The EU-Turkey Statement and the Structure of Legal Accountability

Schotel, B.

DOI
10.1007/978-94-6265-487-7_5

Publication date
2022

Document Version
Final published version

Published in
The Informalisation of the EU's External Action in the Field of Migration and Asylum

Chapter 5
The EU-Turkey Statement and the Structure of Legal Accountability

Bas Schotel

Contents

Abstract This chapter looks at the EU-Turkey Statement (hereafter 'the Statement') and the CJEU rulings on the Statement from a legal theory perspective. It seeks to better understand the obstacles and opportunities for legal accountability. The chapter looks at the Statement through the lens of Carl Schmitt's critique of international law during the interbellum. Schmitt's observations will help to highlight three problematic features of the Statement from the perspective of legal accountability: (i) exerting influence but declining legal authority, (ii) seemingly benign and innocuous legal concepts used for geopolitical purposes and (iii) absence of an independent institution determining the meaning of the legal concepts. Triggered by Schmitt's observations, the chapter probes deeper into the types of powers deployed by the EU in the context of the Statement. To this end, the chapter uses Christopher Hood's tools of government as an analytical framework. For each tool, I will indicate whether it constitutes an obstacle or an opportunity for legal accountability. At first glance, it seems that the EU is not using law in the context of the Statement, which explains why it can also elude legal accountability. Upon closer scrutiny, we may actually find that the EU is using more law than meets the eye when executing the Statement.

B. Schotel (✉)
Faculty of Law, University of Amsterdam, Amsterdam, The Netherlands
e-mail: B.Schotel1@uva.nl

E. Kassoti and N. Idriz (eds.), *The Informalisation of the EU's External Action in the Field of Migration and Asylum*, Global Europe: Legal and Policy Issues of the EU's External Action 1, https://doi.org/10.1007/978-94-6265-487-7_5

This may offer an opportunity for holding the EU legally accountable in the future, namely at the level of the Commission decisions to fund external actions such as the EU-Turkey Statement.

Keywords EU-Turkey Statement · Informalization · Legal Accountability · Carl Schmitt · Tools of Government · Christopher Hood · EU Facility for Refugees in Turkey

5.1 Introduction

This chapter looks at the EU-Turkey Statement (hereafter 'the Statement') and the CJEU rulings on the Statement from a legal theory perspective. It seeks to better understand the obstacles and opportunities for legal accountability. The chapter looks at the Statement through the lens of Carl Schmitt's critique of international law during the interbellum. Schmitt's observations will help to highlight three problematic features of the Statement from the perspective of legal accountability: (i) exerting influence but declining legal authority, (ii) seemingly benign and innocuous legal concepts used for geopolitical purposes and (iii) absence of an independent institution determining the meaning of the legal concepts. Triggered by Schmitt's observations the chapter probes deeper into the types of powers deployed by the EU in the context of the Statement. To this end the chapter uses Christopher Hood's tools of government as an analytical framework. For each tool, I will indicate whether it constitutes an obstacle or an opportunity for legal accountability. At first glance, it seems that the EU is not using law in the context of the Statement, which explains why it can also elude legal accountability. Upon closer scrutiny, we may actually find that the EU is using more law than meets the eye when executing the Statement. This may offer an opportunity for holding the EU legally accountable in the future, namely at the level of the Commission decisions to fund external actions such as the EU-Turkey Statement.

The novelty of this approach is threefold. First, it mobilizes insights from legal theory and public administration sciences to better understand the nature of legal authority and how it is to be distinguished from non-legal types of public power. The practical upshot is that it may contribute to our understanding of the conditions and circumstances that may promote or hamper legal accountability. Second, the approach proposes a rule of thumb for legal accountability: legal accountability is a direct function of the extent to which public authorities need to govern through law. Simply put, the more authorities use non-legal tools of government the less they are susceptible to effective legal accountability.[1] Third, the approach also urges legal experts to scrutinize informal or non-legal powers for fragments or remnants of legal power. The approach suggests that when legal experts probe deeper into the EU's

[1] It follows that critical jurists should not only look at ways to constrain the *exercise* of non-legal or informal powers, but also explore how the law can constrain the build-up of non-legal powers. See Schotel 2021.

tools of government they may find that some informal actions still rely heavily on classic legal powers. The Commission decision to fund the Facility for Refugees in Turkey seems a case in point, that deserves closer scrutiny by legal experts of EU law on budget, development cooperation and humanitarian aid. The more general point is that in face of informalization of EU external actions we should not give up too easily on 'traditional' legal accountability.

The chapter takes the critical comments from legal experts on the Statement and the CJEU rulings as its starting point and places the Statement in the broader context of informalization of EU external actions (Sect. 5.2). Section 5.3 briefly discusses Carl Schmitt's critique of international law during the interbellum. The section applies Schmitt's critical observations to the Statement in order to highlight its problematic features. Section 5.4 will probe deeper into what these problematic features mean for legal accountability. The section examines what kind of powers the EU deployed in the context of the Statement using Christopher Hood's tools of government. This will help us see why the EU is so successful in eluding legal accountability. But it will also show that when the EU is deploying the tool 'treasure', namely allocating funds to the EU Facility for Refugees in Turkey it uses law. This offers an opportunity for legal accountability.

5.2 The EU-Turkey Statement, ECJ Ruling and Informalization

On 18 March 2016, the EU-Turkey Statement was published on the website of the European Council.[2] It laid down the basic elements of an arrangement to tackle the influx of irregular migrants from Turkey to Greece following the war in Syria. According to the Statement new irregular migrants arriving in Greece from Turkey as of 20 March 2016 would be resent to and readmitted by Turkey. For every irregular migrant sent back to Turkey, a Syrian selected on the basis of the UN Vulnerability Criteria would be resettled in the EU. The EU will accelerate the liberalization of the visa requirements for Turkish citizens wanting to enter the EU. The disbursement of the Euro 3 billion already allocated to the EU Facility for Refugees in Turkey will be speeded up and an additional 3 billion will be allocated in 2018 for humanitarian, education and health care projects in Turkey.

The Statement has been challenged before the General Court of the EU.[3] The actual case and arguments of the plaintiff were not stated clearly in the order by the

[2] European Council (2016) EU-Turkey statement 18 March 2016. https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/, Accessed 6 June 2021.

[3] CJEU (General Court), Case T-192/16 *NF v European Council*, Order of the General Court, 28 February 2017, ECLI:EU:T:2017:128; CJEU (General Court), Case T-193/16 *NG v European Council*, Order of the General Court, 28 February 2017, ECLI:EU:T:2017:129; CJEU (General Court), Case T-257/16 *NM v European Council, Order of the General Court*, 28 February 2017, ECLI:EU:T:2017:130.

General Court.[4] Most likely the plaintiffs sought the annulment of the Statement because Greece adapted its asylum regulations in execution of the Statement. This paved the way for the Greek authorities to expel the plaintiffs to Turkey allegedly without receiving a proper asylum procedure and with the risk of Turkey sending the plaintiffs to their respective countries of origin (Afghanistan, Pakistan). The Court declined jurisdiction because it found that the Statement was not an act of the EU but an act of individual Member States. The Court looked at some of the circumstances under which the negotiations took place and concluded that all facts pointing to direct involvement of the Council (e.g. premises, agenda's, invitations, attendances, minutes) were in reality acts attributable to individual Member States. Also, the use of the term 'EU' and the Council website for publishing the Statement was construed as merely for communication purposes in order to simplify matters for the media. It was no evidence to the effect that the Statement was made by the EU.[5]

The plaintiffs launched an appeal against the order with the First Chamber of the Court.[6] The Court found the appeal inadmissible because the plaintiffs simply did not produce arguments as to why the General Court's order was unfounded. The plaintiffs merely stated their disagreement with General Court's order. As a result, the Court concluded it could not hear the appeal and declined to judge on the merits of the case.[7]

Legal experts have extensively criticized the EU-Turkey Statement and the decisions by the ECJ declining jurisdiction.[8] For the purposes of this chapter, I can schematically restate the critiques:

- The Statement is an act by the EU and not the individual Member States;
- The Statement is an international treaty;
- The Statement violates refugee law;
- The Statement violates EU institutional law;
- The Court should not have declined jurisdiction. (The General Court should have tested the legality of the content of the Statement and the appeal Court should have looked at the merits of the appeal).

The legal critiques on the Statement and the ECJ declining jurisdiction translate into two more general critiques that are directly related to the phenomenon of informalization: (i) democratic deficit and (ii) compromising the rule of law.[9] Informalization simply means that public actors do not act through legal acts, but through non-legally binding acts, e.g. memorandum of understanding, recommendations, position papers, physical, factual actions. Strictly speaking the Statement is

[4] Ibid., *NF* v European Council, paras 10–13.

[5] Ibid., *NF v European Council*, paras 57–71.

[6] CJEU Joined Cases C-208/17 P to C-210/17 P *NF, NG and NM v European Council*, Order of the Court, 12 September 2018, ECLI:EU:C:2018:705.

[7] Ibid., paras 21–30.

[8] Hathaway 2016; Cannizzaro 2017; Carrera et al. 2017; Danisi 2017; Gatti 2016a, b, Gatti 2019; Gatti and Ott 2019; Den Heijer and Spijkerboer 2016; Idriz 2017; Kaya 2020; Wessel 2021.

[9] Wessel 2021.

not an instance of informalization, at least not in the eyes of the EU and critical legal experts. According to the EU the statement is not an instance of informalization of EU external actions, because the Statement is not an act of the EU. If we adopt the perspective of critical legal experts who argue that the Statement constitutes an international treaty,[10] we cannot consider the Statement an instance of informalization either. For if it is a treaty, it is a legal act and thus not a form of informalization. Still for our purposes the EU-Turkey Statement has all the hallmarks of the problems associated with informalization.

The democratic deficit cuts both ways. Firstly, if the Statement is not a legally binding act, then typically there is no ground for seeking approval by the EU Parliament. Secondly, if the Statement is an act by the EU but not a legally binding act, then the Statement is not attributable to the Member States. As a consequence, individual Member States need not seek approval from their national parliaments either. Moreover, in many Member States from the moment an issue becomes an EU matter it simply disappears from the national political radar. The Statement also creates a rule of law deficit, as the actions of the EU elude judicial review. It is obviously much easier to hold the EU legally accountable if at least one can attribute an act to the EU. Legal acts are by definition easier to attribute than non-legal acts. For example, if the Statement would be formulated more like a traditional international treaty, thus containing clearer legal language, then probably it would have been more difficult to deny that the Statement is attributable to the EU. Furthermore, the remedies available to challenge non-legal acts are more limited. Strictly speaking a non-legal act could give rise to an action for damages. However, the very strict criteria for non-contractual liability of the EU institutions make it extremely difficult to mount such challenges against actions in the sphere of external policy and migration, such as the Statement.

5.3 Carl Schmitt's Critique of International Law and the EU-Turkey Statement

The legal critiques on the EU-Turkey Statement and the CJEU declining jurisdiction can be understood as species of a general objection against informalization of EU external and migration policy, namely an infringement of the basic values of the EU itself: representative democracy and the rule of law. Taking these critiques as my starting point I want to probe deeper into the structure of legal accountability and explore the obstacles and, maybe, opportunities for legal accountability. I want to highlight the structural or logical features of the Statement allowing the EU to elude legal accountability. To this end I draw on three short essays by Carl Schmitt written during the Interbellum.[11] All three essays reflect Schmitt's concern about how key features of classic international law had been changed or perverted in order to enable

[10] See for example Den Heijer and Spijkerboer 2016.

[11] Schmitt 1925, 1928 and 1932.

and legitimize US imperialism in the Western hemisphere and the occupation of the Rhineland by the Allied forces. The three texts are really essays in the sense that they eloquently and succinctly explain the position of the author. The texts do not offer a thoroughly documented and analytical study of the alleged changes in international law. At the end of this section, I will recall the opportunistic and outright criminal intentions behind Schmitt's observations. Still, for our purposes the essays may do enough to highlight the problematic features of the Statement.

5.3.1 Schmitt's Critique on International Law

Declining legal authority. According to Schmitt one of the most important perversions of international law is the possibility for states such as the US to exercise effective economic, military and political control over foreign peoples and territories without claiming formal legal sovereignty over them. The US first helped some Latin-American countries to become independent from Spain and France. Then they concluded a combination of treaties with the newly independent and formally sovereign states granting the US a right to intervene and a right to keep troops in the territory. The right to intervene was granted for purposes of ensuring the independence of the countries, protecting the interests for foreign nationals (esp. property rights), maintaining public order and security. Clearly, these rights gave the US effective economic, political and military control over the countries. By the same token, the countries remained formally independent sovereign states.[12] The advantage for the US was threefold. First, by not annexing the countries to the US, the inhabitants remain nationals of the independent state and do not become US citizens.[13] Second, the formally independent states are full-fledged international actors can thus promote the interests of the US in international politics, including Europe, through for example the League of Nations.[14] Third, as the countries are now independent the US cannot be accused of stealing the colonies from the European colonial powers and thus violating their own Monroe doctrine. By the same token the European powers cannot intervene in Latin-America because of the Monroe-doctrine and formal sovereignty of the Latin-American countries (the Monroe doctrine was incorporated in Article 21 of the Covenant of the League of Nations).[15]

Schmitt sees a similar logic of exercising effective control without claiming legal sovereignty in the occupation of the Rhineland by the Allied forces. Rather than

[12] Schmitt 1925, pp. 29 and 31; Schmitt 1932, pp. 167–173; Schmitt 1928, pp. 105–106.

[13] Schmitt 1925, p. 30.

[14] Schmitt 1932, p. 174.

[15] Schmitt 1932, p. 174; According to the Monroe doctrine the US would not interfere with affairs between European powers in Europe or with their colonies in the Western Hemisphere. In return European powers would not establish new colonies in the Western Hemisphere. Neither would European powers interfere with the affairs of independent nations in the Western Hemisphere. Any such interference would constitute a hostile act against the US; *Britannica* 2021, Monroe Doctrine https://www.britannica.com/event/Monroe-Doctrine. Accessed 6 June 2021.

claiming a genuine annexation, under the Treaty of Versailles the Rhineland is peacefully occupied with a view of the demilitarization of the occupied zone. Yet this occupation is done by military troops and the demilitarization potentially extends to all social and economic activities by German authorities and companies. In short, according to Schmitt the occupation amounts to the *de facto* control a victor would normally exercise over a conquered people and territory.[16]

In effect, Schmitt contrasts the practice of declining sovereignty precisely with the classical way of political annexation, namely where the foreign territory and people would be incorporated by the conquering state. According to Schmitt, incorporation is not ideal but at least it is clear who is in charge.[17] The victor not only took over the territory and the people but also the responsibility. It opens the possibility for the conquered territory and people to be more than just an object. By contrast, the population in the formally independent but *de facto* dependent states have neither genuine citizen rights nor the protection typically granted to foreigners.[18]

Seemingly benign and innocuous concepts and monopoly of legal interpretations. Central to this international law mechanism of exercising effective control while declining sovereignty are terms that conceal the true nature of the powers exercised. So, Schmitt reads notions such as 'right to intervene to protect the independence', 'right to intervene to ensure public order and security', 'peaceful means', 'peaceful occupation', 'de-militarization' as particularly indeterminate from a legal perspective. These vague and seemingly benign and innocuous terms replace the more juridical categories of classic international law, such as 'annexation' and 'acts of war'. This paves the way for construing interventions that involve the massive use of violence as still peaceful measures of restoring public order and security.[19] Moreover, typically the actor that invokes the vague terms often turns out to be the one who also determines the meaning of these terms, e.g. the US determining the meaning of the Monroe doctrine and the right to intervene in Latin-American countries; the Allied forces determining the meaning of de-militarization in the context of the Rhineland occupation.[20]

---

[16] Schmitt 1925, pp. 29–31.

[17] "Das soll hier keineswegs als Ideal verteidigt werden, aber es hatte doch wenigstens den Vorzug der Offenheit und der Sichtbarkeit" ["This is by no means to be defended as an ideal, but it at least had the merit of openness and visibility"]; Schmitt 1925, p. 31.

[18] Schmitt referring to the English international law expert Baty: Schmitt 1925, p. 31.

[19] "Wie ist eine Jurisprudenz möglich, die angesichts blutiger Kämpfe, angesichts der Zehntausende von Toten immer noch von "friedlicher Besetzung" zu sprechen wagt und das Wort und den Begriff des "Friedens" dem grausamsten Hohn und Spott ausliefert?" ["How is a jurisprudence possible which, in the face of bloody battles, in the face of tens of thousands of deaths, still dares to speak of "peaceful occupation", and exposes the word and the concept of "peace" to the cruellest scorn and derision?]; Schmitt 1932, p. 177.

[20] Schmitt 1932, p. 169; Schmitt 1925, p. 32.

5.3.2 *Schmitt's Critique of International Law and the EU-Turkey Statement*

As discussed above, according to Schmitt the US and the European powers not merely violated international law, they perverted or changed classic international law. I do not think we can or should say the same thing of the EU, EU law and contemporary international law. For the purposes of this chapter, let us just use the three symptoms or elements of the perversions of international law identified by Schmitt and apply them to the Statement and ECJ decisions.

The EU declining legal authority. The EU is clearly declining legal responsibility in the matter of the Statement. Both the European Council and the Court state that EU did not act and does not claim legal authority. If the Statement were an act of the EU, then the EU would claim obedience from the Member States and Turkey to execute the Statement. The EU declines such legal authority. By the same token, Greece did change its asylum laws and policies in order to implement the Statement. Also, Turkey executed its part of the deal. Moreover, the Commission also executed the Statement, namely by refunding the Facility for Refugees in Turkey. Below I will return to the role of the Commission. Even if the European Council and the Courts deny that the Statement is made by the EU, the question is how did other actors perceive it? Did Greece execute the treaty because it thought it was a treaty entered into by the EU and thus directly binding for the Member States? Or did Greece execute the Statement because it was a treaty signed by Greece on its own behalf together with other individual Member States? And on what basis did the Commission increase the funding of the Turkey Facility?

Now, I cannot address these questions here. But they point to the possibility that though the EU may claim it was not acting and making binding law, others still think it did so. This then makes an even more awkward perversion of law than the one described by Schmitt. The US and Allied forces at the least claimed legal authority for the treaties they entered into. So, they invoked the legally binding treaties with formally independent sovereign states to exercise *de facto* control over them. The EU is not invoking any legal authority, worse the EU is allegedly not acting, but still others may think the EU created legal rights and obligations.

Seemingly benign and innocuous concepts and monopoly of legal interpretations. The Statement has some striking examples of unclear terms that depart from standard legal categories. So, instead of the standard legal terms used in treaty law such as 'shall' or 'should', the Statement uses 'will' to define the obligations undertaken under the Statement. When it comes to the implementation of the Statement seemingly benign and innocuous terms play a crucial role. The EU's involvement in the Statement is undisputed when it comes to funding. The EU has committed 6 billion Euro to the EU Facility for Refugees. In 2020 the EU already contracted for 4.7 billion euro and actually paid out 3.2 billion to the funded projects.[21] The money was taken

[21] European Commission (2020) EU-Turkey Statement - Four years on. https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20200318_managing-migration-eu-turkey-statement-4-years-on_en.pdf. Accessed 21 June 2021.

from the EU budget and allocated to the Facility by a Decision of the Commission.[22] The official motive for the allocation was: "The EU-Turkey Statement confirmed that the EU will mobilise an additional EUR 3 billion for the Facility by end-2018 if the relevant conditions were met."[23] Though clearly the Statement was the motive it could not be the legal basis for allocating the money, at least not according to the EU. For if the EU denied that the Statement was a legal act of the EU, then surely the Statement could not constitute a legal basis for a Commission decision.[24] Formally, thus, the legal basis for the Commission decision is the same as the Facility itself, namely Articles 210(2) and Article 214(6) TFEU). The Commission 'may take any useful initiative to promote coordination' of

– policies on *development cooperation*; and
– *humanitarian aid* actions.

Below we will probe deeper on the legal basis of the funding. For now, what matters is the Schmittian perspective on the Statement and the funding. Firstly, the language of the Commission decision is incredibly confusing. It suggests that there is a direct link with the Statement as if the EU fulfils its obligation under the Statement. Secondly, all proponents and opponents of the Statement agree that it was of course a deal, hence the 'EU-Turkey deal'. It means that obviously the deal is the outcome of old-school 'Realpolitik' and geopolitical considerations. I am not saying that these considerations are necessarily illegitimate or illegal. But they are certainly not covered by development cooperation let alone humanitarian aid. In other words, seemingly neutral and innocuous concepts such as development cooperation and humanitarian aid become crucial vehicles to materialize a geopolitical deal.

Finally, and also in line with Schmitt's observations, it is the EU itself that gives an authoritative interpretation of crucial legal concepts. The General Court determined what counts as an act of the EU, in particular the European Council. The Court is of course independent from the other EU institutions and cannot be equated with the European Council. So if we zoom in on the institutional separation of powers within the EU, then clearly we must distinguish the position of the European Council from the position of the Court. By contrast, if we zoom out and look at the EU as an international actor then it does seem that the EU has become a judge in its own case. Imagine that there is a dispute between Turkey and the EU about the Statement, whereby Turkey demands the EU to honour its legal obligations under the Statement. Imagine that the EU again claims that it has no obligations under the Statement because the Statement was not an act of the EU. If then the matter would be decided by the CJEU, then surely this would have been highly problematic. Below we will

[22] European Commission (2018) Commission Decision of 14 March 2018 on the Facility for Refugees in Turkey amending Commission Decision C(2015)9500 as regards the contribution to the Facility for Refugees in Turkey, C(2018) 1500 final.

[23] Ibid., Explanatory Memorandum para 1; See also recital 1.

[24] Of course, an equally plausible reading of the Commission decision is that it is simply an outright recognition that the Statement was an act of the EU. If not, the Commission decision would set a troubling precedent: when third parties agree and confirm that the EU will give money—even though the EU was no party to this agreement, then the EU will nevertheless give the money.

see that this is especially problematic when both the European Council and the CJEU decline jurisdiction.

5.3.3 Learning Lessons from Schmitt?

If our aim is to understand the structure of legal accountability in order to promote it, we should be careful using Carl Schmitt's observations. Schmitt was not really interested in questions about how to hold public authorities legally accountable. He was concerned about the political legitimacy of the legal order. More importantly his critical observations about the state of international law served an opportunistic, dangerous and outright criminal project. These observations about the so-called perversion of international law allowed him to argue that the Nazi regime need not respect classic international law any longer. This permitted Schmitt to come up with 'legal' arguments justifying the territorial expansion of the Third Reich through aggressive wars and occupation.[25] Furthermore, his preoccupation with the legitimacy of the legal order and effective control was part of a broader theory about the concrete order as the only legitimate basis for a legal order. Concrete order thinking implied that the expulsion and elimination of political enemies and cultural minorities were justified and even necessary for having a meaningful legal order.[26]

Still, Schmitt's observations remain helpful to underscore the relevance of better understanding the connection between law and other types of powers, for example effective control. He also points to the paradoxical phenomenon that people may be worse off when dominant actors try to exert influence over others but do not claim the legal credits for it.[27] Things may be even worse when dominant actors seek to exert influence without claiming legal authority but also without having effective control. Taking cue from Schmitt's observations about the state of international law during the Interbellum, in the next section I will explore the connection between various types of public power and legal accountability.

5.4 Accountability and the EU's Tools of Government

At the conference that constituted the basis for present edited volume, Andrea Ott suggested that jurists should look beyond the traditional legal routes of accountability in order to address the informalization of EU external action, because informalization

[25] Rüthers 1988, pp. 101–175.

[26] See for a critique and reference to primary and secondary literature on Schmitt's legal theory: Schotel 2012, pp. 75–118; Schotel 2011. See also Rüthers 1988, pp. 54–98. See generally for an international law perspective on Schmitt: Koskenniemi 2018.

[27] Schmitt 1925, p. 31.

defies normal legal accountability.[28] This has been exactly the experience of the EU-Turkey Statement and the CJEU rulings. In this section, I will probe deeper into the mechanisms whereby the EU eludes normal accountability. Taking cue from Schmitt's focus on effective control I will look afresh at what types of powers or instruments the EU actually deployed in the context of the EU-Turkey Statement. This may help us better understand why organizing legal accountability is so difficult. But it may also show us new unexpected opportunities for legal accountability. To this end I will use the taxonomy of governmental powers developed by Christopher Hood in his Tools of Government.

Let me first explain why I think the types of powers or instruments deployed by the EU is relevant for understanding the difficulties with and opportunities for holding the EU legally accountable in the context of the EU-Turkey Statement. Following the political science literature on public accountability one may distinguish various modes and fora of accountability: organizational accountability, political accountability, legal accountability, administrative accountability, professional accountability, vertical and horizontal accountability, collective and individual accountability, democratic accountability, constitutional accountability, learning accountability.[29] For the purposes of this chapter, I focus on constitutional and, to a lesser extent, legal accountability. Accordingly, "accountability is essential in order to withstand the ever-present tendency toward power concentration and abuse of powers in the executive branch."[30] Accountability is then measured by "the extent to which an accountability arrangement curtails the abuse of executive power and privilege."[31] This capacity to curtail the abuse of executive power and privilege is partially a function of having "credible sanctions to punish and deter" abuse. I believe that the power to punish and deter depends greatly on the power one seeks to curtail. So, if one seeks to hold the EU accountable then one must look first at what *type of power* one seeks to curtail.

For the purposes of this chapter, we may use the four types of powers or four tools of governments defined by the public administration scholar Hood, later together with Helen Margetts: nodality, authority, treasure and organisation. Nodality refers to information and communication tools: information about subjects, events and policies, public statements; information campaigns, non-mandatory recommendations, and propaganda. Treasure refers to financial and monetary capacity. Authority means legal power, i.e. "the power officially to demand, forbid, guarantee, adjudicate."[32] And "organization' is the physical ability to act directly: 'Organization denotes the possession of a stock of people with whatever skills they may have

[28] ACES-Asser Online Conference, 8 October 2020.

[29] Bovens 2005; Bovens et al. 2008.

[30] Bovens et al.2008, p. 231.

[31] Ibid.

[32] Hood and Margetts 2007, p. 6; See for an application of Hood's taxonomy on the EU with a focus on organization: Schotel 2021, pp. 627–628.

(soldiers, workers, bureaucrats), land, buildings, materials, computers and equipment, somehow arranged."[33] Let us now briefly look at what tools of government the EU deployed in the context of the Statement and what this means for legal accountability.

5.4.1 Authority

According to its own interpretation the EU is not using its legal authority in the context of the EU-Turkey Statement. It does not issue any binding legal rules and decisions to Member States, EU citizens or Turkey. The EU does not rule through law. It does not invoke the law in order to get something done. So, in this particular case, the EU does not need the enabling force of the law. As a consequence, the EU also eludes the constraining force of the law. In effect, it is more difficult to constrain public actors through law, if the actors do not use the law.

Now, it may be argued that the CJEU obliquely and indirectly invokes legal authority. It declined jurisdiction because it found that the Statement was not an act of the EU. Implicitly, the Court claims that other legal actors respect its legal characterization of the Statement. The legal and political institutions of the Member States should not overrule the legal characterization by the Court. If so then it would mean that the EU or at least the Court is also constrained by the law. The Court demands that other legal actors respect its decision in the name of the law. The Court has therefore a direct interest to also show it respects the law. In other words, if the law enables the Court, the law can also constrain the Court. There seems thus an opportunity for legal accountability.

Unfortunately, the communicative and practical logic of declining jurisdiction is quite different from the normal situation where the Court requires particular actions from Member States and its citizens. The normal way in which the EU and the Court invoke the law is by issuing legally binding rules and decisions typically requiring Member States to act in a particular way. Often this means that Member States must actively implement, apply, and enforce EU law. The Member State must actively cooperate. To ensure cooperation from the Member States the quality (formal and substantive) of the legal rules and decisions issued by the EU becomes crucial precisely because the EU fully depends on the cooperation of the Member States. For the EU does not have its own administration to implement and enforce EU law. Because the EU depends on the cooperation of the officials and citizens of the Member States, there is always a concrete risk that the officials of the Member States do not cooperate or even actively obstruct the implementation and enforcement of EU law. In order to limit the risk of non-cooperation, disobedience or even obstruction the EU has a direct interest to show it respects the law formally and substantively. But when the CJEU declined jurisdiction in the context of the Statement, there seems little to no opportunity for non-cooperation, disobedience and obstruction on the part of the

[33] Ibid.

Member States. How could Member States practically disobey or obstruct the CJEU rulings? The only thing that comes to mind is that a domestic legal institution of a Member State, such as a domestic court, re-characterizes the Statement and finds that it does constitute an act of the EU. But even if a domestic court would be willing to do so, it could still not hold the EU accountable. For domestic courts would simply not allow plaintiffs to bring a suit against the EU.

Above we criticized from a Schmittian perspective the EU having the monopoly to determine the legal meaning of its own legal concepts, in the case at hand: what counts as an act of the European Council. Having considered the communicative and practical logic of claiming legal authority, we can now see that this monopoly to determine the legal meaning of key concepts of EU law is even more problematic when the EU declines legal authority. In fact, the EU-Turkey Statement sheds a new light on the CJEU's resistance against the EU joining the ECHR and recognizing the authority of the ECtHR over the EU.[34] It is one thing for the EU to make legal interpretations that seek to maintain the autonomy of the EU and promote the EU project, e.g. EU as a separate legal order, mutual trust, *effet utile*. But the autonomy of EU law will become more difficult to uphold, if the EU simply discards certain matters by declining legal authority. In other words, declining legal authority may be an effective tactic to escape legal accountability in the short term. It seems difficult to maintain in the long run. In any event, it seriously questions the EU's ability to organize independent and neutral judicial review in its own case.

5.4.2 Nodality

According to the EU, the Statement was not an act of the EU and thus the Statement itself does not involve any deployment of nodality by the EU. The EU only made its website available to the Member States but the Statement was not a communication of its own. Even if according to the EU the Statement itself was not a communication of the EU, the EU did issue communications *about* the Statement. And those communications are thus the deployment of nodality.

According to Hood the tool of nodality depends on credibility.[35] Successful communications depend on their credibility. Here lies the potential for accountability. How credible is the EU's claim that the Statement was not an act of the EU? Thus, a direct counterforce against the EU abusing the power of nodality is to challenge the credibility of its communications. To be sure, bearing in mind Hood's taxonomy, we can see that the counterforce for nodality is not the law, because the law is largely about authority and competences. Still, the credibility of the EU's communication

[34] ECJ, Case Opinion 2/13 *Opinion pursuant to Article 218(11) TFEU—Draft international agreement—Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms—Compatibility of the draft agreement with the EU and FEU Treaties*, Opinion of the Court, 07 September 2013, ECLI:EU:C:2014:2454; See amongst the many commentators: Lazowski and Wessel 2015; Peers 2015; Halberstam 2015.

[35] Hood and Margetts 2007, p. 6.

is in the context of the Statement partially a legal matter or at least a matter for the legal profession.

Credibility is of course a complex phenomenon involving multiple factors. For example, the perception of credibility may be even more important than the factual soundness of a communication. But facts still matter. And whether the legal characterization by the CJEU of the Statement is *legally* sound does matter for the credibility of the EU's communications about the Statement. Legal experts have presented good legal reasons to question the legal soundness of the CJEU's ruling. These good reasons constitute a ground for not taking the credibility of the EU's communications about the Statement for granted. I can only speculate here. But it is not unlikely that if the legal profession for example through an open letter—signed by academics and practitioners—were to challenge the ruling of the ECJ this may have some impact on some relevant audiences. At least, there would be some form of accountability. Though this is not legal accountability, it is a form of accountability that involves legal professionals.

5.4.3 Organization

The EU does not consider the Statement to be a legal act of the EU. It denies legal authority, similar to the US with respect to some Latin-American countries, as observed by Schmitt. The difference with the US, is that EU lacks effective control. By and large the EU lacks what Hood calls organization: the physical capacity to intervene in tangible reality.[36] With an exception of the small contingent of EU border guards, the EU does not have any officials with real physical capacity. EU officials are not building roads, running hospitals, providing care for the elderly, or policing our streets. The EU has hardly any significant form of physical capacity that is remotely comparable to the organization of the Member States. Paradoxically this makes the EU even less accountable than Member States.

When an actor has a tool of government at its disposal it is also jealously trying to hold on to it. So, when a government has organization allowing it to have effective control, it has an interest in not losing it. In general, national and especially local politicians and civil servants are quite sensitive to the effects of policies and measures on public order and peace. It is the classic preoccupation of those in power with public unrest, riots, rebellion, revolution, support for foreign powers, etc. This is still the case in contemporary Europe. Protests by Yellow vests and farmers, but also troubles and chaos in refugee camps and at border crossings directly pose threats to the effective control by national and especially locally operating politicians and civil servants. The physical force of public discontent can make the authorities physically accountable for their actions. Of course, it does not mean that actual and potential wide scale public resistance is a sufficient constraint on the abuse and concentration of public power, but it does constitute a counterforce taken seriously by authorities.

[36] Schotel 2021, pp. 629–630.

The situation is fundamentally different for the EU. Since the EU does not have effective control, it does not worry about losing it either. In the context of the Statement, it also means that the EU politicians and civil servants will not feel the pressure of public disorder, chaos and popular violence that may follow from the policy. Even if citizens of the EU or migrants would want to physically confront the EU, e.g. storm the Berlaymont building of the Commission in Brussels, it will not be a matter of 'organization' or effective control for the EU. It would be an issue for the Belgian Minister for the Interior, the competent mayor for that area, the Belgium police, and most of all individual Belgian police officers who are physically confronted with the violence.

Paradoxically, because the EU lacks organization it can act even more irresponsibly. Or at least it lacks a major incentive to be responsive to realities on the ground. This is the difference with legal authority. Precisely because the EU still governs largely through authority it has an interest in not losing it. In fact, since *Van Gend & Loos*, the EU considers legal authority to be the very nature of the EU as it conceives of itself as a separate legal order.[37] Therefore, the law can still constrain the EU. It also means that the CJEU cannot afford too many rulings like it did on the Statement. However, if the EU is conceiving itself increasingly as an entity that can make things happen without acting legally and without claiming legal authority, then inevitably legal accountability becomes increasingly obsolete.

5.4.4 Treasure

While the EU formally denies that the Statement is a legal act of the EU, it openly deploys treasure as a tool of government in the context of the Statement. Above I discussed how the EU is directly involved in the EU-Turkey deal by allocating enormous amounts of money from the EU budget to the EU Facility for Refugees in Turkey.

According to Hood treasure depends on having fungible assets, mostly money. It means that the counterforce against abuses and concentration of treasure is pretty straightforward: constraining the capacity to collect and spend money. In the EU context this means an *ex ante* and *ex post* process, i.e. establishing the budget and granting discharge to the EU Commission for its spending of the budget. Establishing the budget is largely a political affair offering the various actors significant ex ante counterforce against the EU's treasure. The discharge process is equally a largely political process. Though the independent European Court of Auditors plays an important role in the discharge process, it is the Parliament who decides. And there are no direct legal consequences associated with a refusal to grant discharge. Still, the discharge process is believed to exercise considerable political pressure.

[37] ECJ, Case 26/62 *Van Gend en Loos v Nederlandse Tariefcommissie,* Judgement, 05 February 1963, ECLI:EU:C:1963:1 para II.B.

Political accountability can sometimes be an extremely powerful counterforce against governments trying to concentrate or abuse treasure, taking even revolutionary proportions. By the same token, political accountability fully depends on the capacity to obtain a political majority by either party majority, alliances or compromises.[38] By contrast, legal accountability does not rely on political majority, but on the criteria for legal standing and legal grounds for holding actors accountable. Through law in theory a single man can hold an entire state accountable. But again, legal accountability is not the most likely form of counterforce when it comes to treasure. Precisely because treasure is sanctioned by a careful and highly political process, the law must yield. Still, at least in the context of the EU-Turkey Statement and the Facility for Refugees in Turkey there may be an opportunity for legal accountability already available in the existing legal institutions.

Above I argued, taking cue from Schmitt, that the EU used vague and seemingly innocuous concepts such as development cooperation and humanitarian aid as a legal basis for what is in reality a geopolitical deal. Schmitt took the deployment of vague legal concepts for political purposes as a sign of the demise of classic international law. As also discussed above Schmitt's pessimistic view was largely self-serving and dangerous, if not outright criminal. I think we can adopt a less dramatic and dangerous approach. We may also look at the deployment of treasure by the EU from a more juridical perspective.

The legal basis for funding the Facility in the context of the Statement is the legal competence of the Commission directly derived from the Treaty to 'take any useful initiative to promote *coordination*' of policies on development cooperation and humanitarian aid actions.[39] Scholars have already made insightful analyses of the Facility for Refugees in Turkey from a budgetary perspective.[40] They have also raised doubts about the justification of the funding in light of the real objectives of the so-called EU-Turkey deal. Not only the funding of the Facility, but also how in its turn the Facility spends the money has raised concerns about accountability by critical observers. These concerns are in line with the critical comments from the European Court of Auditors. As a result, the critical scholars have called for more democratic accountability of the funding of the Facility. These calls for more democratic accountability are justified. But so far, they have been mobilized in the context of normal budgetary accountability which as mentioned above is a form of political accountability. I think we can also use these critical analyses to trigger a basic form of *legal* accountability.

---

[38] Accountability is even more complicated in the context of the EU Facility for Refugees in Turkey as the European Parliament itself 'considers those trust funds, as well as the Facility for Refugees, to be neither inside nor outside the EU budget, therefore lacking the necessary accountability and democratic process prescribed by the Community method, and intends therefore to closely monitor the setting up of the funds and facility and their implementation; underlines that the above actions are a clear infringement of Parliament's rights as an arm of the budgetary authority'. See: European Parliament (2016) Resolution of 9 March 2016 on general guidelines for the preparation of the 2017 budget, Section III—Commission (2016/2004(BUD)), P8_TA(2016)0080 para 22.

[39] See Articles 210(2) and 214(6) TFEU.

[40] Carrera et al. 2018; den Hertog 2016.

There is a basic legal requirement that applies to any act by a public authority including the Commission, namely that its actions must fall within the legal competence conferred on it. The objectives and the means must fall within its legal authority. If the Commission acts outside its competence it violates the most basic rule of legality. It either lacked competence to act or misused its powers. If we apply this basic legal requirement to the Statement, we can turn the Commission's involvement in the EU-Turkey deal into a basic legal question about whether the objectives behind the funding and the nature of the funded projects fall within the scope of the powers conferred on the EU Commission.

First, the Commission funded the Facility with the objective of executing the Statement. Thus, the question is whether the objectives of the Statement fall within the scope of Articles 210(2) and 214(6) TFEU. There are elements in the Statement that clearly fall under the notion humanitarian aid. It seems more doubtful whether the Statement also aims at development cooperation. But even if so, the preliminary question is whether the Statement is *sufficiently* aimed at serving these objectives. Both proponents and opponents of the Statement agree that the deal was a geopolitical arrangement about reducing the stock and arrival of illegal migrants into the EU from Syria and neighbouring countries. It is also well-known that Turkey would only sign up for this deal if it could benefit from funding from the EU directly or indirectly. Without the funding, there is no deal. If so, can it be maintained that the objective of the funding is still largely and sufficiently humanitarian aid and development cooperation? Or was the funding of the facility actually used for another objective, namely to strike a geopolitical deal with Turkey? I am not saying that the EU cannot pursue geopolitical goals, but it must do so using the correct legal basis.

Second, not only the real objective of the funding decision but also the stated objectives and the actual funded projects seem to fall outside the scope of Articles 210(2) and 214(6) TFEU. The legal basis pertains to any measures to *promote coordination* of policies on development cooperation and humanitarian actions. It seems that the Commission does much more than just promote coordination. Committing and paying out billions of euros is not merely coordination. Whereas under the initial Facility the EU was only liable for 1/6 of the total fund, it has now become its main financier.[41] This raises the legal question as to whether the legal meaning of 'promoting coordination' grants the Commission the legal power to allocate so much money from the EU budget.

Third, even if we grant that promoting coordination is a legal basis for the Commission financing the bulk of projects under the Facility, there is another legal question whether the funded projects fall under the scope of humanitarian aid and development cooperation. According to Article 214(1) TFEU the humanitarian aid involves operations aimed at "*ad hoc* assistance and relief and protection for people in third countries who are victims of natural or man-made disasters, in order to meet the humanitarian needs resulting from these different situations." It seems that this is restricted to the immediate and rather provisional types of aid. A part of the objectives of the Statement and Facility and a large number of the actual projects clearly falls

[41] European Commission 2015, Article 4.

under the scope of humanitarian aid. But what about the many other projects, such as health care and education projects, which the EU itself labels as non-humanitarian?

One may argue that these non-humanitarian projects fall under the scope of 'development cooperation'. But this is highly questionable. First, though the health care and education projects constitute a form of aid (albeit non-humanitarian), they are largely aimed at servicing the Syrian refugees. In this respect, it is not clear how these projects fall under the notion of development cooperation which is typically oriented at the development of the country itself. It is not obvious that helping refugees contributes the development of Turkey. Second, and more importantly, it follows from Article 208(1) TFEU that development cooperation is about the reduction and eradication of poverty in developing countries. So, the EU Commission is granted the legal competence to take measures that promote the coordination of actions to reduce poverty in developing countries. But is Turkey a developing country? Turkey is not characterized as a developing country under one of the EU's main development cooperation initiatives, namely the ACP-EU Partnership. Of course, this may be because Turkey does not fall under the geographical scope of the ACP. In the context of the Generalized Scheme of Preferences which grants preferential treatment in trade matters to developing countries the EU uses the criteria of the World Bank.[42] Countries that are considered to be developing countries are those that are ranked by the World Bank as *lower* than 'upper-middle' income. But since 2004 Turkey has been rated consecutively as an upper-middle income country.[43] In other words, in the EU's own terms Turkey is not a developing country, which suggests that the non-humanitarian projects cannot fall under the scope of development cooperation.

Finally, if Articles 210(2) and 214(6) TFEU do not authorize the Commission to allocate money from the EU budget for health care and education projects, then surely there is no legal basis for funding two migration management projects. To be fair only a small percentage of the total funding is allocated to these two projects. But the absolute amount of 80 million euro is still a very substantial amount of money to spend without a proper legal basis.[44]

In short, the Commission decision to fund the Facility and many of the subsequent projects seems to lack a legal basis. This means that the Commission either lacked the legal competence to act or misused its powers. This could trigger the standard institutional framework to hold the EU legally accountable for its involvement in the EU-Turkey deal, namely the annulment of the Commission decision by the ECJ (Article 263(1) TFEU). Of course, when it comes to the actual Commission decision of 2018 the time limits for lodging an annulment action have been expired long ago. Still, the EU is likely to continue to deploy treasure in future external actions. If

[42] European Commission 2021.

[43] http://databank.worldbank.org/data/download/site-content/OGHIST.xls link available at https://datatopics.worldbank.org/world-development-indicators/the-world-by-income-and-region.html.

[44] Carrera et al. 2018, p. 63.

so, then depending on the context annulment procedures may be a powerful tool for holding the EU legally accountable.[45]

5.5 Conclusions

In this chapter I looked at how the EU manages to elude normal legal accountability in the context of the EU-Turkey Statement. The chapter takes the critical comments from legal experts on the Statement and the CJEU rulings as its starting point in order to probe deeper into structure of legal accountability. The problem of EU legal accountability is studied against the background of the general phenomenon of informalization of EU external actions, i.e. EU external policies that do not involve legally binding agreements, rules and decisions.

To highlight the problematic features of the Statement from the perspective of legal accountability, the chapter draws on Carl Schmitt's critique of international law during the Interbellum. Schmitt notes three shortcomings of international law and politics that directly apply to the Statement: (i) dominant actors directly exerting influence over others but declining legal authority, (ii) the use of seemingly benign and innocuous legal concepts for geopolitical purposes and (iii) the dominant actor being its own authoritative institution determining the meaning of these concepts.

This chapter explored how these problematic features of the Statement enable the EU to elude normal legal accountability. To this end I examined what type of power the EU actually deployed in the context of the Statement. The chapter used as an analytical framework Christopher Hood's tools of government: nodality, organization, treasure and authority. I found that the possibility for legal accountability is directly related to the type of power deployed by the EU. Precisely because the EU declines legal authority it is difficult to hold the EU legally accountable because the EU has no direct interest to show it respects the law. Also, the CJEU rulings declining jurisdiction do not fit the normal picture of the CJEU claiming legal authority over the legal institutions of the Member States. In practical terms the CJEU rulings declining jurisdiction do not require any active cooperation or implementation by the Member States. Also, national courts cannot offer an alternative competing jurisdiction for those seeking to challenge the EU. As a result, the CJEU can—at least for the time being—afford to make a highly questionable interpretation of what counts as an act of the European Council. Applying Hood's taxonomy also revealed how paradoxically the fact that the EU lacks effective control or physical power to intervene may

[45] Of course, though a form of legal accountability par excellence, the annulment of these budgetary decisions will involve quite some politics. It will be extremely difficult for non-privileged applicants, such as NGOs, to have standing because typically the budgetary decisions do not concern them directly. By contrast mobilizing the privileged applicants, such as a Member State or the European Parliament, will require a lot of political dealing. At least on paper the European Court of Auditors is the most suited partially privileged applicant to bring annulment actions precisely for budgetary reasons. Yet to my knowledge the Court of Auditors has not used this power yet in the context of external actions.

make the EU even less accountable than Member States who have to face the real physical consequences of policies on the ground.

Finally, I combined Schmitt's observation about how international actors use seemingly benign and innocuous concepts for geopolitical purposes with the EU's deployment of treasure in the context of the Statement. I found a possible opportunity for legal accountability that appears to have been overlooked by most legal experts. The funding of the EU Facility for Refugees in Turkey and the funding of the subsequent projects by the Commission from the EU budget are based on provisions of the TFEU conferring on the Commission the legal power to take any measure to promote the coordination of humanitarian aid and development cooperation. But the real and stated objectives of the Statement as well as the actual projects funded by the Facility fall largely outside the scope of humanitarian aid and development cooperation. In other words, the EU Commission acted *ultra vires*. This means that if the EU undertakes similar external actions in the future it may be held legally accountable through legal procedures seeking the annulment of Commission decisions allocating funding from the EU budget.

In short, in this chapter I tried to probe deeper into the structure of how the EU eludes legal accountability. It resulted in a better understanding of why normal legal accountability does not work. But surprisingly, it also showed us an alternative but very classic legal way to hold the EU legally accountable for external actions.

References

Bovens M (2005) Public Accountability. In: Ferlie E, Lynn L, Pollitt C (eds) The Oxford Handbook of Public Management. Oxford University Press, Oxford/New York

Bovens M, Schillemans T, 't Hart P (2008) Does Public Accountability Work? An assessment tool. Public Administration 86:225

Cannizzaro E (2017) Denialism as the Supreme Expression of Realism: A Quick Comment on NF v. European Council. European Papers 2:251

Carrera S, den Hertog L, Stefan M (2017) It wasn't me! The Luxembourg Court Orders on the EU-Turkey Refugee Deal. www.ceps.eu/ceps-publications/it-wasnt-me-luxembourg-court-orders-eu-turkey-refugee-deal/. Accessed 20 June 2021

Carrera S, den Hertog L, Núñez Ferrer J, Musmeci R, Pilati M, Vosyliūtė L (2018) Oversight and Management of the EU Trust Funds Democratic Accountability Challenges and Promising Practices. https://www.europarl.europa.eu/RegData/etudes/STUD/2018/603821/IPOL_STU(2018)603821_EN.pdf. Accessed 21 June 2021

Danisi C (2017) Taking the 'Union' out of 'EU': The EU-Turkey Statement on the Syrian Refugee Crisis as an Agreement Between States under International Law. 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/. Accessed 20 June 2021

den Heijer M, Spijkerboer T (2016) Is the EU-Turkey refugee and migration deal a treaty?. http://eulawanalysis.blogspot.nl/2016/04/is-eu-turkey-refugee-and-migration-deal.html. Accessed 20 June 2021

den Hertog L (2016) EU Budgetary Responses to the 'Refugee Crisis': Reconfiguring the Funding Landscape. https://www.ceps.eu/ceps-publications/eu-budgetary-responses-refugee-crisis-reconfiguring-funding-landscape/. Accessed 21 June 2021

European Commission (2015) Commission Decision of 24 November 2015 on the coordination of the actions of the Union and of the Member States through a coordination mechanism – the Refugee Facility for Turkey, C(2015) 9500 final

European Commission (2018) Commission Decision of 14 March 2018 on the Facility for Refugees in Turkey amending Commission Decision C(2015)9500 as regards the contribution to the Facility for Refugees in Turkey, C(2018) 1500 final

European Commission (2021) Generalised Scheme of Preferences (GSP). https://ec.europa.eu/trade/policy/countries-and-regions/development/generalised-scheme-of-preferences/. Accessed 21 June 2021

Gatti M (2016a) The EU-Turkey Statement: A Treaty That Violates Democracy (Part 1 of 2). https://www.ejiltalk.org/the-eu-turkey-statement-a-treaty-that-violates-democracy-part-1-of-2/. Accessed 20 June 2021

Gatti M (2016b) The EU-Turkey Statement: A Treaty That Violates Democracy (Part 2 of 2). https://www.ejiltalk.org/the-eu-turkey-statement-a-treaty-that-violates-democracy-part-2-of-2/. Accessed 20 June 2021

Gatti M (2019) La marginalisation du pouvoir législatif dans la politique migratoire de l'union Européenne : défis pour l'état de droit, Revue des Droits et Libertés Fondamentaux [The marginalisation of the legislative power in the European Union's migration policy European Union: challenges to the rule of law, Fundamental Rights and Freedoms Review]. http://www.revuedlf.com/droit-ue/la-marginalisation-du-pouvoir-legislatif-dans-la-politique-migratoire-de-lunion-europeenne-defis-pour-letat-de-droit/. Accessed 20 June 2021

Gatti M, Ott A (2019) The EU-Turkey statement: legal nature and compatibility with EU institutional law. In: Carrera S, Santos Vara J, Strik T (eds) Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis Legality, Rule of Law and Fundamental Rights Reconsidered. Edward Elgar, pp 175-200

Halberstam D (2015) "It's the Autonomy, Stupid!", A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward. German Law Journal 16:105

Hathaway J (2016) Taking refugee rights seriously: A reply to Professor Hailbronner. https://verfassungsblog.de/taking-refugee-rights-seriously-a-reply-to-professor-hailbronner/. Accessed 20 June 2021

Hood C, Margetts H (2007) The Tools of Government in the Digital Age. Palgrave Macmillan, London

Idriz N (2017) The EU-Turkey statement or the 'refugee deal': the extra-legal deal of extraordinary times? In: Siegel D, Nagy V (eds) The Migration Crisis? Criminalization, Security and Survival. Eleven International Publishing

Kaya H (2020) The EU-Turkey Statement on Refugees: Assessing Its Impact on Fundamental Rights. Edward Elgar, Cheltenham

Koskenniemi M (2018) Carl Schmitt and International Law. In: Meierhenrich J, Simons O (eds) The Oxford Handbook of Carl Schmitt. Oxford University Press, Oxford, pp 592–608

Lazowski A, Wessel R (2015) When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR. German Law Journal 16:179

Peers S (2015) The EU's Accession to the ECHR: The Dream Becomes a Nightmare. German Law Journal 16:213

Rüthers B (1988) Entartetes Recht: Rechtslehren und Kronjuristen im Dritten Reich [Degenerate Law: Legal Doctrines and Crown Lawyers in the Third Reich]. C.H. Beck, Munich

Schmitt C (1925) Die Rheinlande als Objekt internationaler Politik [The Rhineland as an Object of International Politics]. In: Schmitt C (ed) Positionen und Begriffe: im Kampf mit Weimar – Genf – Versailles 1923–1939 [Positions and concepts: in struggle with Weimar - Geneva - Versailles 1923–1939]. Duncker & Humblot, Berlin, pp 26–33

Schmitt C (1928) Völkerrechtliche Probleme in Rheingebiet [Problems of international law in the Rhine area]. In: Schmitt C (ed) Positionen und Begriffe: im Kampf mit Weimar – Genf – Versailles 1923–1939 [Positions and concepts: in struggle with Weimar - Geneva - Versailles 1923–1939]. Duncker & Humblot, Berlin, pp 97–108

Schmitt C (1932) Völkerrechtliche Formen des modernen Imperialismus [Forms of modern imperialism under international law]. In: Schmitt C (ed) Positionen und Begriffe: im Kampf mit Weimar – Genf – Versailles 1923–1939 [Positions and concepts: in struggle with Weimar - Geneva - Versailles 1923–1939]. Duncker & Humblot, Berlin, pp 162–190

Schotel B (2011) Doing Justice to the Political - The International Criminal Court in Uganda and Sudan: A Reply to Sarah Nouwen and Wouter Werner. EJIL 22:1153

Schotel B (2012) On the Right of Exclusion: Law, ethics and immigration policy. Routledge, New York/Abingdon, pp 75–118

Schotel B (2021) EU Operational Powers and Legal Protection: A legal theory perspective on the operational powers of the European Border and Coast Guard. German Law Journal 22: 625

Wessel R (2021) Normative transformations in EU external relations: the phenomenon of 'soft' international agreements. West European Politics 44:72–92

Bas Schotel is Assistant-professor Legal Theory in the Faculty of Law at the University of Amsterdam.