INSIGHT

The EU-Turkey Statement, the Treaty-Making Process and Competent Organs. Is the Statement an International Agreement?

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ABSTRACT: The EU-Turkey Statement has undergone multiple analyses regarding issues of human rights and refugee law. One of the most controversial matters among scholars is its nature as an international agreement. This insight will analyse the legal nature of this statement, on the basis of the international law of treaties, the law of international organizations and EU law, in order to conclude on the difficulties considering it as an international agreement.

KEYWORDS: EU-Turkey Statement – international agreement – competent organ – treaty-making capacity – non-binding norms – Art. 218 TFEU.

I. Introduction

The EU-Turkey Statement, or "agreement" or "deal" as it has also been called, has been the subject of important debates regarding its nature in international law: is it or not an international agreement? This question has gained momentum since the applications for annulment lodged under Art. 263 TFEU before the CJEU, in which the applicants challenge the EU-Turkey Statement, considering it an agreement between the EU and Turkey.[1]

This is contrary to those who consider that the EU-Turkey Statement is not an international agreement,[2] mainly because the procedure established in Art. 218 TFEU has not

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[1] See the orders of the General Court of 28 February 2017: case T-192/16, *NF v. European Council*; case T-193/16, *NG v. European Council*; case T-257/16, *NM v. European Council*. For a comment on such orders, see E. Cannizzaro, *Denialism as the Supreme Expression of Realism – A Quick Comment on* NF v. European Council, in *European Papers – European Forum*, *Insight* of 15 March 2017, www.europeanpapers.eu, p. 1 *et seq.*

[2] S. Peers, *The Draft EU/Turkey Deal on Migration and Refugees: Is It Legal?*, in *EU Law Analysis*, 16 March 2016, eulawanalysis.blogspot.it; K. Babická, *EU-Turkey Deal Seems to Be Schizophrenic*, in *migrationonline.cz*, 22 March 2016, migrationonline.cz; E. Cannizzaro, *Disintegration Through Law?*, in *European Papers*, Vol. 1, No 1, 2016, www.europeanpapers.eu, p. 3 *et seq.*

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been followed. Others base their consideration of the Statement as an international agreement mainly on its content and context, as well as on the EU internal decisions adopted in order to implement the agreement.[3] Considering the Statement as an international agreement would mean recognising that the EU has an international obligation, which could clash with other international norms relating to human rights, refugee rights and EU law.[4] This recognition would also mean that the EU had breached its own procedure on the negotiation and conclusion of international agreements, which could bring about the annulment of the agreement by the CJEU.

This *Insight* will analyse the latest arguments regarding the legal nature of the Statement, in order to conclude upon the difficulties associated with classifying the Statement as an international agreement. To do this, we will need to analyse the laws of international treaties so as to clarify what can be considered an international agreement. After that, we will consider the laws of international organizations in order to determine who can engage such bodies. These two issues should allow us to explain the nature of the EU-Turkey Statement in clearer terms.

II. The existence of an international agreement concluded between States

Regarding the above opinion on the content and context of the Statement, and focusing on the international law of treaties, it is clear that the definition or the nomenclature does not determine the nature of a treaty, and neither does its form determine it. An objective test to establish the nature of an international agreement, also based on the jurisprudence of the International Court of Justice (ICJ), would be "its actual terms and the particular circumstances in which it was made".[5] It is thus necessary to examine the content of the instrument and the context in which it was concluded, so as to establish the existence of a treaty.

To support this view, references to several ICJ judgments have been made. In the *Libya v. Chad* case, the ICJ held that the exchange of letters between the governments was an agreement.[6] Also, in the *Greece v. Turkey* case the ICJ held that a *joint communiqué* of the

[3] See. T. Spijkerboer, *Minimalist Reflection on Europe, Refugees and Law*, in *European Papers*, 2016, Vol. 1, No 2, www.europeanpapers.eu, p. 533 *et seq.*; O. Corten, *Accord politique ou juridique: Quelle est la nature du "machin" conclu entre l'UE et la Turquie en matière d'asile?*, in *EU Migration and Asylum Law and Policy*, 10 June 2016, eumigrationlawblog.eu.

[4] B. Nascimbene, *Refugees, the European Union and the "Dublin System". The Reasons for a Crisis*, in *European Papers*, 2016, Vol. 1, No 1, www.europeanpapers.eu, p. 101 *et seq.*; J.C. Hathaway, *A Global Solution to a Global Refugee Crisis*, in *European Papers*, Vol. 1, No 1, 2016, www.europeanpapers.eu, p. 96 *et seq.*; G. Fernández Arribas, *The EU-Turkey Agreement: A Controversial Attempt at Patching up a Major Problem*, in *European Papers*, 2016, Vol. 1, No 3, www.europeanpapers.eu, p. 1097 *et seq.*

[5] M. Fitzmaurice, *The Practical Working of the Law of Treaties*, in M. Evans (ed.), *International Law*, Oxford: Oxford University Press, 2010, p. 167.

[6] International Court of Justice, *Territorial Dispute* (Libyan Arab Jamahiriya v. Chad), judgment of 3 February 1995, para. 28 *et seq.*

Prime Ministers can constitute an international agreement to submit the dispute to the ICJ,[7] since it "depends on the nature of the act or transaction to which the Communiqué gives expression".[8] Furthermore, in the *Cameroon v. Nigeria* case the ICJ considered that the Maroua Declaration signed by the two Heads of State was an international agreement.[9] And finally, in the well-known *Qatar v. Bahrein* case, the ICJ based its finding on "actual terms of the instrument",[10] and held that the minutes of consultations between the Foreign Affairs Ministers[11] constituted an international agreement.

From these judgments, it could be inferred that, as established above, in order to determine the existence of a treaty we need to look at the terms of the instrument. But another issue must be taken into account when analysing these cases: the authorities that concluded the agreements. In the cases mentioned above, the agreements were concluded by the governments, the Prime Ministers, the Foreign Affairs Ministers, and the Head of States, that "represent the State merely by virtue of exercising their functions".[12]

On the other hand, in the *Democratic Republic of Congo v. Rwanda* case, the ICJ established that "other persons representing a State in specific fields may be authorized by that State to bind it by their statements in respect of matters falling within their purview".[13] The ICJ noted that these persons "may be authorized", otherwise, they cannot be considered as representatives of the States in order to express the consent to be bound. This finding had been previously confirmed in the *Croft* case, where the arbitrator held that the decisions of national courts cannot be considered international agreements because they do not engage in international relations, and do not speak on behalf of national governments.[14] Later, in 2012, this approach was confirmed by the International Tribunal for the Law of the Sea in the *Bangladesh v. Myanmar* case, where the tribunal held that there were no grounds to consider the 1974 Agreed Minutes, signed between the two States, as a legally binding agreement. The first reason for this was that the head of the Burmese delegation did not have full powers, and there was no other evidence to that confirm that he could engage his country. This differed from the Maroua Declaration which was signed between two Heads of States. Secondly, the Court considered that since the States had not followed

[7] International Court of Justice, *Aegean Sea Continental Shelf* (Greece v. Turkey), judgment of 19 December 1978, para. 96.

[8] *Ibid*.

[9] International Court of Justice, *Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon v. Nigeria: Equatorial Guinea intervening), judgment of 10 October 2002, para. 264.

[10] International Court of Justice, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v. Bahrain), judgment of 15 February 1995, para. 29.

[11] *Ibid*., para 30.

[12] International Court of Justice, *Armed Activities on the Territory of the Congo* (New Application: 2002; Democratic Republic of the Congo v. Rwanda), judgment of 15 February 2006, para. 46.

[13] *Ibid*., para. 47.

[14] J. Kabblers, *The Concept of Treaty in International Law*, The Hague: Kluwer Law International, 1996, p. 225.

the procedure required by their respective constitutions for binding international agreements, this was an indication of its non-legally binding character.[15]

Therefore, in order to consider the existence of an international agreement, it is also necessary for the agreement to have been concluded by the appropriate authorities, that is, those included in Art. 7 of the Vienna Convention of the Law of Treaties.

III. Characteristics of international organizations and their effect on the EU-Turkey Statement: the competent organs

Regarding international organizations, the question that emerges in this case is which organs are competent to conclude international agreements. It has been stated that the supreme organ in the field concerned must be the organ with the competence to conclude the agreement,[16] and that this organ can delegate power to another specific organ.[17] But the situation becomes even clearer when the constitutive treaty establishes the organs competent to conclude agreements. In any case, according to the internal rules of the organization, those organs could also delegate the power to conclude the agreements.

This takes us to the next question: can an instrument that has been concluded by an organ without the power of concluding or negotiating treaties and, by extension, does not have, or cannot produce, full powers, be considered an international agreement?[18]

Regarding the States, the cases analysed above concluded that if the person or organ has not been entrusted with this power, the instrument cannot be considered an international agreement. By analogy, the same criteria should be applied to international organizations. Indeed, it is not the breach of the constitutional rules regarding the procedure to conclude treaties that is the problem here, but a matter relating to the international representation of States and international organizations when negotiating or concluding an international agreement according to international law.

Regarding the EU-Turkey agreement, concluded by the European Council, it is clear that the European Council has not been entrusted with the competence to conclude in-

[15] International Tribunal of the Law of the Sea, judgment of 14 March 2012, *Bangladesh v. Myanmar*, para. 83.

[16] H.G. Schermers, N.M. Blokker, *International Institutional Law*, Leiden-Boston: Martinus Nijhoff Publishers, 2011, para. 1765.

[17] Chiu notes that in practice the Secretary-General or the chief executive officer of an international organization conclude the treaties but "on the basis of resolutions of the competent organs concerned". See H. Chiu, *The capacity of International Organizations to conclude treaties, and the special legal aspects of the treaties so concluded*, Leiden-Boston: Martinus Nijhoff Publishers, 1966, p. 90; H.G. Schermers, N.M. Blokker, *International Institutional Law*, cit., para. 1766.

[18] See Art. 7 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

ternational agreements. This lack of competence has been considered a question of violation of Art. 218 TFEU, a violation of the procedure, which would not affect the existence of the treaty.[19]

To support the view that a violation of the procedure does not entail the inexistence of a treaty, two cases have been mentioned. Firstly, reference will be made to the *Parliament and Commission v. Council* case.[20] In this case, the CJEU held that a Declaration addressed to Venezuela granting fishing opportunities in EU waters adopted by the Council, and without respecting the procedure of Art. 218 TFEU, was an international agreement between the EU and Venezuela. As we have mentioned, the contested Declaration was adopted by the Council, the organ which possesses the power to conclude international agreements. Therefore the Council was representing the EU and had the power to express the consent of the Union to be bound. Secondly, the CJEU also found in 1994 that an agreement concluded *ultra vires* by the European Commission with the US Department of Justice was binding, and fell within the category of international agreements.[21] In this case the Commission, who according to Art. 228, para. 1, of the Treaty establishing the European Economic Community, had the competence to negotiate agreements on behalf the European Community, exceeded its competence by also concluding the agreement instead of just negotiating it. It also worth mentioning that the Commission had, according to Art. 101 of the Euratom Treaty, competence to conclude international agreements.

But the situations of the mentioned cases were not those of the EU-Turkey Statement. This because the Statement was concluded by an institution that has not been entrusted with any treaty-making competence, since Art. 218 TFEU only includes in that process the European Commission, the Council and the European Parliament. In any case, it will be also useful to analyse whether this power can be implied.

Looking at the functions of the European Council, its competence regarding external actions is linked with common and security policy.[22] The EU-Turkey Statement, however, deals with area of freedom, security and justice, specifically the asylum policy, and therefore the European Council has no competence on this matter.[23] In this case, the theory that the supreme organ in the field could be competent to conclude an agreement, despite breaching the constitutional rules of the organization, does not apply in this situation.

It would be also difficult to maintain that an organ which does not have legislative functions[24] could have implied treaty-making competences. As it has been stated,[25] an international organization must have the competence to make binding rules of law in

[19] O. CORTEN, *Accord politique ou juridique*, cit.

[20] Court of Justice, judgment of 26 November 2014, joined cases C-103/12 and C-165/12, *Parliament and Commission v. Council*.

[21] Court of Justice, judgment of 9 August 1994, case C-327/91, *France v. Commission*.

[22] Arts 15, 24 and 26 TEU.

[23] This is something Turkey must be aware of, after years of accession negotiations.

[24] Art. 15 TEU.

[25] H.G. SCHERMERS, N.M. BLOKKER, *International Institutional Law*, cit., para. 1751.

order to make binding agreements. By extension, the organ that concludes the agreement must have that legislative power, or at least have been delegated by an organ with legislative power. Again, this premise is not applicable to the European Council.

Therefore, the assumption of a conclusion of an international agreement by the European Council based only on the content and context of the instrument, and leaving aside the question regarding the competent organ, would be a contested conclusion since the European Council cannot be considered a representative of the EU in this regard, and therefore is not able to express the consent of the EU to be bound.[26]

IV. Changes in the *acquis communautaire* as evidence of the conclusion of an international agreement

Regarding the argument that the EU has amended legal instruments in order to apply the EU-Turkey Statement, which "would be a strong indication that the Statement is a treaty obliging the EU to implement it",[27] it must be mentioned that changes in the *acquis communautaire* in order to comply with, or to implement, international rules does not entail or constitute evidence of the binding character of those rules. Three examples, among others, can be mentioned here.

Firstly, the EU is participant in the Kimberley Process, and in order to comply with the Kimberley Process Certification Scheme adopted a Council Regulation in 2002[28]. This regulation has been amended on different occasions in order to comply with decisions taken by the Kimberley Process.[29] However, these internal changes do not render the Kimberley Process Certification Scheme a binding international agreement. Secondly, the EU is also a member of the Organization of the *Codex Alimentarius* Commission, and implements Codex standards in its internal legal order.[30] But again, this does not mean that those standards are binding norms. Finally, the EU is party to the Convention on International Trade in Endangered Species of Wild Fauna and Flora, and in order to implement the decisions of the Conference of States Parties, which are not binding, the EU has amended the Council resolution that implement the Convention several times.[31]

[26] E. Cannizzaro, *Disintegration Through Law?*, cit., p. 5.

[27] T. Spijkerboer, *Minimalist reflection on Europe*, *Refugees and Law*, cit., p. 551.

[28] Regulation (EC) No 2368/2002 of the Council of 20 December 2002 implementing the Kimberley Process Certification Scheme for the international trade in rough diamonds.

[29] Regulation (EC) No 257/2003 of the Commission of 11 February 2003 amending Council Regulation (EC) No 2368/2002 implementing the Kimberley Process Certification Scheme for the international trade in rough diamonds, Commission implementing Regulation (EU) No 789/2013 of 16 August 2013 amending Council Regulation (EC) No 2368/2002 implementing the Kimberley Process Certification Scheme for the international trade in rough diamonds.

[30] S. Duquet, D. Geraets, *Food Safety Standards and Informal International Lawmaking*, in A. Berman, S. Duquet, J. Pauwelyn, R.A. Wessel, J. Wouters (eds), *Informal International Lawmaking: Case Studies*, The Hague: Torkel Opsahl Academic EPblisher, 2012, p. 403.

[31] Regulation (EU) No 1320/2014 of the Commission of 1 December 2014 amending Council Regulation (EC) No 338/97 on the protection of species of wild fauna and flora by regulating trade therein.

The EU's participation in the new forms of international cooperation that has led to the adoption of non-binding rules, reveals a new way of elaborating *acquis communautaire* that is based on non-binding international rules that become binding through their implementation into the national system.

V. Concluding remarks

The EU-Turkey agreement has been widely criticised with regard to its violation of international and European rules on human rights and refugee law. The possibilities of leaving without effect the statement through the challenging of the European and national rules of implementation has been displayed in different works.

To challenge the Statement considering it an international agreement entails serious doubts and makes the outcome very unpredictable. As we have expounded, there is ample evidence regarding the European Council's competences that could lead us to consider that it cannot conclude international agreements on behalf of the EU. We need to look jointly at the international law of treaties, international law of international organizations and EU law in order to solve this matter. The answer would appear not to be favourable to the position adopted by the applicants.

Finally, the recognition of the EU-Turkey Statement as an international agreement would also mean recognising that the European Council has a treaty-making competence. This would go beyond the system of attribution of competence within the EU.