” instead of the modal “shall,” which is typical of binding international agreements.<sup>156</sup>

Another way to claim that the EU-Turkey Statement is not an international agreement would be to assume that it simply reconfirms pre-existing obligations that derive from previous agreements

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<sup>149</sup> Sergio Carrera, Leonard den Hertog, and Marco Stefan, “It wasn’t me! The Luxembourg Court Orders on the EU-Turkey Refugee Deal”, *CEPS Policy Insights*, No 2017/15, April 2017.

<sup>150</sup> Themistoklis Tzimas, “Two years After: Evaluation of the EU Refugee Policy from an International and EU law perspective”, *Geneva Jean Monnet Working Paper*, No.11/2017.

<sup>151</sup> Carrera, den Hertog, and Stefan, “It wasn’t me!”.

<sup>152</sup> *Ibid.*

<sup>153</sup> Peers, “The final EU/Turkey”.

<sup>154</sup> *Ibid.*

<sup>155</sup> Karolina Babická, “EU-Turkey deal seems to be schizophrenic”, *Migration Online*, March 23, 2016, available at: <https://migrationonline.cz/en/eu-turkey-deal-seems-to-be-schizophrenic>.

<sup>156</sup> Duncan B. Hollis, *The Oxford Guide to treaties*, (Oxford, Oxford University Press, 2012).

(such as the EU-Turkey and Greece-Turkey Readmission Agreement).<sup>157</sup> However, these arguments are difficult to uphold.

As established in the Vienna Convention, an “international agreement” is a treaty “concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.”<sup>158</sup> In the case *Qatar v. Bahrain*, the International Court of Justice (ICJ) held that international agreements “may take a number of forms and be given a diversity of names.”<sup>159</sup> In line with the Vienna Convention and the ICJ, the EU Court of Justice defined an international agreement as “any undertaking entered into by entities subject to international law which has binding force, whatever its formal designation.”<sup>160</sup> From this comes that what really matters in determining what constitutes an international agreement are the actual intents of the parties involved instead of its form.<sup>161</sup> If, as it seems, the legal nature of an international instrument depends on the will of the States participating in it, it appears from a simple reading of the EU-Turkey Statement that the will of the EU and Turkey was truly to establish a binding treaty. Indeed, it evidently illustrates the commitments the parties have agreed upon, indicating that they intended such provisions to be binding in their reciprocal relations.<sup>162</sup> For this reason, Cannizzaro considered that “there is little doubt that the Statement is not a mere declaration of principles, but rather a fully-fledged regulatory scheme, spelling out specific conduct for the parties.”<sup>163</sup> Similarly, Gatti wrote that “by expressly agreeing to specific commitments, the EU and Turkey intended to enter into an international agreement.”<sup>164</sup>

The idea that the EU-Turkey Statement merely repeats pre-existing obligations is not more convincing. In fact, the Statement provided that while “reconfirm[ing] their commitment to the implementation of their joint action plan activated on 29 November 2015, [the Republic of] Turkey and the [European Union], recognize[d] that further, swift and determined efforts [were] needed.” From this perspective, the decision to “return all irregular migrants crossing for Turkey into the Greek islands,”<sup>165</sup> the principal instrument of the EU-Turkey Statement, is a novel feature, that cannot be seen as a mere restatement of already existing obligations. Indeed, while the 1:1 scheme originates

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<sup>157</sup> Maarten den Heijer, and Thomas Spijkerboer, “Is the EU-Turkey refugee and migration deal a treaty?”, *EU Law Analysis*, April 7, 2016, available at: <http://eulawanalysis.blogspot.nl/2016/04/is-eu-turkey-refugee-and-migration-deal.html>.

<sup>158</sup> United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155.

<sup>159</sup> Paragraph 23 of the Judgment of the ICJ *Qatar v. Bahrain*, Reports 1994, available at: <https://www.icj-cij.org/files/case-related/87/087-19940701-JUD-01-00-EN.pdf>.

<sup>160</sup> Opinion 1/75 of 11 November 1975 of the EU Court of Justice.

<sup>161</sup> Heijer and Spijkerboer, “Is the EU-Turkey refugee?”.

<sup>162</sup> Cannizzaro, “Disintegration through law?”.

<sup>163</sup> *Ibid.*

<sup>164</sup> Mauro Gatti, “The EU-Turkey Statement: a Treaty that violates democracy (Part 1 of 2)”, *EJIL: Talk!*, 18 April, 2016, available at: <https://www.ejiltalk.org/the-eu-turkey-statement-a-treaty-that-violates-democracy-part-1-of-2/>.

<sup>165</sup> Council of the European Union, “EU-Turkey Statement”.

from previous sources, namely the EU-Turkey Joint Action Plan<sup>166</sup> and the Statement of 7 March 2016,<sup>167</sup> they did not provide for binding commitments.<sup>168</sup>

It appears, conversely, that the EU-Turkey Statement of 18 March 2016 was intended to translate generic political arrangements into legally binding instruments, which would confirm that the Statement is an international agreement.

### 4.3. The legal nature according to the EU institutions

Ever since the entry into force of the EU-Turkey Statement the European Council, the Council and the European Commission have publicly praised it as the leading and most effective policy response to the refugee crisis and have actively been committed to its implementation. This is clearly reflected in a number of budgetary, policy and legal measures that were put into action after the Statement's release that includes, *inter alia*, the 3 billion euros Facility for Refugees in Turkey.<sup>169</sup>

Immediately after the adoption of the Statement, the President of the European Council Donald Tusk remarked that “we have finally reached an agreement between the EU and Turkey.”<sup>170</sup> In the debate held in the European Parliament on 13 April 2016, it was generally assumed that the EU-Turkey Statement was concluded by the European Council on behalf of the Union. Tusk also acknowledged that the Statement represented “a common European position,” “that the Commission gave a positive assessment of the legality of the agreement” and that “that agreement was reached at the European Council on 18 March.”<sup>171</sup> During the same debate, the President of the European Commission Jean-Claude Juncker referred to the Statement as “the agreement concluded on 18 March 2016 between the European Union and Turkey.”<sup>172</sup> The following week the European Commission issued a press release where it called the Statement “The EU-Turkey Agreement.”<sup>173</sup> Since then, the European Commission has produced several documents and reports where it consistently defined the

<sup>166</sup> European Commission, EU-Turkey Joint Action Plan, October 15, 2015, available at: [https://europa.eu/rapid/press-release\\_MEMO-15-5860\\_it.htm](https://europa.eu/rapid/press-release_MEMO-15-5860_it.htm).

<sup>167</sup> European Council, Statement of the EU Heads of State or Government, March 7, 2016, available at: <https://www.consilium.europa.eu/en/press/press-releases/2016/03/08/eu-turkey-meeting-statement/>.

<sup>168</sup> Gatti, “The EU-Turkey Statement”.

<sup>169</sup> European Commission, European Neighbourhood Policy and Enlargement Negotiations-The EU Facility for Refugees in Turkey, available at: [https://ec.europa.eu/neighbourhood-enlargement/news\\_corner/migration\\_en](https://ec.europa.eu/neighbourhood-enlargement/news_corner/migration_en).

<sup>170</sup> European Council, Remarks by President Donald Tusk after the meeting of the EU Heads of State or Government with Turkey, March 18, 2016, available at: <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18/tusk-remarks-after-euco-turkey/>.

<sup>171</sup> European Parliament, Minutes of the debate of Wednesday 13 April 2016, April 13, 2016, available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=CRE&reference=20160413&secondRef=ITEM-005&language=EN>.

<sup>172</sup> *Ibid.*

<sup>173</sup> European Commission, Implementing the EU-Turkey Agreement: Questions and Answers, April 20, 2016, available at: [http://europa.eu/rapid/press-release\\_MEMO-16-1494\\_en.htm](http://europa.eu/rapid/press-release_MEMO-16-1494_en.htm).

Statement a “game-changer,” emphasizing its positive effects in reducing irregular arrivals and the number of lives lost at sea.<sup>174</sup> However, when addressing the legal aspects and democratic control of the EU-Turkey Statement during another debate within the European Parliament on 28 April 2016, the President-in-Office of the Council Klaas Dijkhoff stated that “when we look at the legal aspects [the EU-Turkey Statement] is a political agreement between the Member States and Turkey.”<sup>175</sup> The same position was taken by the European Council, the European Commission and the Council when, by letters from the registry of 3 November 2016, the General Court asked them to inform it, *inter alia*, whether the meeting of 18 March 2016 had led to a written agreement and, if that was the case, to send it any documents to enable the identification of the participating parties.<sup>176</sup>

In its replies of 18 November 2016, the European Council took an unexpected 180° turn. It argued that “to the best of its knowledge, no agreement or treaty in the sense of article 218 TFEU or article 2(1)(a) of the Vienna Convention on the law of treaties of 23 May 1969 had been concluded between the European Union and the Republic of Turkey” and that the EU-Turkey Statement is “not intended to produce legally binding effects nor constitute an agreement or a treaty.”<sup>177</sup> Additionally, in the European Council’s view, the participants to the meeting of 18 March 2016 were the Heads of State or Government of the Member States and the representatives of Turkey, not formally the members of the European Council.<sup>178</sup> It further specified that the reference to the fact that “the EU and [the Republic of] Turkey” had agreed on certain action points is explained by the need to simplify the content of the Statement that, being a press release, was directed to the general public.<sup>179</sup> In this regard, the European Council claimed that the term “EU” must be settled in a “journalistic” context and stressed that the EU-Turkey Statement has no legal value but simply serves an informative document.<sup>180</sup> The same approach was shared by the Commission, that in its reply added that it was clear from the vocabulary used in the EU-Turkey Statement that it was not intended to be a legally binding agreement, but a mere political arrangement.<sup>181</sup> The Council, for its part, explained that it was not in any way whatsoever involved in the negotiations between the Republic of Turkey and the

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<sup>174</sup> European Commission, EU-Turkey Statement: three years on, March 2019, available at: [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20190318\\_eu-turkey-three-years-on\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20190318_eu-turkey-three-years-on_en.pdf)

<sup>175</sup> European Parliament, Minutes of the debate of Thursday 28 April 2016, April 28, 2016, available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bCRE%2b20160428%2bITEM-002%2bDC%2bXML%2bV0%2f%2fEN&language=EN>.

<sup>176</sup> Order of the General Court *NF v. European Council*, T-192/16, (ECLI:EU:T:2017:128), para. 26.

<sup>177</sup> *Ibid.*, para. 27.

<sup>178</sup> *Ibid.*, para. 28.

<sup>179</sup> *Ibid.*, para. 57.

<sup>180</sup> *Ibid.*, para. 58.

<sup>181</sup> *Ibid.*, para. 29.

representatives of the Member States nor in the activities carried out by the President of the European Council that anticipated the Statement.<sup>182</sup>

Quite surprisingly, however, the position according to which the EU-Turkey Statement is not an international agreement, nor an EU act was also taken by the European Parliament. On 9 May 2016 the Legal Service of the European Parliament declared that the Statement “was nothing more than a press release, which has no legal bearing.”<sup>183</sup> The legal nature of the EU-Turkey Statement was then briefly discussed before the Civil Liberties Committee of the European Parliament, which ultimately embraced the attitude of the Legal Service, insisting that the Statement is a mere catalogue of measures adopted on their own specific legal basis (no matter if in their recitals reference is made to the EU-Turkey Statement).<sup>184</sup> Therefore, the Statement is not legally binding in itself.

The impression, as De Capitani suggested, is that on this issue the European Parliament preferred to endorse this “Machiavellian project” to overcome the opposition to the EU migration and asylum policies of the Visegrad countries.<sup>185</sup>

#### 4.4. The legal nature according to the General Court

In its Orders of 28 February 2017, the General Court confined itself to answering the question related to the authorship of the EU-Turkey Statement, by holding that “independently of whether it constitutes [...] a political statement or, on the contrary, [...], a measure capable of producing binding legal effects, the EU-Turkey Statement, [...] cannot be regarded as a measure adopted by the European Council or, moreover, by any other institution, body, office or agency of the European Union.”<sup>186</sup> On the contrary, in the Court’s view, the EU-Turkey Statement results to be an act concluded by the Heads of State or Government of the MSs operating in their capacity of organs of their respective States.<sup>187</sup>

As a preliminary point, it should be remembered that article 263 TFEU gives the Court the power to review the legality of the legislative acts of the EU institutions or of “bodies, offices or agencies of the Union.”<sup>188</sup> Furthermore, with specific regard to the European Council, the Lisbon

<sup>182</sup> *Ibid.*, para. 30.

<sup>183</sup> Nikolaj Nielsen, “EU-Turkey deal not binding, says EP legal chief”, *EU Observer*, 10 May, 2016, available at: <https://euobserver.com/justice/133385>.

<sup>184</sup> Emilio de Capitani, “Is the European Union responsible for the so-called “EU-Turkey Agreement”? The issue is on the Court of Justice table...”, *Free Group*, 10 June, 2016, available at: <https://free-group.eu/2016/06/07/is-the-european-council-responsible-for-the-so-called-eu-turkey-agreement-the-issue-is-on-the-court-of-justice-table/>.

<sup>185</sup> *Ibid.*

<sup>186</sup> Order of the General Court *NF v. European Council*, T-192/16, (ECLI:EU:T:2017:128), para. 71.

<sup>187</sup> *Ibid.*, para.72.

<sup>188</sup> Art. 263 TFEU.

Treaty established that it is an institution of the EU, that therefore no longer escapes the review of legality provided for in art. 263 TFEU.<sup>189</sup> Nevertheless, the Court has no jurisdiction to rule on the lawfulness of a measure adopted by representatives of the Member States physically gathered in the grounds of one of the European institutions and acting not in their capacity as members of the Council or of the European Council, but in their capacity of representatives of their governments.<sup>190</sup> As a consequence, stating that the EU-Turkey Statement was concluded by the Heads of State or Government of the EU MSs was sufficient to dismiss the applicants' action for annulment.

In fact, overlooking the issue of the legal nature *sensu stricto*, the General Court suggested that “even supposing that an international agreement could have been informally concluded during the meeting of 18 March 2016, [...] that agreement would have been an agreement concluded by the Heads of State or Government of the Member States of the European Union and the Turkish Prime Minister.”<sup>191</sup> Both the logical process followed and the conclusion arrived at by the General Court sound highly questionable.<sup>192</sup> The Court first looked at the website where the Press Release was published, but the findings were anything but conclusive.<sup>193</sup> In fact, while the online version of the EU-Turkey Statement was marked as “Foreign Affairs and International Relations,” which generally indicates the work of the Council, the PDF version had the heading “International Summit,” which indicates meetings of Heads of State or Government.<sup>194</sup> Moreover, in the Orders, the Court recognized that there were inaccuracies in the EU-Turkey Statement concerning the identification of its authors. The reference to the “Members of the European Council” and to the term “the EU” in the Statement is regarded as “ambivalent”<sup>195</sup> and “ambiguous.”<sup>196</sup> Hence, the Court declared that to assess the authorship of the Statement, it was imperative to examine the documents pertaining to the meeting held on 18 March 2016.<sup>197</sup>

In the analysis that followed the Court demonstrated that two separate meetings had taken place<sup>198</sup> and that, more importantly, the documents relating to the work of 18 March 2016 repeatedly refer to meetings of “the Heads of State or Government of the European Union with their Turkish counterpart, and not to a meeting of the European Council.”<sup>199</sup> The Court accepted the European

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<sup>189</sup> Order of the General Court *NF v. European Council*, T-192/16, (ECLI:EU:T:2017:128), para. 43.

<sup>190</sup> *Ibid.*, para. 44; judgment of 30 June 1993, *Parliament v Council and Commission*, C-181/91 and C-248/91, (EU:C:1993:271), para. 12.

<sup>191</sup> Order of the General Court *NF v. European Council*, T-192/16, (ECLI:EU:T:2017:128), para. 72.

<sup>192</sup> Enzo Cannizzaro, “Denialism as the supreme expression of realism: a quick comment on *NF v. European Council*”, *European Papers*, Vol. 2, No. 1(2017).

<sup>193</sup> Narin Idriz, “The EU-Turkey Statement or the refugee deal: the extra-legal deal of extraordinary times?”, *ASSER Research Paper* 2017-06.

<sup>194</sup> Order of the General Court *NF v. European Council*, T-192/16, (ECLI:EU:T:2017:128), para. 55.

<sup>195</sup> *Ibid.*, para. 61.

<sup>196</sup> *Ibid.*, para. 66.

<sup>197</sup> *Ibid.*, para. 61.

<sup>198</sup> *Ibid.*, para. 62-63.

<sup>199</sup> *Ibid.*, para. 68.

Council's troublesome reasoning also concerning the presence of its President admitting that, for a number of reasons,<sup>200</sup> it does not prove that the meeting of 18 March 2016 was attended by the European Council acting on behalf of the EU.<sup>201</sup> As a result, "notwithstanding the regrettably ambiguous terms of the EU-Turkey Statement,"<sup>202</sup> the Court dismissed the case on the ground that it lacked jurisdiction.

#### 4.5. Major flaws in the Orders of the General Court

After a brief analysis of the Court's Orders, three significant flaws can be detected.

The first, most evident one is the fact that the General Court does not go into analyzing the substance of the Statement, and it decides only on the form: it bases its entire argumentation on the identification of its authors, namely the Heads of State or Government of the Member States of the EU, that are notably, also Members of the European Council.<sup>203</sup> Instead, addressing the substance, specifically the "content and aim" of the Statement, the Court should have arrived at the conclusion that it represented a fully-fledged international agreement. Secondly, even assuming that the Member States concluded the agreement with Turkey and that Court had no competence to act in such case, the real problem is that apparently the Court does not object on the fact that Member States can enter into agreements with third countries on their own on an issue that has already been covered by EU legislation.<sup>204</sup>

Without further delving into details, it is important to briefly discuss the division of competences between the EU and the MSs, in order to establish who had the competence to act in this specific case. The first step to make to identify the appropriate procedure to be followed is to look at the "content and aim"<sup>205</sup> of the Statement, that appears to be "end irregular migration"<sup>206</sup> through the return of "all irregular migrants"<sup>207</sup> to Turkey. Therefore, the substance of the Statement concerns the Area of Freedom, Security and Justice,<sup>208</sup> that is an area of shared competence between the Member States and the EU. The provision related is article 79 TFEU, to which the ordinary

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<sup>200</sup> *Ibid.*

<sup>201</sup> *Ibid.*, para. 67.

<sup>202</sup> *Ibid.* para. 66.

<sup>203</sup> Cannizzaro, "Disintegration Through Law?"

<sup>204</sup> Narin Idriz, "Taking the EU-Turkey deal to Court?", *Verfassungsblog on matters constitutional*, 20 December, 2017, available at: <https://verfassungsblog.de/taking-the-eu-turkey-deal-to-court/>; Luigi Limone, "Today's Court (non) decision on the (non) EU "deal" (') with Turkey", *European Area of Freedom Security and Justice, FREE Group*, 1 March, 2017, available at: <https://free-group.eu/2017/03/01/the-todays-court-non-decision-on-the-non-eu-deal-with-turkey/>.

<sup>205</sup> Judgment *Venezuela fishing rights*, C-103/12 and C-165/12 (ECLI:EU:C:2014:2400), para 74.

<sup>206</sup> Council of the European Union, "EU-Turkey Statement".

<sup>207</sup> *Ibid.*

<sup>208</sup> Art 4(2)(j) TFEU.

legislative procedure applies.<sup>209</sup> According to article 218(6)(a)(v) TFEU, when concluding an agreement with third countries on fields where the ordinary legislative procedure applies, the Council must obtain the consent of the European Parliament. As far as the readmission of third country nationals is at stake,<sup>210</sup> this is precisely what the Readmission Agreement<sup>211</sup> already covers.

In the area of shared competences, the Member States are entitled to legislate only to the extent that the Union has not yet exercised its jurisdiction or to the extent that the Union has ceased its competence.<sup>212</sup> This means that the Member States are not allowed to conclude any kind of further agreement with Turkey on that topic. Additionally, the *ERTA* doctrine, now codified under article 3(2) and 216(1) TFEU, established that the MSs could not assume obligations which might affect common rules or alter their scope outside the framework of the EU institutions.<sup>213</sup> Moreover, Member States shall not independently enter into international obligations in the fields that are already covered by EU legislation “even if there is no contradiction between those commitments and the common rules.”<sup>214</sup> Under article 2(1) TFEU, the only possibility of the Member States to act in the areas of EU exclusive competence is after having received explicit authorization from the Union to that end or in order to implement Union measures.<sup>215</sup> Since the MSs did not receive such approval for the conclusion of the EU-Turkey Statement, it derives that the MSs violated the division of competences and the principle of sincere cooperation.<sup>216</sup> In Opinion 1/13 the Court of Justice also specified that an international agreement does not have to fully coincide with the EU measures already in place to “affect common rules or alter their scope,” as soon as the international agreement covers an area that is already covered by a large extent by EU legislation.<sup>217</sup> Notably, the EU-Turkey Statement concretely affected the scope of some of the common rules located under the umbrella of the Common European Asylum System (CEAS). For instance, the concept of “safe third country,” which implies “the possibility [...] to receive protection in accordance with the Geneva Convention,”<sup>218</sup> combined with the geographical limitation applied by Turkey, places a considerable question mark on whether it fulfills the requirements of this definition.<sup>219</sup> To the extent that it does not, the EU-Turkey Statement

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<sup>209</sup> Art. 79(2) TFEU.

<sup>210</sup> Art. 79(3) TFEU.

<sup>211</sup> European Union, Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorization, OJL 134, May 7, 2014.

<sup>212</sup> Art 2(2) TFEU.

<sup>213</sup> Judgement of the Court, *Commission v. Council*, C-22/70 (ECLI:EU:C:1971:32), para. 22.

<sup>214</sup> Geert De Baere, “The Framework of EU External Competences for Developing the External Dimensions of EU Asylum and Migration Policy”, *Leuven Centre for Global Governance Studies*, Working Paper No. 50, May 2010.

<sup>215</sup> Article 2(1) TFEU.

<sup>216</sup> Article 4(3) TEU.

<sup>217</sup> Opinion 1/13 of the Court of Justice (ECLI:EU:C:2014:2303), para. 72-73.

<sup>218</sup> Council of the European Union, “Asylum Procedures Directive”, art. 38(1)(e).

<sup>219</sup> Idriz, “The EU-Turkey Statement”; Emanuela Roman, Theodore Baird, and Talia Radcliffe, “Why Turkey is not a safe country”, *Statewatch*, February 2017; Amnesty International, “No safe refugee”.



undoubtedly alters the scope of the “safe third country” notion.<sup>220</sup> Thirdly, in policy areas where the EU has already exercised its competence, MSs are not only pre-empted from concluding international agreements as the wording of article 3(2) TFEU lays down, but also when they take actions that might lead to the adoption of acts with legal effects.<sup>221</sup> Thus, even supporting the Court’s view of the Statement as a non-binding political arrangement, it does entail legal effects.<sup>222</sup> Indeed, it is easy to point to the laws passed by Greece<sup>223</sup> after its release to permit the effective implementation of the EU-Turkey Statement.

From these considerations follows that the Court should have concluded that the EU-Turkey Statement was, at least partially, an EU exclusive competence, so that the Member States could not have concluded the EU-Turkey Statement without violating both the rule of law<sup>224</sup> and the principles of sincere cooperation and of conferred powers.<sup>225</sup>

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<sup>220</sup> Idriz, “The EU-Turkey Statement”.

<sup>221</sup> Judgement *Commission v Hellenic Republic*, C-45/07, (ECLI:EU:C:2009:81), para 17.

<sup>222</sup> Idriz, “Taking the EU-Turkey”.

<sup>223</sup> Greece: Law No. 4375 of 2016 on the organization and operation of the Asylum Service, the Appeals Authority, the Reception and Identification Service, the establishment of the General Secretariat for Reception, the transposition into Greek legislation of the provisions of Directive 2013/32/EC [Greece], 3 April 2016.

<sup>224</sup> Article 2 TEU.

<sup>225</sup> Article 5(2) TEU.

#### 4.6. Consequences of the Orders of the General Court

By choosing to act extra-Treaties, the EU institutions and MSs involved in the negotiations supposedly side-lined the EP and democratic accountability and transparency, but also the judicial control of the CJEU in Luxemburg, allowing profound violations of the rights and freedoms of asylum seekers and migrants to go unpunished. Furthermore, the General Court's reasoning poses several additional concerns. By assessing its content and the question of competences, it results that EU-Turkey Statement should be considered *de facto* an EU act subject to judiciary review. On the contrary, the Court has actively avoided answering the legal questions raised by the applicants, in what looks like an attempt to "take the EU out of the EU-Turkey Statement."<sup>226</sup>

This is by no means an isolated case of such an approach. In fact, in sharp contrast with its traditional judicial activism, in recent years the Court has been accused of showing a troublesome "judicial passivism,"<sup>227</sup> in particular in relation to asylum and migration law.<sup>228</sup> Goldner-Lang has defined "judicial passivism" as "a sub group of judicial activism, referring to cases where the Court is consciously not using its powers where it should, thereby sending a message to the EU institutions and Member States."<sup>229</sup> Judicial passivism can take place when the Court chooses not to decide on a specific issue declaring that it lacks jurisdiction, that is precisely what happened in the Orders previously addressed. By deciding to adopt this passive approach in reviewing the legality of the EU-Turkey Statement, the Court demonstrated to be willing to acknowledge a wide margin of discretion to the EU institutions and Member States' decision-making.

Referring to the fact that the Court gave priority to intergovernmental cooperation rather than cooperation within the EU institutional framework, Carrera *et al.* wrote about the "reversing Lisbonization of EU migration policy:"<sup>230</sup> this approach, in fact, is at odds with the central objectives of the Lisbon Treaty, namely enhancing transparency and accountability and expanding the former

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<sup>226</sup> Carmelo Danisi "Taking the 'Union' out of the 'EU': The EU-Turkey Statement on the Syrian Refugee Crisis as an Agreement Between States under International Law", *European Journal of International Law*, April 10, 2017, available at: <https://www.ejiltalk.org/taking-the-union-out-of-eu-the-eu-turkey-statement-on-the-syrian-refugee-crisis-as-an-agreement-between-states-under-international-law/>.

<sup>227</sup> Iris Goldner Lang, Speech at "The Odysseus Network's 3rd Annual Conference: Conflict and Competence Between Law and Politics in EU Migration and Asylum Policies", Final Plenary Session, "Towards 'Judicial Passivism' in EU Migration and Asylum Law?", February 1, 2018, available at: <https://www.youtube.com/watch?v=x8U98izwkyA>.

<sup>228</sup> The CJEU has been accused of judicial passivism in relation to the X and X and the Jafari cases. See in this regard: Judgment of the Court, *X and X*, C-638/16 (ECLI:EU:C:2017:173); Judgment of the Court, *Jafari*, C-646/16, (ECLI:EU:C:2017:585).

<sup>229</sup> Iris Goldner-Lang, "Towards judicial passivism in EU migration and asylum law?", Preliminary thought for the Final Plenary Session of the 2018 Odysseus Conference.

<sup>230</sup> Carrera, den Hertog, and Stefan, "It wasn't me!".

community method to all areas falling under the AFSJ.<sup>231</sup> The Court's conscious "decision not to decide" enables the EU-Turkey Statement to set a dangerous precedent for similar agreements to be concluded outside the scope of EU law and exempt from the judicial review of the CJEU.<sup>232</sup> Moreover, the consequences of the Orders do not remain confined in the field of asylum and migration policy but can really cover any field of EU competence.<sup>233</sup> Extra-Treaty policy-making has the effect of disregarding the European institutional balance, shifting the center of gravity to the Member States (acting through the European Council) and permitting them to pursue their objectives over the Treaty framework.<sup>234</sup> Deliberately choosing to employ such a "creative approach"<sup>235</sup> the Court is limiting its own powers and tying its own hands to rule on similar agreements in the future.<sup>236</sup>

Giving the EU institutions or the Member States the authority to conclude agreements and enter in obligations with third countries that can potentially violate human rights standards, the Court eroded its credibility as a "human rights court." Whereas the protection of fundamental rights forms part of the "very foundations of the Community legal order"<sup>237</sup> and is "an indispensable prerequisite for [its] legitimacy,"<sup>238</sup> the General Court's Orders raise severe doubts about its capacity to act as a sound promoter of human rights in the EU legal framework. It is particularly in times of crisis, when EU institutions and MSs tend to forget that the Union is founded on the respect of fundamental human rights, that the CJEU is expected to intervene to make sure that these principles are respected.<sup>239</sup> Instead, in the case of the EU-Turkey Statement, the General Court Orders gave precedence to political choices over the respect of fundamental human rights,<sup>240</sup> using the question of its authorship as an avoidance technique which hid the real issue at stake, *i.e.* the dubious consistency of the Statement with international and EU law.<sup>241</sup>

The three Orders of the General Court have been appealed to the Court of Justice. Many scholars<sup>242</sup> saw in these cases an opportunity to restore its authority as a proper human rights court. It is still the duty of the CJEU to provide the full respect of the principle of conferral,<sup>243</sup> to guarantee

<sup>231</sup> De Vrieze, "The legal nature".

<sup>232</sup> Goldner-Lang, "Towards judicial passivism".

<sup>233</sup> De Vrieze, "The legal nature".

<sup>234</sup> Cannizzaro, "Disintegration Through Law?".

<sup>235</sup> Limone, "Today's Court".

<sup>236</sup> Goldner Lang, "Towards judicial passivism".

<sup>237</sup> *Kadi and Al Barakaat v Council of the European Union and Commission of the European Communities*, joined cases C-402/05 P and C-415/05 P (ECLI:EU:C:2008:461), para. 303.

<sup>238</sup> Armin Von Bogdandy, "The European Union as a Human Rights Organization? Human Rights and the Core of the European Union", *Common Market Law Review*, Vol. 37 (2000): 1307.

<sup>239</sup> De Vrieze, "The legal nature".

<sup>240</sup> Thomas Spijkerboer, "Bifurcation of Mobility, Bifurcation of Law. Externalization of migration policy before the EU Court of Justice", *Journal of Refugee Studies*, Vol. 31, issue 2 (2017): 216-39.

<sup>241</sup> Cannizzaro, "Denialism as the supreme".

<sup>242</sup> Idriz, "The EU-Turkey Statement"; Carrera *et al.*, "It wasn't me!".

<sup>243</sup> Art. 5(1) TEU.

institutional balance and the respect of the rule of law,<sup>244</sup> to make sure that each EU institution operates “within the limits of the powers conferred on it in the Treaties and in conformity of the procedures, conditions and objectives set out in them”,<sup>245</sup> and, last but not least, to “ensure that in the interpretation and application of the Treaties the law is observed”.<sup>246</sup> However, the fact that the CJEU ultimately decided to dismiss the applications not only casts doubt on the existence of an effective system of judicial protection in the EU legal order,<sup>247</sup> but also plainly demonstrates that, in times of crisis, the Court bents the authority of the EU judicial system to the demands of *realpolitik*.<sup>248</sup>

## Chapter 5: Conclusion

This dissertation sought to disclose how the EU-Turkey Statement of 18 March 2016 is to be seen as a new controversial strategy that the EU institutions and MSs, with the unexpected support of the CJEU, have employed in order to cope with the need to secure the EU external borders: this profoundly disregarding their obligation to safeguard the asylum seekers’ fundamental rights. The EU-Turkey Statement stands at odds with various fundamental principles of EU law and can be viewed as an “unprecedented plan to legalize [...] violations of fundamental human rights and of international and European law.”<sup>249</sup>

Externalization, supported by the security discourse, was again used to legitimize practices that undermined fundamental human rights. As pointed out in chapter 3, the Statement presumes Turkey to be a safe third country and violates the principle of *non-refoulement*, by permitting the return of migrants and asylum seekers to countries where their life or liberty could be at risk. Moreover, as noted in chapter 4, the Statement falls outside the EU Treaties procedures and constitutes a policy tool which locates far away from the ordinary shapes of, and checks and balances applicable to, foreseen by the EU Treaty framework regarding international agreements.

Interestingly, it can be legitimately stated that the EU institutions and MSs acted in *mala fide* when concluding the deal with Turkey. First, although the context and content of the Statement plainly manifest that it is a binding treaty, it was intentionally formulated in a way that made it resemble a hybrid between an international agreement and a political declaration: this raising the question of its problematic legal nature. Second, even accepting the debatable claim that the Heads of State or Government of the MSs were the actual authors of the Statement, they did not follow the

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<sup>244</sup> Judgment of the Court, *Les Verts*, C-231/12 (ECLI:EU:C:1986:166).

<sup>245</sup> Art. 13(2) TEU.

<sup>246</sup> Art. 19(1) TEU.

<sup>247</sup> Idriz, “Taking the EU-Turkey”.

<sup>248</sup> Cannizzaro, “Denialism as the supreme”.

<sup>249</sup> Babická, “EU-Turkey Deal”.

procedures laid down in the Treaties to conclude agreements with third countries, violating the division of competences and the principle of sincere cooperation. Third, the adoption of the EU-Turkey Statement was anything but transparent, as it was published in the form of a press release, and there was no parliamentary involvement whatsoever at the EU level nor at the national level. Last, while being complicit to the effectiveness of the Statement in reducing the scope of the migratory flows towards the EU, the EU institutions rejected authorship and refused to assume legal responsibility for the impact of the Statement on asylum seekers' rights before the Court.

In its Orders, the General Court surprisingly accepted the dubious arguments put forward by the EU institutions which asserted that the EU-Turkey Statement was an act concluded by the EU Member States, and not by any EU institutions whose measures can be subject to judicial review. Hence, it fell outside the Court's competence to review its legality and decided not to rule on the issue whether it was an international agreement producing binding legal effects, as it should have been considered, or a mere political statement, as suggested by the European Council, the Council and the European Commission. While the EU-Turkey Statement should have been concluded following the regular procedures for international agreements under EU law, the European and MSs' decision-making bodies cunningly opted to use alternative informal means, undermining transparency, accountability and ultimately, the respect of human rights. The fact that the General Court sided with the European institutions only further perpetuated the violation of these fundamental values.<sup>250</sup>

From this perspective, the EU-Turkey Statement demonstrates that, when coping with the tension between the protection of human rights and migration control, the EU operates as a realistic actor instead of as a normative one. As Emiliani puts it, the EU makes "a perverse use of conditionality, appealing to [...] political realism rather than upholding the universal rights of protection."<sup>251</sup>

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<sup>250</sup> De Vrieze, "The legal nature".

<sup>251</sup> Tommaso Emiliani, "Refugee crisis-EU crisis? The response to inflows of asylum seekers as a battle for the European soul", *College of Europe Policy Brief*, No. 6.16(2016).

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