

THE ROLE OF THE EUROPEAN COUNCIL IN THE EU-TURKEY STATEMENT: DRIVEN BY INTERESTS

Havva Yesil*

Abstract: The core principle of intergovernmentalism has always been that the decisions and actions of EU Member States drive European integration. The EU's normative decision-making process is centred on supranational mechanisms. This leads to a confrontation between new intergovernmentalism and supranationalism. The 2015 refugee crisis demonstrated that domestic concerns significantly influenced EU integration. Therefore, this article examines the power of the European Council in the conclusion of the EU-Turkey Statement (2016), which is pertinent to the continuing discussion on the function of the European Council in the context of the increasing new intergovernmentalism of the EU.

Keywords: EU migration law, European Council, EU-Turkey Statement, Syrian refugee crisis, new intergovernmentalism, migration governance

1 Introduction

The uprisings of the Arab Spring in 2010 and the conflict in Syria caused millions of people to seek sanctuary in Europe, often using irregular migration means to achieve this. Once the refugee crisis turned into a significant crisis for the EU in 2015, the EU common migration policy problems and the differences in the migration policies of Member States began to come to the fore. European countries responded to migration flows at national, regional, and sometimes international levels. This approach has played a role in constructing a common migration policy and in debate on the integration of Europe. Moreover, when the EU built the common migration policy at the EU level, there was a discussion regarding which institution holds more power in Brussels among the quadrangle of the European Commission (EC), the European Parliament (EP), the European Council (EUCO), and the Council.¹

The basic assumption of intergovernmentalism has been that EU Member States' decisions and actions shape European integration. The normative decision-making process of the EU focuses on supranation-

* PhD candidate at Dublin City University, School of Law and Government, havva.yesil@outlook.com, ORCID iD: <https://orcid.org/0000-0001-5649-1230>. DOI: 10.3935/cyelp.19.2023.534.

¹ Daniel Thym and Kay Hailbronner, 'Legal Framework for EU Asylum Policy' in Kay Hailbronner and Daniel Thym (eds), *EU Immigration and Asylum Law*. (Commentary, 2nd edn, CH Beck/Hart/Nomos 2016).

al procedures. This creates tension between new-intergovernmentalism and supranationalism. Creating consistent solutions to crises has always been a difficult task for the EU. However, the 2015 refugee crisis showed that domestic interests weighed heavily on EU integration. Therefore, this paper investigates whether the EUCO had the authority to conclude the EU-Turkey Statement (2016) (hereinafter: Statement), which is relevant to the ongoing debate about what role the EUCO played in the context of emerging intergovernmentalism in the EU. In order to build a strong background of the rising power of EUCO, this research focuses on the new-intergovernmentalism in political science.

This paper is organised as follows. In section 2, I review the political science literature on new intergovernmentalism in order to sketch the context within which the EU Member States responded to the Syrian refugee crisis. After outlining the concept of new intergovernmentalism, in section 3 I explain the role of the EUCO both as a driving force behind the EU's decision-making process, and in changing the governance of the EU. Having a general framework of new intergovernmentalism and the role of EUCO, in section 4 I explain how new intergovernmentalism played out during the refugee crisis. Then, section 5 analyses how the EUCO reached a deal with Turkey in light of discussions in the literature and cases from the CJEU. To conclude, in section 6, the main findings of this research will be summarised. Drawing on the explanation that the rising power of the EUCO serves individual Member States' interests, and, in light of the literature and cases, this article concludes that Member States used the EUCO to conclude the Statement while simultaneously seeking to achieve their national demands.

2 Key concept: new intergovernmentalism in literature

The EU Member States' priorities regarding the Syrian refugee crisis and their effects on the EU's decision-making system entail a further analysis of new intergovernmentalism and political science debates within the Union. In this section, I will analyse various scholars' approaches to the new intergovernmentalism theory.

The theory of new intergovernmentalism regards as paramount the decisions and actions of European Member States in European integration. This theory is based on the concept of interest inherent in the States. It also aims to balance between the intergovernmental and supranational actors within the EU. Compared to traditional intergovernmentalism, this entails a significant increase in joint authority and control at the EU level, which was previously believed impossible. It emphasises the importance of gathering Member States under a single roof. Intergovernmentalism draws attention to the importance of interstate bargaining in the integration process. The theory focuses on the nation State, aiming to

improve its own conditions and then protecting its national interests.² In this respect, common arrangements exist as long as they serve the State's interest as a dependent variable. While the Member States' interests and priorities were shaped in accordance with national sovereignty, the extent of the influence of European integration remains insufficiently evaluated. Despite the fact that the proponents of the intergovernmentalist method do not make the problem of legitimacy the central focus of discussions on integration, they discuss the legitimacy of the Union as it coincides with the interests of the Member States.

In the 1980s, when European integration focused on the internal market, supranationalism and intergovernmentalism were the dominant theories of European integration. Interstate negotiations that cannot be isolated from external factors are accepted as a critique of the intergovernmental theory. Therefore, the theory of liberal intergovernmentalism developed by Andrew Moravcsik appears as a more comprehensive study to explain the period of the 1990s.³ Liberal intergovernmentalism claims that the enlargement process results from negotiations and unanimous decisions between governments acting with rational choices. Moravcsik uses the liberal approach to explain domestic preferences regarding economic interests.⁴ Liberal intergovernmentalism is composed of national preferences, intergovernmental bargaining, and the role of EU institutions. In his article, he includes his criticisms of neo-functionalism.⁵ His rational theory explains that Member States and/or governments focus on cooperation at the EU level to protect their interests.

Moravcsik's theory successfully explains the critical steps in integration regarding certain significant points, namely 'economic interest, relative power, credible commitments'.⁶ He mostly defends European integration as a series of rational responses by national leaders to limits and opportunities caused by the rise of an interdependent world economy (economic interest). Some authors argue that the theory inadequately addresses the issue of how domestic preferences form at the EU level. Forster argues that liberal intergovernmentalism neither separates the States nor clarifies governments' motivations in intergovernmental bargaining.⁷ Schimmelfennig considers liberal intergovernmentalism as a version of the 'rationalist institutionalism' approach explicitly used to explain European integration. According to him, the theoretical foundations

² Andrew Moravcsik, 'Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach' (1993) 31(4) *Journal of Common Market Studies* 473.

³ Andrew Moravcsik, 'Negotiating the Single European Act: National Interests and Conventional Statecraft in the European Community' (1991) 45 *International Organization* 19.

⁴ *ibid.*

⁵ Andrew Moravcsik, 'Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach' (1993) 31(4) *Journal of Common Market Studies* 473.

⁶ Craig Parsons, 'Review of the Choice for Europe: Social Purpose and State Power from Messina to Maastricht, by A Moravcsik' (1999) 17(1) *French Politics and Society* 74-78.

⁷ Anthony Forster, 'Britain and the Negotiation of the Maastricht Treaty: A Critique of Liberal Intergovernmentalism' (2002) 36(3) *Journal of Common Market Studies* 347.

of rationalist institutionalism align harmoniously with the fundamental tenets of liberal intergovernmentalism. Therefore, the theory can be analysed from the perspective of international relations in the same way as Moravcsik's studies emphasised the European Community's international dimension.⁸

Nevertheless, a new form of intergovernmentalism has gradually emerged since the Maastricht era. In the 2010s, Puetter et al introduced a new intergovernmental approach to explain European integration in times of crisis.⁹ 'New intergovernmentalism' refers to the domination of the EUCO in the decision-making process in the EU. The new engagement of Member States has diminished 'traditional' supranationalism which envisages an increase in the power of supranational actors such as the EC and the European Court of Justice in hierarchical actions.¹⁰ They define new intergovernmentalism as the rise of the EUCO's decision-making role. The claims regarding new intergovernmentalism show that the Member States have taken the lead in governing the EU.¹¹ The new intergovernmentalists criticise the traditional intergovernmentalist approach as always focusing primarily on power in the decision-making process. Traditional intergovernmentalists followed the path, assuming the process was concerned with the desire for power, whether through profit bargaining in the Council or budget maximisation for the bureaucracy as Schmidt emphasises in her research.¹²

Puetter grounds his approach to new-intergovernmentalism on 'deliberation and consensus'.¹³ New intergovernmentalism advocates the guidance of deliberation and consensus in EU decision-making. He explains deliberative intergovernmentalism in the institutional change of the EUCO as mainly driven by consensus actions. In the new form of the EUCO under new intergovernmentalism, EUCO became an executive actor dealing with mid- and long-term decision-making and intergovernmental-based executive decisions. Puetter's analysis of new intergovernmentalism provides a comprehensive argument to explain the leading

⁸ Andrew Moravcsik and Frank Schimmelfennig, 'Liberal Intergovernmentalism' in Antje Wiener, Tanja A Börzel and Tomas Risse (eds), *European Integration Theory* (3rd edn, OUP 2009).

⁹ Uwe Puetter, Dermot Hodson and Christopher J Bickerton, *New Intergovernmentalism: States and Supranational Actors in the Post-Maastricht Era* (OUP 2015).

¹⁰ Sweet Alec Stone & Sandholtz Wayne, 'European Integration and Supranational Governance' (1997) 4(3) *Journal of European Public Policy* 297.

¹¹ Sergio Fabbrini, *Which European Union? Europe after the Euro Crisis* (CUP 2015). Uwe Puetter, Dermot Hodson and Christopher J Bickerton, *New Intergovernmentalism: States and Supranational Actors in the Post-Maastricht Era* (OUP 2015).

¹² Vivien A Schmidt, 'The "New" EU Governance: "New" Intergovernmentalism Versus "New" Supranationalism Plus "New" Parliamentarism' (2016) 5(5) *Les Cahiers du Cevipol* <www.cairn.info/revue-les-cahiers-du-cevipol-2016-5-page-5.htm> accessed 25 March 2022.

¹³ Uwe Puetter, 'The Centrality of Consensus and Deliberation in Contemporary EU Politics and the New Intergovernmentalism' (2016) 38(5) *Journal of European Integration* 601, <<http://dx.doi.org/10.1080/07036337.2016.1179293>> accessed 28 November 2021.

role of institutional reforms during the euro crisis¹⁴ which led to a political crisis within the EU. The countries that easily survived the crisis did not want to help the debt-ridden Member States. Hence, the countries affected by the crisis felt alone in and excluded from the Union.¹⁵ The EUCO predominantly focused on reaching consensus in policy deliberation during the main discussion on the euro crisis. It effectively managed the crisis in cooperation with the Eurogroup. The crisis shows how the preferences of Member States and/or governments were shaped in accordance with their financial interests and Europe's legitimacy concerns. Accordingly, during the euro crisis, the EUCO took the role of ultimate decision-maker. As a result, Puetter sees new intergovernmentalism as a helpful concept with deliberative and consensus tools for dealing with the crisis under the current institutional framework.¹⁶

In the meantime, Hodson has made significant contributions to the concept regarding the euro crisis and to Puetter's claims on new intergovernmentalism.¹⁷ He clarified three aspects of new intergovernmentalism in the euro crisis. First, governments responded to the challenge of managing the crisis in line with their commercial benefits. Second, the institutional preferences of Member States proved the significance of deliberation and consensus via the EUCO and *de novo* bodies. For example, the European Central Bank (ECB) and the permanent European Stability Mechanism (ESM) were empowered. Lastly, the crisis also proved the EC's scepticism about the Union's integration. The Commission became a supranational institution reluctant to take charge of dealing with the crisis rather than having the role of maximising competence.¹⁸ Therefore, new intergovernmentalism argues that European integration has consolidated the delegation of new powers to the EUCO without traditional supranationalism.

3 The European Council: the driving force of new intergovernmentalism

The EUCO is the most intergovernmental EU organ, comprising top political leaders of Member States. It is responsible for defining the 'EU's overall political direction and priorities'.¹⁹ Since it is not a legislative institution of the EU, it calibrates the EU's policy agenda in accordance with

¹⁴ *ibid.*

¹⁵ Benjamin M Friedman, 'The Pathology of Europe's Debt' (2014) 61 *The New York Review of Books*.

¹⁶ *ibid.*

¹⁷ Dermot Hodson, 'The New Intergovernmentalism and the Euro Crisis: A Painful Case?' [2019] *SSRN Electronic Journal* <<http://dx.doi.org/10.2139/ssrn.3412326>> accessed 28 November 2021.

¹⁸ *ibid.*

¹⁹ European Council <www.consilium.europa.eu/en/european-council/> accessed 1 October 2021.

the identified matters and required actions.²⁰ After the Maastricht Treaty, the EUCO supported the EU's enlargement policy. Hence, it extended the decision-making areas under the Community method and new intergovernmentalism.²¹ Jean Claude Piris, who was Director General of the Council Legal Service, explained the empowerment of the EUCO and its rising efficacy as an outcome of not only the legal measures but also political reality.²² As European integration progressed, the EUCO, which met for the first time on 11 March 1975 in Dublin, steadily increased the frequency of its sessions. Then, the importance of the EUCO began to be more widely recognised. Although the EUCO lacked official powers or even existence under the EU Treaties, a body comprising all heads of State/government clearly has enormous authority and influence.²³

The EUCO's primary role is to map out the EU's overall direction and give political leadership in order to achieve it. It was not anticipated that the EUCO would play a direct role in legislative decision-making. It is expressly stated in Article 15(1) TEU that it 'shall not exercise legislative functions'.²⁴ Though not directly participating in legislation, it has a significant impact on legislative and policy development. The EC generally has strong motivation to collaborate with the EUCO when it comes to dealing with crises. As these crises are politically sensitive issues, they must be handled at the highest political level possible – that is, by the heads of State and government as part of the intergovernmental EUCO. Consequently, the EU's activities are expanding, and so is its informal authority to carry out these extra duties.

On the other hand, the EUCO has an influence on determining the content of legislation under Article 31(2) TEU. Although the EUCO is not involved in the day-to-day functioning of the Council, it is frequently consulted on contentious issues. The Council can request the EUCO to make a decision by unanimously approving it.²⁵ A decade after the Lisbon Treaty came into effect, the EUCO has solidified its place as the EU's most important institutional body. When we look at the euro crisis, Europe faced the most serious threat to its economic stability since the foundation of the EEC. It prompted several of the political, legal, and institutional reactions within the Union. The financial upheaval in the United States and Europe in 2007 showed that the EU lacked the 'firepower' to deal with a

²⁰ European Council, Council of the European Union, 'European Council' <www.consilium.europa.eu/en/european-council/#> accessed 18 October 2021.

²¹ Uwe Puetter, Dermot Hodson and Christopher J Bickerton, *New Intergovernmentalism: States and Supranational Actors in the Post-Maastricht Era* (OUP 2015).

²² Jean-Claude Piris, *Lisbon Treaty: A Legal and Political Analysis* (CUP 2010) 208.

²³ Armin Cuyvers, 'The Institutional Framework of the EU' in *East African Community Law* (Nijhoff 2017).

²⁴ *ibid.*

²⁵ Article 31 TEU.

huge sovereign debt crisis.²⁶ When Greece's debts were due to default in 2009, the crisis had officially begun. After Greece, the threat of sovereign debt defaults from Portugal, Italy, Ireland, and Spain grew to the point that they could no longer be ignored. Germany and France, the EU's two most (economically) powerful members, did tremendous work to aid these Member States.²⁷

The heads of Member States/governments recognised that further reforms would eventually be required to resolve the euro crisis, and that they would be unable to manage this process themselves. Therefore, the EUCO took on the leadership position of crisis management in addition to its many other responsibilities. When the first Greek bailout package was agreed at a meeting in March 2010, a statement of heads of States and/or governments gave the new EUCO president the authority to establish a taskforce to study long-term adjustments of the European Monetary Union.²⁸ The EU heads of government developed a strong sense of commitment in the crisis by working together through the EUCO. Euro summits, where the Euro area heads met frequently to respond to the financial crisis, provided a critical forum for its members to formulate responses to the extraordinary volatility and major issues confronting the continent.²⁹ When considering the EUCO's complex and nuanced performance in the Eurozone crisis, there is no doubt that the heads of State or government played a major role in shaping a resolution to the crisis. The heads of State undertook the crisis management responsibilities on their own, even though this was not their official function under the Treaty.

Since the beginning of the Euro crisis and the subsequent responses to it, scholars have adopted various perspectives on EUCO domination. Most of these observers have reflected on the intergovernmental orientation of the EUCO. One starting point for an analysis of the rising power of the EUCO involves reviewing the literature on the subject.

According to Puetter, the EUCO has acquired the leading role in policy-making processes, and meetings with the heads of Member States are at the heart of this process.³⁰ He also discusses the extent to which the EUCO has been relying on the legislative structure of the EU during the exercise of its leadership role. He considers the rising power of the EUCO as linked with the EU's activity in new areas such as the Common Foreign and Security Policy (CFSP). The EUCO has not only transformed

²⁶ Paul Craig, 'The Financial Crisis, the European Union Institutional Order, and Constitutional Responsibility' (2015) 22(2) *Indiana Journal of Global Legal Studies* 257.

²⁷ Mark Dawson and Floris de Witte, 'Constitutional Balance in the EU after the Euro-Crisis' (2013) 76(5) *Common Market Law Review* 817.

²⁸ Statements by the Heads of State and Government of the Euro Area, Brussels 25 March 2010.

²⁹ General Secretariat of the Council, *Rules for the Organisation of the Proceedings of the Euro Summits*, 2013, (Publications Office of the European Union).

³⁰ Uwe Puetter, *The European Council and the Council: New Intergovernmentalism and Institutional Change* (OUP 2014).

into an institution from a forum for the purpose of creating consensus on the integration process, but it has also evolved into a focal point for decision-making with direct intervention in EU governance.³¹ Puetter criticises the ongoing proliferation of *de novo* bodies, which he views as another result of the EUCO's rising power. There is no doubt that the EUCO objectifies its idiosyncratic way of decision-making due to continuing works and actions to build a common policy.³²

Federico Fabbrini analyses the EUCO's role under the domination of big powers among the Member States. He sees the rise of the EUCO as problematic since the big players are taking a commanding role in the decision-making process, particularly the EU's economic governance.³³ Indeed, the EUCO has been transformed into a role with a powerful presidency, dominated by major countries such as Germany. Thus, the presidency may obtain a freestanding position in order to perform in line with the Member States' preferences.³⁴ In this way, as Fabbrini observes, permanent leadership under the Member States' political direction significantly increases the EUCO's influence in the policy-making process and legitimacy roles within the EU structure.

In addition, as a political powerhouse, the EUCO is fuelled by the power of the participating leaders at home and by the dynamic nature of their informal meetings. The Lisbon innovation of a stable president plays a crucial part in this power transmission. With no executive powers, and 'no fiscal responsibilities', the role of the President of the EUCO is to facilitate collaborative decision making.³⁵ Kelemen explains this point: 'member countries were eager to establish a permanent President of the EUCO, in part because they wished to prevent the President of the EC from becoming the EU's *de facto* leader on the international arena'.³⁶ For this reason, the President of the Council, who was to be directly connected to the Member States, would assume an intergovernmental form of leadership, as an alternative source of EU leadership.

In order to clarify the EUCO's political leadership responsibilities, Beach and Smeets designed a new institutionalist leadership (NIL) mod-

³¹ Uwe Puetter, 'The European Council the Centre of New Intergovernmentalism' in Christopher J Bickerton, Dermot Hodson and Uwe Puetter (eds), *The New Intergovernmentalism: States and Supranational Actors in the Post-Maastricht Era* OUP 2015).

³² *ibid.*

³³ Federico Fabbrini, 'Austerity, the European Council, and the Institutional Future of the European Union: A Proposal to Strengthen the Presidency of the European Council' (2015) 22(2) *Indiana Journal of Global Legal Studies*.

³⁴ *ibid.*

³⁵ European Council, Council of the European Union, 'The President's Role' <www.consilium.europa.eu/en/european-council/president/role/> accessed 20 October 2021.

³⁶ R Daniel Kelemen, 'The Impact of the Lisbon Treaty: From Misdiagnosis to Ineffective Treatment' in Anna Södersten (ed), *The Lisbon Treaty 10 Years On: Success or Failure?* (Swedish Institute for European Policy Studies 2019).

el³⁷ which stressed that the EUCO is seen as a control room, shaping the broad boundaries of agreements. They also list the duties of EUCO's political leadership, including agenda setting, providing political momentum, and brokering to ensure agreement on the final settlement. Even so, while the EUCO cannot discuss major EU reforms under Article 15 TEU, scholars describe the current EU law-making process as a machine room that includes the Council (ministerial – ambassador and specialists), the Council Secretariat, and the EC (and sometimes the EP).³⁸ Formal reform procedures were never substantially addressed when the euro crisis arose. Instead, significant reforms were implemented via informal procedures. Because of the sensitive nature of the issues and the way in which the solutions were implemented, the heads of States and governments in the control room closely monitored the negotiations. A new institutional framework was therefore avoided by using existing EU law-making procedures, albeit in a EUCO-dominated format that relied heavily on informal collaboration amongst EU institutions to provide instrumental leadership in the machine room.³⁹

With respect to the literature on the rising power of the EUCO, the informal crisis management procedures created to cope with the euro crisis and dominated by the EUCO were used to manage the refugee crisis. I shall now endeavour to advance the EU's analysis of the refugee problem in the context of new intergovernmentalism.

4 The refugee crisis and the new intergovernmentalism

The EU has been facing a number of crises, starting with the Eurozone debt crisis of 2009, and then followed by the humanitarian crisis caused by the displacement of refugees in 2015. Regarding the management of asylum seekers and the enormous influx of refugees, there has been discord among Member States concerning the application of established asylum legislation and the pursuit of policies outlined in the Schengen Agreement and Convention. These policies aimed to eliminate border controls and establish a unified visa policy among participating nations. While several Member States adopted a more welcoming position, others, such as Poland and Hungary, strongly objected to the open-door policy. The divergence of Member State/government approaches to managing the refugee crisis led to disrupted power dynamics within the EU institutions.

During the euro crisis, the Member States of the European Union implemented contentious reforms and made significant choices. However, when it comes to the Common European Asylum System, the process of

³⁷ Derek Beach and Sandrino Smeets, 'New Institutional Leadership: How the New European Council-Dominated Crisis Governance Paradoxically Strengthened the Role of EU institutions' (2020) 42(6) *Journal of European Integration* 837 <<http://dx.doi.org/10.1080/07036337.2019.1703966>> accessed 28 November 2021.

³⁸ *ibid.*

³⁹ *ibid.*

reform has been characterised by a sluggish pace, despite the evident and urgent need for such reforms. In the Schengen crisis, European countries lack agreement on how to address the challenge collectively at hand. The terrorist attacks in Paris in November 2015 caused the situation in Europe to deteriorate significantly. France immediately announced a state of emergency and strengthened all of its internal land and air borders, and these measures extended into 2017.⁴⁰ Early in September 2015, Germany, the most popular final destination for refugees, also adopted temporary border controls.⁴¹ Furthermore, politicians appear to be too terrified of anti-immigrant attitudes in the general public to bridge the gap between differing national views on shared border and migration control. The migration crisis has exposed serious political divisions in attitudes toward minorities and diversity in all EU countries.⁴² The topic of immigration is used by political parties to energise the electorate, resulting in a greater polarisation of society.⁴³

This section therefore discusses new intergovernmentalism, focusing on how the EU Member States responded to the migration crisis and how these responses paved the way for the Statement. The EU's response to the refugee crisis, in which security concerns prevailed over the EU's values and principles, is consistent with the findings of the theory of new intergovernmentalism. New intergovernmentalism anticipates the more centralised governance role of the EUCO.⁴⁴ In this research, the engagement of the EUCO in the migratory crisis verifies the managing method of new intergovernmentalism as a system of governance.

The Maastricht Treaty and Lisbon Treaty play a crucial role in bringing immigration and asylum policies to the intergovernmental level within European integration. The primary expectation from these policies should be prioritising human rights and EU values. However, in 2015, as the migrant crisis arose at the borders of the EU, Member States prioritised intergovernmental actions to address their concerns about domestic border security. The European governance process in the field of immigration and asylum policy was welcomed as an essential step in the right direction through the lens of supranationalism. The expectation was that it would eliminate the discriminatory policies followed by EU

⁴⁰ Loi n° 2016-1767 du 19 décembre 2016 prorogeant l'application de la loi n° 55-385 du 3 avril 1955 relative à l'état d'urgence (1).

⁴¹ Council of the European Union, 11986/15.

⁴² Richard Wike, Bruce Stokes and Katie Simmons, 'Europeans Fear Wave of Refugees Will Mean More Terrorism, Fewer Jobs' (Pew Research Centre 2016) <www.pewresearch.org/global/2016/07/11/europeans-fear-wave-of-refugees-will-mean-more-terrorism-fewer-jobs/> accessed 1 April 2022.

⁴³ Polskie Forum Migracyjne, *Poland: Locals Fear Reception of Refugees Will Bring Social Tensions, Poll Finds* (Polskie Forum Migracyjne 2016).

⁴⁴ Sandrino Smeets and Natascha Zaun, 'What Is Intergovernmental about the EU's "(New) Intergovernmentalist" Turn? Evidence from the Eurozone and Asylum Crises' (2020) 44(4) *West European Politics* 1 <<http://dx.doi.org/10.1080/01402382.2020.1792203>> accessed 28 November 2022.

Member States and exclusionary approaches such as foreign, immigrant or anti-Islam ones.⁴⁵ In this context, some scholars argue that readmission agreements were perceived as mechanisms that could play a role in transferring the EU's norms, standards, and regulatory structures to the neighbouring and surrounding countries.⁴⁶ However, it should be noted that these supranational policies (such as readmission agreements) carried out by the EC included the pursuit of security and restrictive elements as much as intergovernmental policies. In my view, this strategy additionally assisted the legitimisation of the exclusionary measures implemented to justify exemption from following the Schengen regulations.

The heads of Member States have exercised leadership roles, inevitably enhancing the EU policy-making area and constraining sovereignty in order to set the political trajectory of the EU.⁴⁷ Significant divergence exists among members regarding how to proceed to engage in international cooperation on matters of security and foreign policy. It is acknowledged that these members have been affected by shared policies, necessitating a certain degree of exertion of power. When we look at the literature, Smeets and Zaun ascribe differences in the formation of EU asylum policy to Member States rather than the Commission in the refugee crisis.⁴⁸ While they accept that there were differences in reform processes during the crises, they focus on two important differences between new and old intergovernmentalism: 'the different role of the EUCO' and 'the different role of supranational expertise'.⁴⁹ Regarding the first point, the heads of Member States/governments have replaced the community method of decision-making with the intergovernmental scheme. In the asylum crisis, they determine the involvement of the EUCO as an obstacle to progress in decision-making. In the meantime, the heads of States/governments, acting as a sort of barrier, were less concerned with the procedures of the process and more focused on the content. In contrast, the Member States were hindered from making progress in Justice and Home Affairs due to the reluctance of political leaders to solve issues like relocation schemes and asylum procedures.⁵⁰ Furthermore, Fabbrini argues that disagreements among the Member States within the Council undermined any efforts to reform the CEAS, and despite the positive support of the EUCO, the Commission's proposals to improve the system, including the introduction of a permanent relocation mechanism to increase the soli-

⁴⁵ Stephen Zunes, 'Europe's Refugee Crisis, Terrorism, and Islamophobia' (2017) 29(1) *Peace Review* 1.

⁴⁶ Beyza Cağatay Tekin, 'Düzensiz Göçün Yönetimi Konusunda Varılan Türkiye – Ab Mütakatının Avrupa Birliği'nin Uluslararası Kimliği Üzerindeki Etkileri' (2017) 39(11) *Marmara Üniversitesi İktisadi ve İdari Bilimler Dergisi*.

⁴⁷ Uwe Puetter, *The European Council and the Council: New Intergovernmentalism and Institutional Change* (OUP 2014).

⁴⁸ Smeets and Zaun (n 44) 1.

⁴⁹ *ibid.*

⁵⁰ *ibid.*

parity, were not achieved.⁵¹

Regarding the institutional changes during the migration crisis, Bonjour et al provide a framework on how new perceptions in migration governance are shaped in line with three crucial scopes: 'the dynamics of preference formation of member states and EU institutions, the relative power and influence of member states and EU institutions, and their impact on the domestic politics and policies of member states'.⁵² They analyse the intergovernmental findings on the migration crisis in light of the 'venue shopping theory'. This theory refers to national governments seeking new policies in line with their preferences and aims.⁵³ This view of intergovernmentalism finds expression in the control that Member States exercise over migration policies and in their reluctance to accept new migrants. In this way, Member States' restrictions thereby shape the integration process. Then, once they accomplish their demands, European integration results in inadequate solutions to deal with the crisis of asylum and migration. Consequently, the figure of 'Fortress Europe' draws the intergovernmental actions in European cooperation based on the limitation mind-sets of Member States, particularly to securitise their borders in the face of refugee flow.⁵⁴ In relation to the evolution of Member States' preferences, Bonjour et al discovered that reliance on domestic reasons for decision-making posed challenges. This is because the actions adopted at the EU level, which align with the interests of Member States, may not necessarily correspond to the required course of action. For instance, Member States responded to the refugee crisis by securing their borders. This approach created more limitations in decision-making at the EU level and led to the human rights of migrants being ignored.⁵⁵

Furthermore, Hodson and Puetter analyse challenger governments like Hungary during the crisis from the perspective of new intergovernmentalism.⁵⁶ They propose the term 'challenger governments' to describe what happens when parties led by leaders who are strongly critical of the current integration track create governments in their own right or serve as senior coalition partners. According to their findings, these governments have found a way to avoid dealing with the current migration problem, which has led to increased disequilibrium across the EU. These challenger governments, like Orban's government, maintain their oppo-

⁵¹ Federico Fabbrini, 'The Future of the EU27' (2019) Special Issue on the Brexit Negotiations & the May Government, *European Journal of Legal Studies* 305.

⁵² Saskia Bonjour, Ariadna Ripoll Servent and Eiko Thielemann, 'Beyond Venue Shopping and Liberal Constraint: A New Research Agenda for EU Migration Policies and Politics' (2017) 25(3) *Journal of European Public Policy* 409.

⁵³ Virginie Guiraudon, 'European Integration and Migration Policy: Vertical Policy-making as Venue Shopping' (2000) 38(2) *Journal of Common Market Studies* 251.

⁵⁴ Bonjour, Ripoll Servent and Thielemann (n 52).

⁵⁵ *ibid.*

⁵⁶ Dermot Hodson and Uwe Puetter, 'The European Union in Disequilibrium: New Intergovernmentalism, Postfunctionalism and Integration Theory in the Post-Maastricht Period' (2019) 26(8) *Journal of European Public Policy* 1153.

sition to the EU. They see themselves as defenders of national interests against the Union. According to Hodson and Puetter, an increase in challenger governments caused the EU to tolerate the violations of EU values and 'normative consensus', which were undermined by their actions provided that they did not risk the EU's day-to-day decision-making system.⁵⁷ They claim that this opposition signals more disequilibrium within the Union rather than reaching limited consensus. New intergovernmentalism in dealing with the crisis provides a disequilibrium concept to grand theories. They refer to disequilibrium as a way to describe the rising turmoil within an institutionalised political system that is led by pro-integration consensus but sheltered from public dissatisfaction by policy outcomes. Their research moves beyond neo-functionalism by improving the concept of disequilibrium. Their analyses show that EU elites are creating short-term solutions to deal with the crisis, such as border closure. Since this response to the crisis heightened the disequilibrium, the EU is in danger both from these challenger states and their determination to pursue their domestic policies.⁵⁸

Some scholars identified the response to the migration crisis as 'deliberate, legitimate and functional'.⁵⁹ Member States are eager to deal with the consequences of the breakdown of Schengen and the Dublin Regulation since they meet their main interest of stopping and reducing the influx of migrants and/or refugees to their lands.⁶⁰ To have a better understanding of the concept of new intergovernmentalism, this research entails further analysis of the role of the EUCO in the migration crisis. Therefore, the next sub-section focuses on the EUCO.

4.1 The European Council and Member States: engaging with the refugee crisis

As described above, the European Council is at the heart of new intergovernmentalism. Member States should work in cooperation to establish a common approach to address the refugee crisis as they are aware of the excessively politicised European policy. The power and individual characteristics of Member States can be decisive in the EUCO. Therefore, this section analyses the EUCO's involvement in the refugee crisis in light of the literature on new intergovernmentalism.

EU decision-making is commonly conducted within the triumvirate of the EC, EP, and the Council. However, when the Union is dealing with crises, which are sensitive for individual Member States, it has turned its face to the top political level to manage the divisions among the Member States within the intergovernmental form of the EUCO. Although im-

⁵⁷ *ibid.*

⁵⁸ *ibid.*

⁵⁹ Andrew Moravcsik, 'Preferences, Power and Institutions in 21st-century Europe' (2018) 56(7) *Journal of Common Market Studies* 1648.

⁶⁰ Moravcsik and Schimmelfennig (n 8).

migration rather pertains to domestic matters for all individual Member States, the EU has shared regulations for asylum seekers under the Schengen rules and Dublin system. It is evident that it was inappropriate to apply the Dublin system in the case of the massive influx. It also caused pushback from frontier countries like Italy and Greece. The German government initially followed a more welcoming approach and suspended the Dublin regulation in order to let Syrian refugees immediately into its territory. The solution was short lived. After a few weeks, Germany suspended the Schengen agreement and applied border controls to stem the refugee influx. This action triggered other Member States' reactions: many in turn refused asylum applications and opposed the implementation of the EU immigration rules.⁶¹

The part played by the EUCO in the refugee crisis differed from the one played in previous crises. The heads of governments and States sought to block entry rather than implement principles that might manage the refugee crisis, such as fair burden sharing. The reluctant Member States and insufficient cooperation on burden sharing caused the suspension of Schengen by some Member States such as Denmark and Austria. This led to a shadow being cast on the European integration project, in particular on free movement within the EU.⁶² The refugee crisis raised an 'internal emergency' which signalled the failure of the Schengen Agreement which is one of the EU's biggest achievements for a closer Union.⁶³ The failure of Schengen resulted from another important dimension on the ground: terrorism. With anti-immigrant and anti-Muslim turmoil fuelled by terrorist attacks committed in European towns by Islamic State terrorists, the management of displaced people devolved into a 'political minefield', which has made it harder to take steps to save the Schengen system.⁶⁴ I may therefore claim that the failure of Schengen is not simply the result of a lack of trust and cooperation among Member States, but also of the struggle against terrorist attacks.

When the refugee crisis was at its peak in 2015, the Member States failed to distribute the refugees throughout the Union, and the asylum system under the Dublin regulation collapsed.⁶⁵ The EC proposed a 'relocation proposal for 120,000 refugees from Greece, Hungary and Italy'

⁶¹ Liesbet Hooghe and Gary Marks, 'Grand Theories of European Integration in the Twenty-first Century' (2019) 26(8) *Journal of European Public Policy* 1113.

⁶² Ian Traynor, 'Is the Schengen Dream of Europe Without Borders Becoming a Thing of the Past?' *The Guardian* (London, 5 January 2016) <www.theguardian.com/world/2016/jan/05/is-the-schengen-dream-of-europe-without-borders-becoming-a-thing-of-the-past> accessed 28 October 2021.

⁶³ Michela Ceccorulli, 'Back to Schengen: The Collective Securitisation of the EU Free-border Area' (2018) 42(2) *West European Politics* 302 <<http://dx.doi.org/10.1080/01402382.2018.1510196>> accessed 28 October 2021.

⁶⁴ Bridget Carr, 'Refugees without Borders: Legal Implications of the Refugee Crisis in the Schengen Zone' (2016) 38(1) *Michigan Journal of International Law* 137.

⁶⁵ Daniel Thym, 'The Refugee Crisis as a Challenge of Legal Design and Institutional Legitimacy' (2016) 53(6) *Common Market Law Review* 1545.

as an urgent response.⁶⁶ Although the EUCO supported this proposal, it failed to achieve some objectives, including the permanent quota system and Dublin Regulation revision.⁶⁷ The decision was adopted with a qualified majority vote by the Justice and Home Affairs Council rather than with a unanimous vote.⁶⁸ Puetter's assessment supports the contribution of this research that this action of the EU and reactions towards the relocation decisions undermined European deliberation and consensus-based decision-making.⁶⁹ After adopting this decision, EUCO former president Donald Tusk expressed the decision as 'political coercion'.⁷⁰ This interpretation stems from the fact that there exists a greater number of nations that hold a suspicious stance towards the establishment of a mandatory mechanism. He also signalled the consideration of cooperation with third countries like Turkey to securitise their external borders: 'All Member States will be ready to show more solidarity if they feel that Europe as a whole is ready to protect external borders more effectively. I mean that they are able to reduce this number of refugees, because that is the biggest fear today in Europe'.⁷¹ Puetter raises questions about the guiding role of consensus and deliberation in the new activity areas of the EU from the perspective of new intergovernmentalism. He argues that this kind of non-consensual adoption quickly undermines the quality of the consensus decision-making system within the EUCO. Therefore, Member States and governments may pay no attention to solidarity to protect European integration. At the same time, progress in reforming the existing asylum system by consensus may be impossible at the EU level.⁷²

Examining the experience gained during Donald Tusk's term as president of the EUCO between 2014 and 2019 which is the period of the refugee crisis, Hagemann claims that Tusk made a significant political contribution to the EU by laying the groundwork for a liberal, policy movement.⁷³ The role of president of the EUCO is more prominent during crises in order to accomplish governments' agreements. Hagemann points out that the EUCO and its president were mostly tasked with crisis management due to the pressing need to respond to a series of interconnected

⁶⁶ Commission, 'Refugee Crisis: European Commission Takes Decisive Action' (Press Release 2015).

⁶⁷ Eiko Thielemann, 'Why Refugee Burden-Sharing Initiatives Fail: Public Goods, Free-Riding and Symbolic Solidarity in the EU' (2018) 56(1) *Journal of Common Market Studies* 63.

⁶⁸ Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece [2015] OJ L239/146.

⁶⁹ Puetter (n 13).

⁷⁰ Ian Traynor, 'Detain Refugees Arriving in Europe for 18 Months, Says Tusk' *The Guardian* (London, 2 December 2015) <www.theguardian.com/world/2015/dec/02/detain-refugees-arriving--europe-18-months-donald-tusk> accessed 10 February 2022.

⁷¹ *ibid.*

⁷² Puetter (n 13).

⁷³ Sara Hagemann, 'Politics and Diplomacy: Lessons from Donald Tusk's Time as President of the European Council' (2020) 31(3) *European Journal of International Law* 1105–1112.

multiple crises like the euro crisis and refugee crisis since 2008.⁷⁴ She listed three elements to show the president's power to manage the action plan and find consensus in the EUCO in light of the observations from Donald Tusk's and Herman Van Rompuy's term: a) divisions of Member States over policy issues; b) what extent these issues are essential for the Member States; c) norms and actions conducted in the EUCO regarding these issues. Furthermore, this study not only provides significant evidence that supports her research findings on the presidency role of the European Council (EUCO), but also adopts a broader perspective to illustrate the growing significance of the EUCO in the context of the refugee crisis. Although she contends that Donald Tusk is best described as a vital and powerful 'activist' voice for democracy at a critical period in European and international politics, I argue the president's role in the refugee crisis differs from previous crises. During the refugee crisis, the president of the EUCO took the leadership role of Member States rather than of the EU. Rather than seeking an EU-wide solution to the crisis, the president was employed by Member States to achieve a solution outside the EU with third countries.

On the other hand, regarding the relocation decision, Article 78(3) TFEU was applied for the first time during the 2015 migration crisis, when Italy and Greece, which are located on the EU's external borders, were confronted with enormous arrivals of asylum seekers escaping persecution or substantial damage.⁷⁵ In the meeting of the EUCO in April 2015, while some Member States, like Italy and Germany, agreed on a binding quota system, others were strongly opposed to the burden-sharing proposal. Furthermore, Germany's chancellor, Angela Merkel, supported this proposal which aimed at the compulsory distribution of refugees in line with the dimensions covering the unemployment situation, the size of the country, and the wealth of nations.⁷⁶ After a meeting on 23 September 2015, the EUCO agreed on the priorities and objectives and invited the EU institutions to create strong cooperation to deal with the refugee crisis and border securitisation.⁷⁷

Afterwards, the Council introduced two temporary measures for the benefit of Greece and Italy.⁷⁸ Until the approval of the relocation decisions in support of Greece and Italy in 2015, the Dublin system lacked any constructive solidarity mechanism for responsibility sharing. The first

⁷⁴ *ibid.*

⁷⁵ Article 78 of Treaty on the Functioning of the European Union (TFEU).

⁷⁶ Arkadiusz Nyzio, 'The Second Revival? The Visegrád Group and the European Migrant Crisis in 2015-2017' (2017) 50(5) *Politeja* 47-98 <www.jstor.org/stable/26564285> accessed 28 November 2021.

⁷⁷ European Council, Special meeting of the European Council, 23 April 2015, Statement.

⁷⁸ Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece [2015] OJ L248/80; Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece [2015] OJ L239/146.

measure was adopted on 14 September 2015 and the second on 22 September 2015. The Council adopted Decision 2015/1523 with a qualified majority vote, with the opposition of the Czech Republic, the Slovak Republic, Hungary, and Romania, and the abstention of Finland.

These decisions determined that the Syrians who entered the EU and were registered would be resettled in the EU Member States under the settled quotas. In accordance with the determined quotas, the burden on the shoulders of Italy and Greece would be shared by other Member States. These two decisions were based on Article 78 TFEU, which gives authority to the EU to take measures for the benefit of overwhelmed States. The decisions also laid down the principle of solidarity and fair burden sharing (Article 80 TFEU). Article 78(3) TFEU allows the Council to take temporary measures in the interest of the Member State(s) in question if one or more Member States face an emergency situation involving a sudden influx of nationals from third countries. The Slovak Republic and Hungary challenged in court the decision on its invalidity. Poland backed them up, and the Commission was joined by Belgium, Germany, Greece, France, Italy, Luxembourg, and Sweden to defend the Council.

While these decisions were welcomed by Member States such as Italy and Greece which are the entrance gates to the EU, Hungary, Poland, Czechia, and Slovakia opposed the decisions by stating that they would not accept even a single refugee. Even though the majority of Member States were willing to accept asylum seekers under the two emergency relocation schemes, Slovakia and Hungary refused and challenged Council Decision 2015/1601, which had been adopted by qualified majority. When the issue was brought before the CJEU by Hungary and Slovakia, the CJEU stated that the Member States must accept the refugees falling under their share; otherwise, they could be prosecuted for violating EU law. CJEU rendered a judgment in September 2017 (C-643/15 and C-647/15), whereby it rejected the case by addressing the legal foundation for the adoption of the decision, as well as procedural and substantive issues.⁷⁹ The Slovak Republic offered six legal arguments to support their case, while Hungary offered ten. The CJEU decided that the cases should be joined and that the arguments should be divided into three groups based on their legal basis. The first was that the contested decision did not have an appropriate legal basis in accordance with Article 78(3) TFEU. The second was that the decision was adopted with procedural issues that resulted in a violation of essential procedural rules, and the third was the substantive arguments.⁸⁰ Regarding the allegation of a contested decision under Article 78(3), provisional measures taken under Article 78(3) TFEU must be regarded as 'non-legislative acts' according to the CJEU, because they are not adopted at the conclusion of a legislative

⁷⁹ Joined Cases C643/15 and C647/15 *Slovak Republic and Hungary v Council of the European Union* ECLI:EU:C:2017:631.

⁸⁰ *ibid.*, paras 206-345.

procedure (special or ordinary). 'Provisional measures' mentioned in Article 78(3) must be appropriately wide – to an extent to allow EU institutions to quickly and efficiently respond to an emergency situation fuelled by a sudden inflow of nationals from third countries. Although provisional measures implemented under Article 78(3) TFEU may, in principle, diverge from legislative acts, both the substantive and temporal nature of such changes must be limited.

The Court also pointed out the relocation mechanism as part of the Dublin system by confirming its applicability as follows: 'That mechanism is an integral part of that *acquis* and the latter therefore remains, in general terms, applicable'.⁸¹ Furthermore, the Court emphasised the requirement of a fruitful remedy system under national law in light of Article 47 of the EU Charter of Fundamental Rights in opposition to every decision made by the national government during the relocation process. Ultimately and significantly, the CJEU construed the 'right to remain' based on the 1951 Refugee Convention as a particular manifestation of the principle of non-refoulement, therefore not prohibiting an applicant's migration from one Member State to another. The Court stated strongly again that the relocation mechanism exemplifies the principle of solidarity under Article 80 TFEU among the Member States. As a result, the EU's responsibility of solidarity in this area of law can be operable if the actions are adopted in accordance with a Treaty-based legislative procedure. However, it is obvious that the political and legal dimensions were defined together in the ruling. The principle of solidarity is clearly referenced in the list of EU values in Article 2 TEU. Also, the preamble of the Charter of Fundamental Rights of the EU states: 'the Union is founded on the indivisible universal values of human dignity, freedom, equality and solidarity'.⁸² In other words, the CJEU avoided the view that solidarity was voluntary by emphasising the compulsory nature of solidarity among Member States. However, the rulings of the CJEU contradict the prior decisions in the context of solidarity. Especially, it claims in the *Pringle* case that Article 122(1) TFEU does not create an obligation for Member States to share financial liabilities emerging in the European Monetary Union (EMU) in accordance with the idea of solidarity.⁸³ Consequently, the self-contradiction of the Court in the context of the description of solidarity proves that the enforcement of solidarity relies on the subject matter. Some legal scholars support this finding with the analysis that the Court's innovative approach is politically sensitive and, in this respect, they claim that the Court aimed at combating a position taken by some Member States in favour of the free adoption of solidarity based on

⁸¹ *ibid*, para 323.

⁸² Charter of Fundamental Rights of the EU.

⁸³ Case C-370/12 *Thomas Pringle v Government of Ireland and Others* ECLI:EU:C:2012:756.

voluntary pledges.⁸⁴

On the other hand, the Court did not go beyond the solidarity issues and did not make any useful contribution to EU asylum law and refugees' human rights. It was clear from the ruling that the subjects of the contested decision who are refugees were ignored by the Court. Except by referring to non-refoulement, the Court paid no attention to normative considerations and the refugees' fundamental rights. Labayle held similar views, expressing this approach as 'a regrettable input into the field of refugee law'. He also stated that the CJEU's judgment on the Council's decision to utilise a binding mechanism based on Article 78(3) TFEU supports the binding nature of solidarity in EU migration policy.⁸⁵ In terms of failed solidarity within the Union, Arriba-Sellier supports these research findings by defining the Court's decision and the Member States' approach as 'national egoism'.⁸⁶ The unwillingness of Member States and the low numbers of relocations on the ground in spite of the CJEU decision on enforcing solidarity confirmed the findings of this research that the EU is unable to find a common solution at the Union level in such highly politicised matters.

The EC began infringement procedures in an attempt to resolve the disagreement without resorting to the Court after a long series of relocation assessments and patiently encouraging these Member States to comply with their relocation responsibilities. When Hungary, Poland and Czechia did not implement the decision, the issue was brought before the CJEU by the Commission on the grounds that they had violated EU law.⁸⁷ More specifically, these three States failed to fulfil their obligations by pledging that a specified number of refugees from Greece and Italy could be transferred, and then failing to finish the relocation process by transferring refugees who had applied for international protection. The respondent States contested the infringement procedures' admissibility and substance before the Court. The Polish government intervened in

⁸⁴ Andrea Circolo, Ondrej Hamulak and Peter Lysina, 'The Principle of Solidarity between Voluntary Commitment and Legal Constraint: Comments on the Judgment of the Court of Justice of the European Union in Joined Cases C-643/15 and C-647/15. 9(2018)' (2018) 9 *Czech Yearbook of Public & Private International Law* 155.

⁸⁵ Henry Labayle, 'Solidarity Is Not a Value: Provisional Relocation of Asylum-seekers Confirmed by the Court of Justice (6 September 2017, Joined Cases C-643/15 and C-647/15 Slovakia and Hungary v Council)' (EU Immigration and Asylum Law and Policy, 2017) <<https://eumigrationlawblog.eu/solidarity-is-not-a-value-provisional-relocation-of-asylum-seekers-confirmed-by-the-court-of-justice-6-september-2017-joined-cases-c-64315-and-c-64715-slovakia-and-hungary-v-council/>> accessed 25 January 2022.

Obradovic Daniela, 'Cases C-643 and C-647/15: Enforcing Solidarity in EU Migration Policy' (*European Law Blog*, 2 October 2017) <<https://europeanlawblog.eu/2017/10/02/cases-c-643-and-c-64715-enforcing-solidarity-in-eu-migration-policy/>> accessed 25 January 2022.

⁸⁶ Nathan de Arriba-Sellier, 'Welcome Refugees, Adieu Solidarité' (*Leiden Law Blog*, 2017) <www.leidenlawblog.nl/articles/welcome-refugees-adieu-solidarite> accessed 28 January 2022.

⁸⁷ Joined Cases C-715/17 Commission v Poland, C718/17 Commission v Hungary, C-719/17 Commission v Czech Republic ECLI:EU:C:2020:257.

this case, claiming that the enforcement of obligatory relocation quotas under Council Decision 2015/1601 (Relocation Decision) would breach Article 72 TFEU. It was claimed that the relocation mechanism would jeopardise 'the responsibilities incumbent upon Member States with regard to the administration of law and order and the safeguarding of internal security'. In accordance with the interpretation of Article 72, Member States could opt out of EU law (in this case, the 2015 relocation decisions) whenever the existence of a prospective and serious threat to law, order, and security is proven. However, the Court refused to accept Article 72 as a provision that allows Member States complete discretion in applying or disapplying EU legislation, depending on their assessments of potential threats and risks to national order and security in 2020. Therefore, the Treaty does not carry 'an inherent general exception excluding all measures taken for reasons of law and order or public security' in EU law.⁸⁸ However, while it is undeniable that the aforementioned provision affirms the right of States and their need to preserve their own internal security, this does not imply that the States have unrestricted authority to do so. The Court noted that 'the scope of the requirements relating to the maintenance of law and order, or national security cannot therefore be determined unilaterally by each Member State, without any control by the institutions of the EU'.⁸⁹ In terms of the judgment on relocation mechanisms, the Court recognised that Member States retain broad discretion in determining whether an asylum claimant poses a threat to national security or public order. In addition, the Court emphasised the principle of individual assessment, which states that measures relating to the protection of internal order and security cannot be used in a generalised and arbitrary manner without being adequately anchored in the unique situation. As a result, three Visegrad countries have not consistently documented how many asylum seekers should be moved and assumed that all of them pose a national security threat. Finally, the Court rejected a generalised and inherent presumption that an application for international protection poses a threat to national security or public order. As a counterbalance, the Court emphasised the importance of investigating every individual case, which must be supported by 'consistent, objective and specific evidence'.⁹⁰ Jonas Borneman connects the Court's opposed approach against defendant Member States to the 'administrative nature of the relocation mechanism'.⁹¹ However, from my point of view, it is clear that the CJEU once again avoided confronting the content of the highly politicised debate by shifting its attention to the administrative tasks that come along with relocation.

⁸⁸ *ibid.*, para 143.

⁸⁹ *ibid.*, para 146.

⁹⁰ *ibid.*, para 159.

⁹¹ Jonas Borneman, 'Coming to Terms with Relocation: The Infringement Case against Poland, Hungary and the Czech Republic' (*European Law Blog*, 17 April 2020) <<https://eumigrationlawblog.eu/coming-to-terms-with-relocation-the-infringement-case-against-poland-hungary-and-the-czech-republic/>> accessed 1 February 2020.

While the immigration crisis caused the questioning of the EU's basic principles of solidarity, the rule of law, and the protection of human rights, it also brought to the surface problems such as unemployment and xenophobia. On the other hand, it also revealed the structural weakness of the Schengen system. As a matter of fact, there is still no common asylum policy that works well in the face of an extraordinary refugee influx.

The front-line States, especially the Balkan countries, combatted the influx by building fences, suspending Schengen, and implementing more border controls. These measures, which challenged EU values, seriously destabilised the established asylum system. Nonetheless, these different approaches show that the EU asylum system is not capable of governing an influx of refugees. The following steps taken by the EUCO supported the Member States' preferences.⁹²

According to Article 80 TFEU, achieving a working common asylum system is the top goal of the Union, and solidarity and fair burden sharing is the way to achieve this goal. Solidarity is a mandatory rule under EU law, and it has been explicitly confirmed by the Court in the aforementioned cases about the relocation mechanism. Solidarity and fair burden sharing, as provided under Article 80 TFEU, should be fulfilled to the greatest extent that is practically and legally conceivable, not depending on Member States' interests.

The ongoing migrant crisis has pushed the EU and Member States to implement a series of measures, some of which were unplanned, while others were ineffective.⁹³ During the previous decade, the EU has witnessed an unprecedented escalation in the migrant population, which has shown itself through a variety of routes that terminate in Mediterranean Sea countries such as Turkey and Libya as the gateways to Europe. Having presented the new intergovernmentalism framework and conceptualised how the Member States responded to the refugee crisis and to what extent solidarity was considered by the Member States, it is now possible to analyse why the EU pursues cooperation with Turkey, especially regarding the role Turkey has played in the securitisation of the EU border in recent years.

Alongside the Member States' approach to keep the castle closed, the EUCO also started to work with Turkey on the migration flow.⁹⁴ Concerning the situations of frontier countries and reluctant Member States to implement the mandatory relocation scheme, the EU opted to implement

⁹² Claudia Morsut and Bjørn Ivar Kruke, 'Crisis Governance of the Refugee and Migrant Influx into Europe in 2015: A Tale of Disintegration' (2017) 40(2) *Journal of European Integration* 145.

⁹³ Bridget Carr, 'Refugees without Borders: Legal Implications of the Refugee Crisis in the Schengen Zone' (2016) 38(1) *Michigan Journal of International Law* 137.

⁹⁴ Claudia Morsut and Bjørn Ivar Kruke, 'Crisis Governance of the Refugee and Migrant Influx into Europe in 2015: A Tale of Disintegration' (2017) 40(2) *Journal of European Integration* 145.

more extreme measures, building on the existing EU-Turkey cooperation framework. Afterwards, in mid-October 2015, the EUCO cooperated with Turkey under a 'Joint Action Plan' derived from the responsibility-sharing mechanism.⁹⁵ In the following month, EU leaders and Turkey's prime minister met in Brussels to discuss the details of cooperation and to boost political and financial engagement with the refugee crisis.⁹⁶ In other words, the solidarity crisis within the EU proved that finding a common solution at the EU level seems impossible in the immediate future. This led to a search for a solution outside the EU borders. Externalisation of migration governance is the direct consequence of internal disagreement. In this case, the EU concluded that the best way to deal with the migration crisis was by outsourcing to a third country, in this case Turkey, to satisfy the problem of the Member States and asking it to keep refugees in Turkey alongside the control of migration routes to and from Europe's Eastern Mediterranean region.

Ultimately, the Statement was agreed on 18 March 2016 by the EUCO and Turkey in order to prevent the irregular migration flow from Turkey to Greece. In exchange, the EU agreed to pay EUR 6 billion and to remove the necessity for a visa for entry to the EU from Turkish citizens.⁹⁷ Questions have been raised about the compatibility of the EU-Turkey Statement with human rights. Other important issues relate to how the European Council concluded this deal with Turkey and where it derived its power to do so. While moving on to the specific topic of the Statement, the following section establishes the framework by discussing the role of the EUCO in concluding the Statement, and interactions between the EU and Member States in regard to asylum, migration, and border issues.

5 Discussion on the European Council role through the EU-Turkey Statement

The EU's international standing is threatened by several methodological weaknesses in reaching and implementing the Statement. According to the analysis of the EUCO's central role in new intergovernmentalism, a new stage of European integration has now been reached in the securitisation of migration in the EU by positioning the migration and asylum seeker movements as a prior security issue. It is possible to see the discourse and representation policies surrounding this new phase in the securitisation of migration within the EU and the methods used to implement this agreement.⁹⁸ The fact that the Statement was concluded by using an informal way via the EUCO points to the problem of disabling and stopping an important solidarity mechanism of the EU. The EU's for-

⁹⁵ European Council, European Council Conclusions, 15 October 2015.

⁹⁶ European Council, Meeting of the EU heads of State or government with Turkey, 29 November 2015.

⁹⁷ European Council, EU-Turkey Statement, 18 March 2016.

⁹⁸ Nika Bačić Selanec, 'A Critique of EU Refugee Crisis Management: On Law, Policy and Decentralisation' (2015) 11 *Croatian Yearbook of European Law and Policy* 73.

eign policy practices away from parliamentary decision-making processes undermine the EU's normativity. Then, Member States take the lead without any national and supranational democratic control mechanisms. As noted above by the literature review, Member States failed to create a common asylum policy at the EU level. Instead, Member States followed their own policy to keep refugees outside their borders. On the other hand, informal meetings were initiated by the EUCO and Turkey through the Member States' preferences. Here, the choice of unofficial and informal ways reminds us of the EU's reactions to the Euro crisis. Through the Statement, the EU used the intergovernmental way to benefit from the non-binding law over democratic legitimacy and the gradual solution that takes refuge behind claims of urgency and emergency. One of Bickerton's hypotheses in new intergovernmentalism, 'problems in domestic preference formation have become standalone inputs into the European integration process', obviously explains the prioritisation of national interests within EU policy.⁹⁹ I noted that Member States' actions eroded the control mechanisms in the euro crisis. Intergovernmental agreements hindered the EP by bailout packages and other emergency measures in order to manage the economic crisis that was spreading rapidly in the Eurozone, ignoring customary law.

Seminal contributions have been made by some authors to explore the position of the Statement in the EU. Schimmelfennig explains the different integration consequences of crises as 'variation in the structure of intergovernmental bargaining'.¹⁰⁰ The fiasco of decentralised institutions during a crisis is paralleled with the requirement to protect the EU's integrational outcomes.¹⁰¹ The interests and preferences resulting from internal conflict have determined the response to the crises. The Statement results from a lack of consensus among Member States during the refugee crisis, which made externalising the crisis easier than resolving it internally. Critical commentaries have diverged widely on the EU's approach to negotiating the deal in recent years. The new intergovernmentalist perspective is at the heart of the explanation of the role of the EUCO in determining the increasing power and authority of Member States. Specifically, new intergovernmentalism explains the conclusion of the Statement through the EUCO. This has damaged supranational institutions since the Member States' role in resolving the Union's issues has been enhanced by the power of intergovernmentalism.¹⁰² Member States' authority in determining the agenda relating to policymaking has increased in line with their interests through their endeavours within the

⁹⁹ Uwe Puetter, Dermot Hodson and Christopher J Bickerton, *New Intergovernmentalism: States and Supranational Actors in the Post-Maastricht Era* (OUP 2015).

¹⁰⁰ Frank Schimmelfennig, 'European Integration (Theory) in Times of Crisis. A Comparison of the Euro and Schengen Crises' (2018) 25(7) *Journal of European Public Policy* 969.

¹⁰¹ *ibid.*

¹⁰² Sergio Fabbrini and Uwe Puetter, 'Integration Without Supranationalisation: Studying the Lead Roles of the European Council and the Council in Post-Lisbon EU Politics' (2016) 38(5) *Journal of European Integration* 481.

EUCO. This has also caused a risky conflict between the EC, the EP, and the EUCO's priorities in the creation of a common policy at the EU level.

Gurkan and Roman support this research finding with an analysis of the EU institutions in accordance with the divisions of policy. As opposed to the EUCO, the EP took a different approach to EU collaboration with external partners on refugee crisis management. Notwithstanding these divisions in the EU, the key political groups in the EP called for a norms-based approach to migrants that put human rights and the right to asylum at its core. The EU-Turkey agreement is more an expression of civilian power resting on diplomatic and economic cooperation to achieve security interests than a normative one. The EU's principles and Treaty-based legal framework give it a normative character. In contrast, civilian power prioritised economic power and securitisation in dealing with the crises. While the EC followed the normative power to respond to the refugee crisis, the EUCO relied on civilian power. In dealing with Turkey, the Commission initially held on to the EU's normative structure. Then, the securitisation of the EU borders and achieving the interests of Member States weighed more heavily than the 'normative identity' of the EU.¹⁰³ Consequently, the Statement resulted from economic and diplomatic cooperation to bring the Member States' interests and securitisation to the same pool.

As noted above in section 4a, the domination of the European Council aimed to resolve the dilemmas by proposing relocation quotas in September 2015. In this attempt, the participation of the European Parliament was limited to exercise the consultation procedure role based on Article 289 TFEU. Some scholars, like Lehner, argue that the Statement is only the European Council's work, that the European Commission did not adopt a negotiating role, and that the consent of the European Parliament was not sought before a deal was reached.¹⁰⁴

On the other hand, Smeets and Beach outline the informal way leading to the EU-Turkey deal by EU Member States.¹⁰⁵ They seek answers as to who has done more to conclude a 'half-baked solution' even where Member States managed this deal in accordance with their political interests.¹⁰⁶ The EC initially offered itself as 'Champions of the Community method' in the early stage of the crisis. Hence, they saw a rise of the EUCO as a threat.¹⁰⁷ They analysed the main objectives agreed under the Statement: funding, visa liberalisation, re-energising the accession pro-

¹⁰³ Seda Gürkan and Ramona Coman, 'The EU-Turkey Deal in the 2015 "Refugee Crisis": When Intergovernmentalism Cast a Shadow on the EU's Normative Power' [2021] *Acta Politica* <<http://dx.doi.org/10.1057/s41269-020-00184-2>> accessed 20 October 2021

¹⁰⁴ Roman Lehner, 'The EU - Turkey "Deal": Legal Challenges and Pitfalls' (2018) 57(2) *International Migration* 176.

¹⁰⁵ Sandrino Smeets and Derek Beach, 'When Success Is an Orphan: Informal Institutional Governance and the EU-Turkey Deal' (2019) 43(1) *West European Politics* 129.

¹⁰⁶ *ibid.*

¹⁰⁷ *ibid.*

cess, and the resettlement mechanism. They found the statement unique since it results from informal governance. Therefore, they raised criticism that informal governance at the institutional level could evolve from temporary to permanent in dealing with crises and EU reforms. As a result, they define the Statement as 'an orphan', with a non-binding, informal background.¹⁰⁸

In dealing with the refugee crisis, the EU failed to follow the values of its supranational structure. The Statement is the crisis-based reform led by the EUCO. This research demonstrates the role of the EUCO in dealing with the crisis under new intergovernmentalism. One may clearly see that the deal indicates the security concerns of Member States and the rebirth of their prominence within the Union. The Statement provides us with new evidence that the expectation from European integration that broadens the supranational policy space in the EU, including immigration and asylum policies, have not come true. The functioning of the EU to bring Member States together on common ground to formulate supranational policies requires consensus among Member States. Therefore, domestic interests and preferences should not take precedence when making decisions at the EU level.

Although studies have been conducted by many authors, the role of the EUCO is still insufficiently explored in law scholarship. Given the legal and political literature on the EUCO role and new intergovernmentalism, I argue that the Member States employed the EUCO to reach a deal with Turkey and to protect their national interests. The rising power of the EUCO can be seen in the Statement through the manner in which it deploys informal governance. In particular, Member States directed these informal procedures in accordance with their interests. Regarding the aforementioned cases and Member States' responses to the refugee crisis, the EU has been unable to create any workable solution to manage the crisis so far. Instead, the EUCO has taken the leading role in seeking a solution outside the Union. Finally, the EUCO sat at the table with Turkey for a disappointing and unethical deal which is far from protecting refugees' human rights. The Statement which is the result of the Member States' separation highlights the power of the EUCO within the EU institutions. However, the refugee crisis in the EU cannot be resolved by bargaining with a third-country's government alone, nor should it. The Statement is no more than a stopgap solution to combat the crisis. Efforts to improve Turkey's ability to cope with the refugees are important, but it should not be viewed as a cheap alternative for EU governments' obligations. Redirecting the problem to the Turkish government does not mean the sharing of responsibilities and burden. The EUCO's power to deliver informal deals with Turkey explicitly undermines not only EU values and EU constitutional law but also Member States' duties.

¹⁰⁸ *ibid.*

With the perspective of EU institutional law, further important scholarship has been developed by Servent on the rise of the EUCO and the decrease of the EP in managing the refugee crisis. As explained by the literature on new intergovernmentalism, there has been a rise in the level of fragmentation over European integration, which has led to new intergovernmentalism that bypasses supranational frameworks.¹⁰⁹ The success of the EP is evaluated based on the level of recasting the problem as one of 'market integration' rather than a conflict in Member States' sovereignty.¹¹⁰ The EUCO was viewed as the only way to get the best deal on the Dublin regulations. Although the EP was granted with veto or approval power in the legislative procedure under EU law, the EP was unable to have any impact on policy outcomes in the refugee crisis.¹¹¹

It was clear that the EU's main institutions had different views on the issue. While securing Schengen's unrestricted regime and maintaining burden sharing for refugees were top priorities for the EC,¹¹² the EP stressed the need to treat refugees in accordance with human rights.¹¹³ Asylum and migration policy disagreements can be overlooked as part of the EU's usual plurality, but these viewpoints are also taken by EU institutions. Despite the EP's emphasis on common European solutions and strong internal support, they were created to provide human rights credibility. But this was not enough to successfully manage the European refugee crisis. With the inability of the EU institutions to bring solutions, the EUCO took the leading role. Therefore, I claim that the Statement proves how the supranational institutions of the EU left the room when the EUCO and Turkey were conducting informal meetings. To conclude the Statement, the European Commission did not play its role and European Parliament's consent was ignored. The Statement was made after the EUCO came out in support of it to show how important Member States and their preferences are when making decisions. The refugee crisis caused not only a group of Member States who lie in the direction of Germany to strike a deal with Turkey on refugees, but also the Visegrad groups, which opposed the relocation scheme within the EU.

¹⁰⁹ See section 3.

¹¹⁰ Edoardo Bressanelli and Nicola Chelotti, 'The European Parliament and Economic Governance: Explaining a Case of Limited Influence' (2018) 24(1) *The Journal of Legislative Studies* 72-89.

¹¹¹ Kenneth Armstrong, '(Br)Exit from the European Union: Control, Autonomy and the Evolution of EU Law' [2021] *SSRN Electronic Journal* 309 <<http://dx.doi.org/10.2139/ssrn.3806712>> accessed 25 October 2021.

¹¹² Commission, 'Delivering on Migration and Border Management: Commission Reports on Progress Made under the European Agenda on Migration' (Press release 28 September 2016) (IP/16/3183) <http://europa.eu/rapid/press-release_IP-16-3183_en.htm> accessed 3 April 2022.

¹¹³ European Parliament, 'European Parliament resolution of 10 September 2015 on migration and refugees in Europe 2015/2833(RSP)' <www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+MOTION+B8-2015-0837+0+DOC+XML+V0//EN> accessed 3 April 2022.

This paper has outlined how a review of the Statement demonstrates that an informal, non-binding agreement to stop the refugee influx resulted from minimising political discussions at the EU level, removing the political responsibility of heads of Member States or governments, and allowing the negotiations to be carried out within the framework of informal consultations. The decisions taken in Brussels, away from the established parliamentary control mechanisms, are controversial in terms of international law and EU law, due to the lack of real cosmopolitan solidarity among the European Member States.

Finally, in concluding the EU-Turkey Statement, one can see the rise of Member States' authority in determining policy-making according to their interests, via the European Council. The statement was more an expression of the power of Member States in the EUCO to achieve security interests rather than EU values. The Statement is the work solely of the EUCO, and the EC was unable to adapt the negotiator role under EU law. Consent of the EP was ignored to reach a deal with a third country. EU policymaking in these areas is now dominated by the Member States, rather than the EU, which means that national interests are the driving force. It is also an aspect of the disintegration of Member States in the refugee crisis. In addition, using an informal way to reach an agreement on this kind of sensitive subject raises the question of the rule of law in the EU, alongside the future of Europe. The EU, which could not reach consensus when it came to creating a common migration policy, easily confirmed the statement to keep refugees away from their lands.

6 Conclusion

The main premises and points of departure of the EU-Turkey Statement have been addressed in this research in light of the EUCO's activity. This study has analysed the role of the EUCO in the conclusion of the EU-Turkey Statement through the perspective of new intergovernmentalism. Its purpose has been to analyse the development of the EUCO within the EU and its evolution into a powerful organ. The policies for immigration and asylum have been heavily dependent on individual Member States due to concerns about the transfer of core sovereign powers in the EU. The migration and asylum policies pursued by the EU limit cosmopolitan solidarity with those seeking asylum from civil war, natural disasters, or economic hardships. This tendency leads to a race to the bottom among Member States. The reason behind the cooperation of intergovernmental and supranational institutions in the Statement has been the advancement of their position within domestic policy.

Sections 2 and 3 offer a summary review of new intergovernmentalism and the EUCO. In Section 4, I analysed the Member States' and EUCO's cooperation in their approach to dealing with the refugee crisis, and the manner in which new-intergovernmentalism was applied to migration governance by the Member States. Regarding the Member States'

approach to the refugee crisis, this study found that the Member States preferred an informal way to cope with the refugee crisis and concluded a deal with Turkey. Through the lenses of new intergovernmentalism, I designed a comprehensive framework to examine the EUCO power to govern the refugee crisis in the EU decision-making system.

And finally, in Section 5, I assumed that the Statement highlights the EUCO's growing power by implementing informal governance. The existing literature focuses on the most obvious components of EU crisis management rather than the more important ones. My analysis has moved beyond the purely political approach to the Statement and has concentrated on the application of new governmentalism to the refugee crisis, together with an evaluation of the rulings of the CJEU on Hungary, Poland, and the Czech Republic. The EU has been unable to come up with a practical solution to the refugee crisis and how the burden might be shared fairly among Member States. Instead, an alternative solution has been found outside the Union through the European Council, in line with the national demands of Member States. As I have explored in the entire study, in order to establish an agreement with Turkey and preserve their national interests, the Member States entrusted the EUCO with the task of negotiation.

In summary, this paper has examined whether the EUCO had the power to conclude a deal with Turkey in the light of new intergovernmentalism. As I have already underlined, the EU, which was unable to establish agreement on a common migration policy, readily confirmed the Statement to prohibit refugees' entrance to their lands, circumventing international refugee law and human rights law via an informal route.



This work is licensed under the *Creative Commons Attribution – Non-Commercial – No Derivatives 4.0 International License*.

Suggested citation: H Yesil, 'The Role of the European Council in the EU-Turkey Statement: Driven by Interests' (2023) 19 *CYELP* 333.