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Incongruity in Accountability—Contesting EU *De Facto* Impunity for International Human Rights Violations in the Field of Asylum and Migration: The EU-Turkey Statement

Joyce De Coninck

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City University London
Northampton Square
Clerkenwell
London
EC1V 0HB
United Kingdom



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Incongruity in Accountability – Contesting EU *De Facto* Impunity for International Human Rights Violations in the Field of Asylum and Migration

The EU-Turkey Statement

Joyce De Coninck

PhD researcher and academic assistant

Ghent European Law Institute (Jean Monnet Centre of Excellence)

Law Faculty, Ghent University

Universiteitstraat 4, B-9000, Gent, Belgium

joyce.deconinck@ugent.be

0032 (0)9 264 9710

Abstract

A number of reports have been drafted raising numerous fundamental rights concerns as a result of EU asylum and migration policy. From a user's perspective these concerns relating to the right to life and the principle of *non-refoulement*, are disconcerting given the difficulties that arise in obtaining redress. These concerns elicit the question as to whether the EU can effectively be held accountable *vis-à-vis* aggrieved individuals for fundamental rights violations it (in-) directly commits and/or contributes to in exercising its competences in this field. In particular, the nascent accountability regime applicable to international organisations for violations of international law, as enshrined in the Articles on the Responsibility of International Organizations, need be assessed and applied to the EU in order to determine to what extent fundamental rights violations by the EU and its agencies can result in effective liability. In addition, it need also be determined to what extent the current accountability regime may be ameliorated so as to ensure effective enforcement of fundamental rights standards following EU measures and action in the field of asylum and migration. Within this vein, the crucial and overlooked question arises whether a substantively tailored accession of the EU to the ECHR could serve as an appropriate means to address the shortcomings in respecting fundamental rights in the field of EU asylum and migration.

List of Abbreviations

ARIO	Articles on the Responsibility of International Organizations
CFR	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
ICJ	International Court of Justice
MS	Member States
TCN	Third country national(s)

Keywords

Fundamental Rights; European Union; Accountability Gap; Articles on the Responsibility of International Organisations; Asylum and Migration; *Non-refoulement*

Introduction

The controversy of the recent EU-Turkey Statement of 18 March 2016 (*hereinafter* ‘the Statement’) provides an interesting angle to determine precisely the contours, limitations and effectiveness of the international accountability regime enshrined in the Articles on the Responsibility of International Organisations (*hereinafter* ARIO) applicable to the European Union (*hereinafter* ‘the EU’) for complicity in fundamental rights violations in the field of asylum and migration. Despite the existence of this accountability regime, an accountability gap seemingly taints EU action in fundamental rights adherence in this particular field, which raises the question as to whether a *substantively* tailored accession of the EU to the European Convention of Human Rights (*hereinafter* ‘ECHR’) could possibly resolve some of the issues contributing to this incongruity in accountability.

Despite the *de iure* adherence to fundamental rights by the EU - the current state of affairs nevertheless facilitates this aforementioned *de facto* accountability gap whereby the EU and its agencies as well as the signatory Member States (*hereinafter* MS) seemingly evade any effective responsibility for human rights violations committed or (in-) directly contributed to in the context of EU policy and action in asylum and migration.¹ Surely, the objective of the Charter of Fundamental Rights (*hereinafter* ‘CFR’) - enacted to ensure fundamental rights adherence in EU measures and action - was not to impose the burden of accountability solely upon the MS for human rights issues as a result of EU policy – quite the contrary. By virtue of Article 51 CFR, the EU affirms its commitment to fundamental rights adherence, by rendering these provisions explicitly applicable to the enactment and exercise of EU law by the institutions, agencies and MS. This commitment includes envisaged compliance with the negative as well the positive obligations inherent to fundamental rights, as the relevant actors are held to “*respect the rights, observe the principles and promote the application thereof in accordance with their respective powers*”.² This entails that the actors concerned are bound by not only by the obligation to not violate these rights, but equally so, by the obligation to take positive action to ensure the effective enjoyment thereof.

Within this context, it is troubling that a significant number of operational and legislative measures taken by the EU have given rise to substantial human rights issues.³ Human Rights Watch and Amnesty

¹ Merlino, Massimo and Parkin, Joanna, *Fundamental and Human Rights Framework: Protecting Irregular Migrants in the EU*, Centre for European Policy Study, European Commission and the European Trade Union Confederation, Brussels, 2011, 6; De Schutter, Olivier, “Human Rights and the Rise of International Organisations: The Logic of Sliding Scales in the Law of International Responsibility”, in Wouters, Jan and Brems, Eva (eds), *Accountability for Human Rights Violations by International Organisations?* (Antwerp: Intersentia, 2010), 51-128; Human Rights Watch, *The EU's Dirty Hands - Frontex Involvement in Ill-treatment of Migrant Detainees in Greece*, New York, 2011, 53 – 54.

² Art.51, Charter of Fundamental Rights of the European Union.

³ Carrera, Sergio and Parkin, Joanna, *Protecting and Delivering Fundamental Rights of Irregular Migrants at Local and Regional Levels in the European Union*, Centre for European Policy Studies, Brussels, European Union and Committee of the Regions, 2011; Amnesty International, *Greece: Frontier of Hope and Fear. Migrants and Refugees Pushed Back at Europe's Border*, London, 2014; Fundamental Rights Agency, *Fundamental Rights at Europe's Southern Sea Borders*, Vienna, European Union Agency for Fundamental Rights, 2013; Guild, Elspeth, et al. (eds), *Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies - Frontex*,

International, amongst others, have consistently documented these issues as a result of EU action in matters concerning asylum and migration.⁴ It suffices to note, amongst others, the *de facto* push-backs as a result of joint operations coordinated by Frontex, as well as human rights concerns inherent to Eurodac, the Air Carrier Sanctions Directive and not in the least – the recent Statement.⁵ The gravity of such concerns is exacerbated by the aforementioned lack of *effective* accountability of the EU and the respective MS for the human rights concerns (in-)directly contributed to in effectuating EU measures and policies in the field of asylum and migration.⁶ This, despite the complicity shared by the MS and the EU, in the enactment of EU policy in asylum and migration.

Irrespective of the strain current migratory flows are imposing upon MS and EU policies, fundamental rights remain firmly embedded within the constitutional orders of MS as well as the constituent EU treaties of which the CFR forms an integral part. The EU as an international organisation and thus a subject of international law⁷, is furthermore bound by overarching international human rights law to the extent that it has reached the threshold of international custom and/or general principles of international law⁸. Finally, the EU is also bound by other relevant sources of international law including treaties by which it is (in-)directly bound such as the ECHR. This is confirmed by Article 52(3) CFR and Article 3(5) TEU, which render the case law and interpretations by the European Court of Human Rights (*hereinafter* the ECtHR) applicable to and binding upon the provisions encompassed in the CFR. Not inconceivably however, the effective protection of these rights is rendered futile insofar such rights are not paired with effective accountability for the duty-bearer – *in casu* the EU - in case of violations thereof.

I. Human Rights Concerns in EU External Migration Management

EU action in the field of asylum and migration is multifaceted. In conformity with Article 4 TFEU, the EU shares competences with MS in the area of freedom, security and justice, as further elaborated upon in Title V TFEU. As a result of this, and noting the importance of the notion of pre-emption enshrined in

Europol, and the European Asylum Support Office, European Parliament - Policy Department C - Citizens' Rights and Constitutional Affairs, European Parliament, Brussels, 2011, 129; Human Rights Watch, *The EU's Dirty Hands - Frontex Involvement in Ill-treatment of Migrant Detainees in Greece*, New York, 2011.

⁴ *Ibid.*

⁵ *Ibid*; Peers, Steve, et al. (eds), *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition*, Vol. 2: Immigration Law (Leiden: Martinus Nijhoff Publishers, 2012), 363 – 384.

⁶ Merlino, Massimo and Parkin, Joanna, *Fundamental and Human Rights Framework: Protecting Irregular Migrants in the EU*, Centre for European Policy Study, European Commission and the European Trade Union Confederation, Brussels, 2011, 6; De Schutter, Olivier, “Human Rights and the Rise of International Organisations: The Logic of Sliding Scales in the Law of International Responsibility”, in Wouters, Jan and Brems, Eva (eds), *Accountability for Human Rights Violations by International Organisations* (Antwerp: Intersentia, 2010), 51-128.

⁷ Art. 2(a), Articles on the Responsibility of International Organizations, International Law Commission, Vol. II, 2011, 16; Article 47 Consolidated Version of the Treaty on European Union (*hereinafter* “TEU”).

⁸ De Schutter, Olivier, “Human Rights and the Rise of International Organisations: The Logic of Sliding Scales in the Law of International Responsibility”, in Wouters, Jan and Brems, Eva (eds), *Accountability for Human Rights Violations by International Organisations* (Antwerp: Intersentia, 2010), 68 – 73.

Article 2(2) TFEU, the EU has enacted a large array of measures within the sphere of its internal competence, as well as within its external competence concerning asylum and migration, binding upon the MS to varying degrees. Due to the ad-hoc and evolutionary nature of some of these competences as a result of Article 3(2) TFEU, it need not surprise that this may give rise difficulties in the attribution and determination of accountability for human rights violations in EU asylum and migration policy (see *infra* § 36).⁹

While the EU is formally bound to respect human rights by virtue of Article 3(5) TFEU and Article 52(3) CFR, *de facto* compliance with these obligations remains a challenge. The international and European community has not been blind to the fundamental rights issues emanating from EU action in the field of asylum and migration as documented by a wide array of international organisations.¹⁰ Dismayingly, these human rights concerns are perceived at all levels of EU competence concerning asylum and migration.¹¹ These challenges relate to both the EU's normative¹² and operational¹³ competences in both the internal and external sphere. It is precisely within this realm that the highly controversial Statement is to be situated.

II. The EU-Turkey Statement

A. The Statement

Despite the increased momentum and joint MS-EU action to bring relief to the current migration crisis, movement by TCN's – irregular or asylum seekers – has surged.¹⁴ The predominant nationalities amongst these individuals are Syrian, Afghan and Eritrean, and the main paths for access to the EU are the Eastern Mediterranean Route, the Western Balkan Route and the Central Mediterranean Route.¹⁵ In deterring unsafe irregular migration, the EU in combination with the MS, has opted to address the increasingly

⁹ Martenczuk, Bernd, "Migration Policy and EU External Relations", in Azoulai, Loic and De Vries, Karin (eds), *EU Migration Law - Legal Complexities and Political Rationales* (Oxford: Oxford University Press, 2014), 104.

¹⁰ See amongst others: Amnesty International, *Greece: Frontier of Hope and Fear. Migrants and Refugees Pushed Back at Europe's Border*, London, 2014.

¹¹ Carrera, Sergio and Parkin, Joanna, *Protecting and Delivering Fundamental Rights of Irregular Migrants at Local and Regional Levels in the European Union*, Centre for European Policy Studies, Brussels, European Union and Committee of the Regions, 2011; Fundamental Rights Agency, *Fundamental Rights at Europe's Southern Sea Borders*, European Union Agency for Fundamental Rights, Vienna, 2013; Guild, Elspeth, et al, *Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies - Frontex, Europol, and the European Asylum Support Office*, European Parliament - Policy Department C - Citizens' Rights and Constitutional Affairs, European Parliament, Brussels, 2011, 129; Human Rights Watch, *The EU's Dirty Hands - Frontex Involvement in Ill-treatment of Migrant Detainees in Greece*, New York, 2011.

¹² Peers, Steve, et al. (eds), *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition*, Vol. 2: Immigration Law (Leiden: Martinus Nijhoff Publishers, 2012), 363 – 384.

¹³ Guild, Elspeth, et al. (eds), *Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies - Frontex, Europol, and the European Asylum Support Office*, European Parliament - Policy Department C - Citizens' Rights and Constitutional Affairs, European Parliament, Brussels, 2011, 129.

¹⁴ Watanabe, Lisa. *Borderline Practices - Irregular Migration and EU External Relations*. Strategic Trends 2016 March 22, 18.

¹⁵ European Commission. *Questions and Answers: Smuggling of Migrants in Europe and the EU Response*. Fact Sheet. Brussels: European Commission, 2015.

popular and used Central Mediterranean Route in particular, by proactively collaborating with Turkey.¹⁶ Said route provides for irregularly entry via Turkey to Greece, Cyprus and Bulgaria. Precisely due to the fact that Turkey – to a certain extent – acts as a transit country, the EU has enhanced its cooperation with Turkey in attempt to bring a halt to the use of this route.¹⁷

Recent cooperation with Turkey in this field dates back to 2014 when a readmission agreement was concluded pursuant to Article 79(3) TFEU.¹⁸ This facilitated further cooperation, which translated into the Joint Action Plan presented in October 2015 as well as a communication on the 7th March 2016.¹⁹ Both of the latter acts however, merely conveyed the intention of parties within the scope of irregular migration and readmission. The same cannot be held for the Joint Statement of 18th March 2016, which encompasses not only intentions but apparently so, reciprocal rights and obligations, as demonstrated by paragraphs 1, 2, 3, 6, and 9 thereof.²⁰

B. Human Rights Issues: *Non-refoulement*

The most contentious aspects of the Statement concern the provisions pertaining to the return of *all* irregular TCN's to Turkey from Greece.²¹ Whilst indeed, readmission agreements as such may very well be in complete conformity with international human rights law, it is questionable whether *this* particular agreement also adheres to the same relevant standards, and the *non-refoulement* principle in particular.

This principle finds its origin in a number of international instruments, such as the 1951 Refugee Convention²², the ICCPR²³, and the ECHR²⁴, albeit not always explicitly. Furthermore, the ECtHR case law concerning *non-refoulement* is a significant source for the understanding and interpretation of the positive and negative obligations inherent to this prohibition.²⁵ Within the EU framework, explicit reference to the principle of *non-refoulement* can be found in Article 78 TFEU, Article 18 CFR, and Article

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

¹⁷ Ibid.

¹⁸ Peers, Steve and Roman, Emanuela. "The EU, Turkey and the Refugee Crisis: What could possibly go wrong?", EU Law analysis, available at <http://eulawanalysis.blogspot.be/2016/02/the-eu-turkey-and-refugee-crisis-what.html> (online on 5 February 2016).

¹⁹ Gatti, Mauro, "The EU-Turkey Statement: A Treaty That Violates Democracy.", EJIL: Talk!, available at: <http://www.ejiltalk.org/the-eu-turkey-statement-a-treaty-that-violates-democracy-part-1-of-2/> (online on 18 April 2016).

²⁰ Ibid.

²¹ Other aspects of the Statement will not be discussed here, as they concern the obligations the EU has towards Turkey that are not limited to immigration matters.

²² United Nations General Assembly, "Convention Relating to the Status of Refugees", United Nations, 28 July 1951.

²³ UN General Assembly, "International Covenant on Civil and Political Rights", Vol. 999, United Nations, 16 December 1966, 171.

²⁴ Council of Europe, "European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14", 4 November 1950.

²⁵ Human rights are characterized by the positive and negative obligations they encompass and impose upon States and other actors. Whilst the negative obligations entail an act that a State must abstain from engaging in a certain type of behaviour, the positive obligations inherent to fundamental rights, refer to the action that must be taken by States to protect and safeguard the content of these rights.

19 CFR.²⁶ Again, the ECtHR's case law is relevant here in light of Article 52(3) CFR, which requires the rights enumerated in the CFR to be interpreted and applied in accordance therewith.

Not surprisingly, due to the various sources in which the principle of *non-refoulement* is found, the definition of this prohibition may vary to a certain extent. The Refugee Convention applies the principle of *non-refoulement* to the specific category of refugees. The ECHR and the respective EU provisions on the other hand, apply the prohibition not only to refugees, but equally so, to individuals entitled to subsidiary protection.²⁷ Under the EU framework, the principle of *non-refoulement* is thus understood as resulting in State liability when an individual is returned to a particular state, insofar he/she is at risk of being persecuted in that same state on account of race, nationality, religion, membership of a particular social group and/or political opinion.²⁸ In addition – as a result of the applicability of ECtHR case law concerning *non-refoulement* within an EU context²⁹, an individual may also not be returned to a state, irrespective of whether this concerns the *state of origin* or another *state of return*³⁰ to the extent that '*substantial grounds have been shown for believing that the person concerned faces a real risk of being subjected to torture, inhuman or degrading treatment or punishment*'³¹ including threats to the right to life.³²

Recalling that human rights impose upon the duty-bearers negative, as well as positive obligations, a number of these obligations can be identified from the applicable sources. The negative obligation under the principle of *non-refoulement* clearly imposes upon the duty-bearer the obligation not to return an individual to a State – irrespective of whether this concerns the State of origin or a third State – where he/she runs the risk of being persecuted on the aforementioned grounds and/or insofar there are substantial risks to the effective guarantee of Article 2 ECHR (right to life) and/or Article 3 ECHR (prohibition of torture, cruel, inhuman and degrading treatment).³³

In addition, the principle of *non-refoulement* encompasses a number of positive obligations, whereby the duty-bearer is held to take positive action in order to protect and safeguard the adherence to this norm. Firstly, mechanisms must be in place whereby the individual concerned can contest and submit reasons

²⁶ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, [2011] OJ L 337/9.

²⁷ Guild, Elspeth, "Art 19 - Protection in the Event of Removal", in Peers, Steve *et al.* (eds), *The EU Charter of Fundamental Rights - A Commentary*. (Oxford: Hart Publishing, 2014), 553.

²⁸ *Ibid.*

²⁹ Art. 78 TFEU; United Nations General Assembly, "Convention Relating to the Status of Refugees", United Nations, 28 July 1951; Council of Europe, "European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14", 4 November 1950; *in juncto* Article 52(3) CFR. See also: Guild, Elspeth, "Art 19 - Protection in the Event of Removal", in Peers, Steve *et al.* (eds), *The EU Charter of Fundamental Rights - A Commentary*. (Oxford: Hart Publishing, 2014), 543 – 562.

³⁰ Guild, Elspeth, "Art 19 - Protection in the Event of Removal", in Peers, Steve *et al.* (eds), *The EU Charter of Fundamental Rights - A Commentary*. (Oxford: Hart Publishing, 2014), 543 – 562.

³¹ *Cruz Varas and others v Sweden*, No. 46/1990/237/307, European Court of Human Rights, Strasbourg: 20 March 1991, § 69.

³² Fundamental Rights Agency, The European Court of Human Rights, Council of Europe (eds), *Handbook on European Law Relating to Asylum, Borders and Immigration* (Luxembourg, Publications Office of the European Union, 2014); *Saadi v Italy*, No. 37201/06, European Court of Human Rights, Strasbourg, 28 February 2008.

³³ Haecck, Yves and Staelens, Valentina, "Verbod van Foltering en onmenselijke of vernederende behandelingen of straffen", in Vande Lanotte, Johan and Haecck Yves (eds), *Handboek EVRM* (Antwerpen: Intersentia, 2004), 127 – 231.

against the return decision, thereby demonstrating that he/she does in fact face a substantial risk of being subjected to acts contrary to the right to life and/or the prohibition of torture, cruel, inhuman and degrading treatment.³⁴ As a corollary thereto, the individual concerned must be accorded sufficient time in order to submit such considerations and reasons. Secondly, an individual case-assessment is required when determining the legitimacy of a return decision of an irregular TCN.³⁵ For an individual assessment to be deemed adequate a number of elements must be taken into consideration. Generally speaking this assessment must take into consideration general elements such as the political situation of the return State³⁶ as well as the general human rights adherence by said State in conjunction with individual elements specific to the case at hand.³⁷ Clearly a certain gravity threshold need be met for the principle of *non-refoulement* to be triggered.³⁸ In addition, a number of elements need be taken into consideration when assessing the legitimacy of the return decision including whether *special distinguishing features* can be identified about the individual concerned warranting his/her stay³⁹, the sanitary and socio-economic conditions the irregular TCN would be subjected to in the return country⁴⁰, as well as the haste whereby a return decision is made⁴¹.

As with all obligations, the question invariably arises as to the tolerated exceptions to the rule. *In casu* some ambiguity can be perceived. Whilst the Refugee Convention and the EU Asylum Procedures Directive⁴² permit for a limited number of exceptions to the *non-refoulement* principle, the ECtHR is adamant about the absolute and non-derogable nature of this provision, entailing that it is triggered irrespective of the status of the individual concerned or his/her past activities.⁴³ This entails that under ECtHR case law, individualised assessments are requisite in all cases. Under EU law on the other hand, and in accordance with Article 36-38 of the Asylum Procedures Directive, it is permitted to return an individual to a safe third country, a first country of asylum, a safe country of origin or a European safe third country, (albeit these are not actually *exceptions* to the *non-refoulement* principle).⁴⁴ In the event that the country of return is thus categorized as one of the foregoing, an accelerated procedure may apply, whereby the return decision is made. Whilst a number of safeguards for the individual remain in place when qualifying a country as being safe for return these safeguards should not be exaggerated as the

³⁴ *Jabari v Turkey*, No. 40035/98, European Court of Human Rights, Strasbourg: 11 July 2000.

³⁵ Fundamental Rights Agency, the European Court of Human Rights, Council of Europe (eds) *Handbook on European Law Relating to Asylum, Borders and Immigration* (Luxembourg, Publications Office of the European Union, 2014), 74-75.

³⁶ *Ibid.*, §38; see concerning indiscriminate violence: *Sufi and Elmi v The United Kingdom*, No. 8319/07 and 11449/07, European Court of Human Rights, Strasbourg: 28 June 2011.

³⁷ *Chahal v The United Kingdom*, No. 70/1995/576/662, European Court of Human Rights, Strasbourg: 15 November 1996.

³⁸ *Cruz Varas and others v Sweden*, No. 46/1990/237/307, European Court of Human Rights, Strasbourg: 20 March 1991.

³⁹ *Vilvarajah and Others v. The United Kingdom*, No. 45/1990/236/302-306, European Court of Human Rights: 26 September 1991.

⁴⁰ *D v The United Kingdom*, No. 146/1996/767/964, European Court of Human Rights, Strasbourg: 2 May 1997, §49.

⁴¹ *Nsona v The Netherlands*, No. 63/1995/569/655, European Court of Human Rights: 26 October 1996, §103.

⁴² Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L 180/60.

⁴³ Fundamental Rights Agency, the European Court of Human Rights, Council of Europe (eds) *Handbook on European Law Relating to Asylum, Borders and Immigration* (Luxembourg, Publications Office of the European Union, 2014), 63.

⁴⁴ Peers, Steve and Roman, Emanuela. "The EU, Turkey and the Refugee Crisis: What could possibly go wrong?", EU Law analysis, available at <http://eulawanalysis.blogspot.be/2016/02/the-eu-turkey-and-refugee-crisis-what.html> (online on 5 February 2016); Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L 180/60.

effectiveness thereof is questionable in view of the fact that the qualification of a safe third country, as supported by the EU, may lead to a finding of inadmissibility of the case concerned, in accordance with said Directive.⁴⁵ This in combination with the fact that the asylum procedure is – as a result of this safe country designation - accelerated, could result in issues in light of the positive obligations crucial for the protection against *refoulement*.

Finally, it should be noted that, in accordance with vast ECtHR case law, diplomatic assurances by the return state irrespective of its format, are not *prima facie* sufficient in ensuring compliance with the *non-refoulement* obligation. Rather, regard will be had for the general human rights conditions in the state concerned as documented by amongst others, relevant NGOs and organisations⁴⁶ as well as with the quality of the assurances.

It need be emphasised that formal adherence to fundamental rights by including such provisions in legislation, does not alleviate the substantive human rights obligations by which the Union as an organisation is bound, nor should it prevent accountability claims to be made for violations of said norms on a national, European and international level. As such, the fact that the Statement refers to the applicable (international) human rights regime, does not mean that the *content of the measures and its implications* are indeed in compliance therewith, particularly in view of the very first sentence of the Statement (see *supra* p.6). Indeed, *prima facie* it appears that the wording of the Statement as such, does not violate international human rights law. Nevertheless, the leeway accorded to Greece by the EU, whereby it has qualified Turkey as a safe country third country⁴⁷ in a generalised manner, thereby negating precisely the requirement of individualised thorough assessments, via the means of this Statement, has arguably already resulted in violations of the *non-refoulement* prohibition as will be elaborated upon (see *infra* 28, 35-44).⁴⁸

Specifically, it appears that by supporting the enactment of this Statement, the EU has facilitated the qualification of Turkey as a safe third country. This is problematic, because as can be recalled from the conceptualisation of the *non-refoulement* prohibition, this principle cannot be invoked *vis-à-vis* States which have been qualified as such. *In casu*, and taking the relevant safeguards of this provision into consideration, it is clear that there is indiscriminate violence *vis-à-vis* (Syrian) TCN's and that their

⁴⁵ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L 180/60..

⁴⁶ *Sufi and Elmi v The United Kingdom*, No. 8319/07 and 11449/07, European Court of Human Rights, Strasbourg: 28 June 2011, §230 – 234; *Ramzy v The Netherlands*, No. 25424/05, European Court of Human Rights, Strasbourg: 27 May 2008; *Othman v The United Kingdom*, No. 8139/09, European Court of Human Rights, Strasbourg: 17 January 2012.

⁴⁷ Den Heijer, Maarten and Spijkerboer, Thomas, “Is the EU-Turkey Refugee and Migration Deal a Treaty?”, EU Law Analysis, available at <http://eulawanalysis.blogspot.be/2016/04/is-eu-turkey-refugee-and-migration-deal.html> (online on 7 April 2016).

⁴⁸ Human Rights Watch, *EU/Greece: First Turkey Deportations Riddled with Abuse*, Human Rights Watch, 16 April 2016., available at <https://www.hrw.org/news/2016/04/19/eu/greece-first-turkey-deportations-riddled-abuse> (online on 5 April 2017); UN High Commissioner for Refugees, *Legal Considerations on the Return of Asylum-seekers and Refugees from Greece to Turkey as Part of the EU-Turkey Cooperation in Tackling the Migration Crisis Under the Safe Third Country and First Country of Asylum Concept*, United Nations, 23 March 2016, 8; Amnesty International, *Turkey: Illegal Mass Returns of Syrian Refugees Expose Fatal Flaw in the EU-Turkey Deal*, Amnesty International, 1 April 2016, 5.

livelihoods are endangered due to the violence instigated by Turkish border guards.⁴⁹ What is more, the reception of (Syrian) irregular TCN's has been documented as being deplorable and not at all in compliance with the standards required by Article 3 ECHR. It suffices to reference the multiple deaths that have occurred⁵⁰, the documented sexual abuse of over 30 children in one particular camp in addition to the ongoing physical and mental violence to which Syrian TCN's are subjected.⁵¹ It can hardly be held that these circumstances are indeed in compliance with the aforementioned required standards of the *non-refoulement* prohibition. Mindful thereof, it is somewhat alarming that the EU - under its international human rights obligations - not only condoned the qualification of Turkey as a safe third country for TCN's and thus the (quasi-)automated return thereof without due regard for the requisite safeguards, but also facilitated this via the proposed measures for Turkey in the Statement concerned. Whilst a Greek Court has recently noted the Greek error in judgment in two particular cases⁵², it remains to be seen how and when the EU as an entity will address the issues arising from this Statement, and its complicity therein. The recently filed annulment claims for the annulment of the Statement against the European Council, will undoubtedly provide greater insight in this respect.⁵³

C. The EU and Human Rights

The establishment of international organisations entails the transfer of certain competences by state parties for the achievement of a collective objective. Within this context, it is held that despite the fact that international human rights obligations are not always directly binding *vis-à-vis* international organisations, the latter are certainly held not to hinder the adherence thereto by state parties, and are thus indirectly affected by these obligations. In other words, as confirmed by the *Kadi* Judgment, despite the fact that international organisations do not directly inherit human rights obligations of state parties, they are nevertheless held to ensure that the compliance thereto by the MS does not become untenable.⁵⁴ The contrary would entail that MS could purposely circumvent their human rights obligations by the mere establishment of an international organisation. International organisations as subjects of international law are furthermore bound by the general rules of international law, including general principles of law,

⁴⁹ Human Rights Watch, *Turkey: Border Guards Kill and Injure Asylum Seekers. Border Lock-down Puts Syrian Lives at Risk*, 2016, available at <https://www.hrw.org/news/2016/05/10/turkey-border-guards-kill-and-injure-asylum-seekers> (online on 5 April 2017).

⁵⁰ Weise, Zia, *Turkish refugee camp hailed as success by Merkel hit by child sex abuse scandal*, The Telegraph, 12 May 2016, available at <http://www.telegraph.co.uk/news/2016/05/12/turkish-refugee-camp-hailed-as-success-by-merkel-hit-by-child-se/> (online on 5 April 2017).

⁵¹ Amnesty International, *EU-Turkey deal: Greek decision highlights fundamental flaws*, 20 May 2016, Amnesty International, available at <https://www.amnesty.org/en/latest/news/2016/05/eu-turkey-deal-greek-decision-highlights-fundamental-flaws/> (online on 5 April 2017).

⁵² Ibid.

⁵³ Statewatch, *Cases before the General Court of the European Union – Statewatch*, June 7 2016, available at: <http://www.statewatch.org/news/2016/jun/eu-council-turkey-agreement-challenges-9897-16.pdf> (online on 5 April 2017).

⁵⁴ De Schutter, Olivier, "Human Rights and the Rise of International Organisations: The Logic of Sliding Scales in the Law of International Responsibility", in Wouters, Jan *et al.* (eds), *Accountability for Human Rights Violations by International Organisations* (Antwerp: Intersentia, 2010), 58.

international customary law and *ius cogens*, as well as their respective constitutions, and lastly, the international agreements to which they are parties.⁵⁵

Despite its assurances to the contrary, it is doubtful whether the Statement's provisions are indeed in conformity with the notion of *non-refoulement*.⁵⁶ This raises the question as to who can be and should be held accountable for the act as such and the measures emanating from this act. *In casu* three parties to the Statement can be identified – Turkey, MS and the EU. Whilst it has been argued that joint accountability for the EU as an international organisation is unnecessary in view of the fact that MS can nevertheless be held accountable for the implementation of EU acts and policy in asylum and migration, this should not be exaggerated. In addition to the issues that arise with findings of MS accountability as discussed below (*infra* 19), the EU in particular is bound by a number of provisions, which impose fundamental rights compliance upon the latter in a direct manner, alongside the human rights provisions imposed upon the MS.

Firstly, as has been amply touched upon, the EU as an organisation is bound by not only its own human rights provisions enshrined in the CFR which it must respect in the exercise of its functions, but equally so by international human rights standards enshrined in the ECHR and the relevant case-law interpreting these provisions. Furthermore, ample case law by the Court of Justice of the European Union (*hereinafter* 'CJEU') elaborates upon the international human rights norms by which the EU as an organisation is bound.⁵⁷ What is more, as a subject of international law, the EU is also held to adhere to international customary law – a status which the notion of *non-refoulement* has undoubtedly reached.⁵⁸ Hence, irrespective of whether MS responsibility would arise for violations of human rights law as a result of (*de facto*) EU measures in the field of asylum and migration and irrespective of whether the correct procedure was followed, this does not deprive or relieve the EU of its duties under international law. Negating its accountability would be entirely nonsensical as the EU as an organisation is nevertheless complicit in the enactment of EU policy and measures in asylum and migration and at the very least has *tacitly consented* and authorized to the reciprocal agreements enshrined in the Statement – the content of which seemingly conflicts with *non-refoulement*, a norm of international custom.

⁵⁵ Ibid., p 55 – 73.

⁵⁶ See for example: Amnesty International, *Turkey: Illegal Mass Returns of Syrian Refugees Expose Fatal Flaw in the EU-Turkey Deal*, Amnesty International, 1 April 2016, 5.; Human Rights Watch, *EU/Greece: First Turkey Deportations Riddled with Abuse*, Human Rights Watch, 16 April 2016, 9, available at <https://www.hrw.org/news/2016/04/19/eu/greece-first-turkey-deportations-riddled-abuse> (online on 5 April 2017).

⁵⁷ See for a thorough overview: Peers, Steve, *et al.* (eds), *The EU Charter of Fundamental Rights - A Commentary* (Oxford: Hart Publishing, 2014).

⁵⁸ UN High Commissioner for Refugees (UNHCR), *The Principle of Non-refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93*, 31 January 1994; Fundamental Rights Agency, the European Court of Human Rights, Council of Europe (eds), *Handbook on European Law Relating to Asylum, Borders and Immigration* (Luxembourg, Publications Office of the European Union, 2014), 63.

III. Incongruity in Accountability

A. Contextualisation

The contemporary human rights architectural framework is focused upon delineating *State* accountability for human rights violations, in order to ensure effective safeguarding thereof *vis-à-vis* individuals. However, in an era of increasing cooperation between States, and the conferral of oftentimes sensitive, competences to international organisations as a means of that cooperation, insight is requisite as to the role of international organisations in safeguarding human rights and the obligations they derive therefrom.⁵⁹ *In casu* the Statement constitutes a form of international cooperation between MS, the EU and Turkey in a somewhat ambiguous form, concerning matters that trigger the applicability of international human rights norms and the principle of *non-refoulement*. In particular, it need thus be established when and how, under the current applicable accountability regime – if at all – international organisations can effectively be held accountable for negligent implementation of and respect for international human rights norms. Within the context of the Statement in particular, the question thus arises as to whether the EU can effectively be held accountable for its contribution and at the very least, its tacit consent and authorization of acts which raise serious concerns as to the compliance with the *non-refoulement* principle.

B. *De Iure* Accountability – the Theoretical Legal Framework

Unlike the determination of state responsibility for violations of international law, the sources to determine the responsibility for violations of international law by international organisations are scarce and novel. As human rights instruments in particular are directed at States, and have been interpreted and applied as such by a myriad of jurisdictions, tribunals and courts, it need not surprise that guidance is abundant to determine *state responsibility*, whereas this is not necessarily the case for international organisations. To address this lacuna *vis-à-vis* international organisations as a distinct subject of international law, the International Law Commission drafted and enacted the ARIO.⁶⁰ These articles prescribe and delineate the bounds within which an international organisation can be held accountable for breaches of international law generally. In addition, the ARIO elaborate upon how this is affected and affects findings of accountability of signatory MS to the organisation concerned, in the same particular set of circumstances.

⁵⁹ Beneyto, José Maria, *Accountability of international organisations for human rights violations*, Council of Europe Parliamentary Assembly (Strasbourg: Council of Europe, 2013) 7.

⁶⁰ International Law Commission, “Articles on the Responsibility of International Organizations, with Commentaries”, Vol. II, International Law Commission, 2011.

Mindful of the foregoing and recalling that international organisations are a form of cooperation between a given number of States, the ARIO encompasses a two-fold approach.⁶¹ Firstly, the current regime holds that the international organisation itself can be held accountable for the violations of international law it commits.⁶² Secondly, the regime holds that, in addition to the liability of the international organisation itself, signatory States cannot simply evade accountability on account of their participation within said international organisation.⁶³ This entails that - from a theoretical perspective - TCNs who see their fundamental rights violated as a result of measure in the field of EU asylum and migration such as the Statement for example, could theoretically hold the EU accountable, *as well* as the MS concerned under this particular regime.

1. Accountability for the International Organisation

As aforementioned, the determination of accountability of an international organisation for the violation of an international (human rights) norm, hinges upon two conditions, namely, attribution and the breach of an actual legal norm by which the organisation is bound. Conduct will be attributable to the organisation in three distinct circumstances namely (1) when the act is committed by organs and/or agents and agencies of or placed at the disposal of the organisation (Articles 6 and 7 ARIO), (2) when there is *ultra vires* action by an organ or agent of the organisation (Article 8 ARIO) or (3) when the organisation acknowledges the conduct as its own. A breach of an international obligation will be deemed to exist insofar the organisation is bound by an obligation and has failed to abide by said obligation. The obligation may arise from a treaty binding the organisation, or from any other source of international law applicable to the organisation.⁶⁴ In accordance with Article 17 ARIO, an international organisation may also be held accountable insofar the organisation circumvents its international obligations by addressing decisions and/or authorisations to its Members, thus leaving the door open for joint accountability. Finally, it need be recalled that the applicability of the ARIO to the organisation can be partially or entirely affected by virtue of the *lex specialis* provision enshrined in Article 64 thereof.⁶⁵

2. Accountability for the Member State

⁶¹ Hartwig, Matthias, “International Organizations or Institutions. Responsibility and Liability”, in Rudiger Wolfrum (ed) *Max Planck Encyclopaedia of Public International Law* (Oxford: Oxford University Press, 2011), 13.

⁶² Part 2 ARIO.

⁶³ Part 5 ARIO.

⁶⁴ International Law Commission, “Articles on the Responsibility of International Organizations, with Commentaries”, Vol. II, International Law Commission, 2011, 14 (Commentary 2 to Article 4 ARIO).

⁶⁵ “These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of an international organization, or a State in connection with the conduct of an international organization, are governed by special rules of international law. Such special rules of international law may be contained in the rules of the organization applicable to the relations between an international organization and its members”, Art. 64, International Law Commission, “Articles on the Responsibility of International Organizations, with Commentaries”, Vol. II, International Law Commission, 2011, 14.

Under the ARIO MS cannot evade responsibility for internationally wrongful acts merely on account of the fact that the organisation was *de iure* or *de facto* responsible for the act or omission concerned. If this was to be permitted, MS could simply negate international (human rights) obligations by transferring the necessary competences to an organisation thereby ensuring impunity for fundamental rights violations to which they (in-)directly contribute. Part Five of the ARIO holds that States implicated in measures and actions by an international organisation, in contravention of international human rights norms will incur responsibility in case of aid and/or assistance provided to the organisation in the commission of the wrongful act (Article 58 ARIO), direction and control exercised by the State in the commission of internationally wrongful act by the international organisation (Article 59 ARIO), coercion of the international organisation by the State (Article 60 ARIO) and circumvention of international obligations by a State of the international organisation (Article 61 ARIO). In addition, insofar the MS acknowledge partaking in an internationally wrongful act committed and/or contributed to by an international organisation, they may also incur accountability.

C. *De Facto* Accountability – the Legal Framework in Practice

1. *De Facto* Accountability for the International Organisation

For an internationally wrongful act of an organisation to exist and thus for accountability to be determinable, two elements need be present. Firstly, the act must be attributable to the organisation and secondly, the act as such must constitute an internationally wrongful act. Whereas these conditions may appear - at first glance - straightforward enough, the application of these conditions to the particular case of the EU, seemingly result in a number of difficulties which hinder findings of accountability. In turn this thus, creates an accountability gap whereby the EU, despite its formal adherence to fundamental rights, escapes any effective accountability findings for acts it contributes to and/or authorizes in potential violation of fundamental rights.

Attribution

Attribution of actions or conduct by an international organisation will be deemed established based upon one of three possible grounds. Firstly, the act will be attributable to the organisation insofar the act or conduct was effectuated by an organ or agent of the organisation or, alternatively an organ or agent at the disposal of the organisation (1). Conduct may also be deemed attributable to the organisation under certain conditions when the organ and/or agents have acted *ultra vires* (2). Finally, conduct will be attributable to the organisation insofar it has been acknowledged as such (3). Despite the deceptive simplicity of these rules, a number of issues arise in the conceptualisation of attribution *vis-à-vis* the EU, as

a result of, amongst others, the legal nature of the Statement, the conceptualisation of effective and normative control and the division of competences in the EU in conjunction with the *lex specialis* provision of the ARIO.

Legal Nature of the Statement and Ultra Vires Action

One of the most controversial aspects of the Statement, other than the human rights implications it has, is the legal nature of the latter. It has been argued that the Statement and the subsequent measures as a result thereof, cannot be attributed to the EU as it is not the result of EU action, but rather, the result of MS action. In other words, it has been held that the Statement is not a legitimate agreement to which the EU as an organisation is a party. Various arguments can be made to counter this claim and interestingly, this is seemingly not as relevant for the determination of attribution of the act to the EU. Firstly, it can be argued that the Statement is an international agreement as such to which the EU is a distinct party. This based upon the fact that Articles 31 and 32 of the Vienna Convention on the Law of Treaties, which constitute international customary law, prescribe that agreements as such must be interpreted in their ordinary meaning, taking account of the circumstances and wording of the agreement. *In casu* the Statement encompasses clear reciprocal rights and obligations, including amongst others, funding to be made available by the EU to implement the deal concerned, as well as accelerated visa liberalisation for Turkey (see *supra* p.6). Moreover, the wording of the Statement cannot be regarded as being mere indications of intent. Rather, the Statement notes that the EU and Turkey have agreed to take action, that Syrian irregular migrants will be resettled in Turkey and that the EU will accelerate the disbursement of funds to fund schemes for the protection of refugees in Turkey. Hence, in conformity with CJEU and case law by the International Court of Justice (hereinafter ICJ), the qualification given to a particular act by the parties concerned is not decisive.⁶⁶ What is more, the fact that the Statement was not effectuated in conformity with the procedure for the conclusion of international agreements prescribed in Article 218 TFEU is irrelevant. Rather, Advocate General Sharpston holds in the pending case C-660/13,⁶⁷ that legal effects can still arise from agreements effectuated outside of the scope of said provision, which may be deemed attributable to the EU as an organisation. Interestingly this seemingly is further confirmed by Article 8 ARIO which stipulates that action taken by agents or organs of an organisation will still be attributable to that organisation even when effectuated *ultra vires*. As such the Statement could be deemed an agreement to which the EU as an organisation is a party.

Even if however, the perception that the Statement is not an agreement to which the EU is a party prevails, this would not necessarily preclude a finding of attribution *vis-à-vis* the EU for the fundamental rights concerns inherent to the Statement. Recalling the applicability of ECtHR case law as the minimum

⁶⁶ Den Heijer, Maarten and Spijkerboer, Thomas, "Is the EU-Turkey Refugee and Migration Deal a Treaty?" EU Law Analysis, available at <http://eulawanalysis.blogspot.be/2016/04/is-eu-turkey-refugee-and-migration-deal.html> (online on 7 April 2016).

⁶⁷ Case C-660/13 *Council v Commission* ECLI:EU:C:2015:787.

form of protection to be granted by the EU by virtue of Article 52(3) CFR, tacit consent to violations of the *non-refoulement* prohibition could be attributed to the EU. Under ECtHR case law and the traditional understanding of *non-refoulement* principle the duty-bearer thereof is bound by a number of positive obligations. These positive obligations include, amongst others, the availability of procedural safeguards which ensure that the individuals concerned will have access to an effective remedy against a return decision liable to violate their substantive human rights, and the designation of a safe third country only insofar said State complies with the criteria to be qualified as such.

As concerns the requirement of attribution, clearly, this is yet to be decided with respect to the Statement⁶⁸, albeit that the European Council is adamant that this is not a legally binding document. It is thus questionable whether an effective remedy against this Statement and the consequences as a result thereof, exists. In addition, the designation of Turkey as a safe third country raises serious questions in light of the numerous reports attesting to the contrary. Hence, it is not clear how the EU could have complied with said positive obligation in view of that fact that it has, at the very least, authorized the generalised designation of Turkey as such. Recalling that attribution under the ARIO may occur by virtue of an action or omission, it could be held that the Statement – insofar it is not deemed legally binding – could still be attributed to the EU by virtue of an omission to prevent these violations of the positive obligations inherent to the *non-refoulement* prohibition. In other words, if effectively transposed to the case at hand and the EU as such, it could be held that tacit consent by the EU for violations of the *non-refoulement* principle implemented by Greece is indeed attributable to the EU and could result in a finding of accountability. An approach as such seemingly is supported by Article 17 ARIO, which allows for attribution of conduct to the entity in case of authorisation by the latter to its members of acts that would be designated as internationally wrongful if committed by the international organisation itself.

Mindful of the foregoing, it appears that the ambiguous legal nature of the Statement at the very least, complicates findings of attribution of conduct to the EU for its complicity in the enactment thereof, which is further exacerbated by the *lex specialis* provision enshrined in the ARIO.

***Lex Specialis* and the Division of Competences**

Within the context of attributing conduct to the EU, Article 64 ARIO cannot be forgotten. The provision stipulates that the ARIO, including the rules on attribution,

... do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of an international

⁶⁸ Statewatch, Cases before the General Court of the European Union – Statewatch, June 7 2016, available at: <http://www.statewatch.org/news/2016/jun/eu-council-turkey-agreement-challenges-9897-16.pdf> (online on 5 April 2017).

organization, or a State in connection with the conduct of an international organization, are governed by special rules of international law. Such special rules of international law may be contained in the rules of the organization applicable to the relations between an international organization and its members.

This *lex specialis* provision touches at the very heart of competence division in the EU (which constitute the rules of the organization) and it is not surprising that the EU as an organization was a pivotal party in the enactment of this provision. It could invalidate the very essence of the ARIO and the rules of attribution. This entails that in addition to the issues concerning the legal nature of the Statement, there is no certainty as to whether the enactment of the EU-Turkey Statement will be deemed attributable to the EU in any form whatsoever. This contrary to the very nature of the EU obligation to adhere relevant international human rights standards as enshrined in Article 2(5) TEU and the international principle of *non-refoulement* principle enshrined in Article 78 TFEU. *In casu* asylum and migration is a shared competence between the EU and its MS. However, by virtue of Article 2(2) TFEU and the principle of pre-emption enshrined therein, the MS will be precluded from acting within this field under certain conditions. Furthermore, within the context of external action pertaining to asylum and migration, the EU may – albeit to a certain extent - acquire exclusive competence in order to effectuate certain policies. However, due to the very nature of this competence division, it is not always clear when MS or the EU are responsible for a given act. What is more, the division of competences is not anchored as such and may fluctuate over time and in certain circumstances. Finally, the division of competence will to a certain extent, determine the degree of effective control incumbent upon the Union as opposed to the MS in effectuating asylum and migration policy. Not only will the ambiguity concerning competence division complicate the determination of the entities which enjoy normative control in a given situation, there is currently no certainty as to whether effective control as opposed to ultimate normative control should prevail as a means to determine attribution. This ambiguity may thus give rise to issues concerning attribution rendering it difficult for the victim to acquire any form of redress from the organisation responsible be it directly or indirectly for human rights violations concerned.

Internationally Wrongful Act

The second required element for accountability to be determined is the breach of an international obligation. A breach may be the result of an act or omission and can be derived from treaties by which the organisation is bound or from any other source of international law, which binds the organisation. As aforementioned, the EU is bound by international human rights norms by virtue of a number of different instruments (see *supra* §22-26). However, as has been hinted at a number of times, this does not facilitate substantive compliance with those respective norms. Can the content of these fundamental rights norms to which the EU is bound internationally, simply be transposed to the EU as an organisation? It need be

recalled that for a State to be held accountable for violations of fundamental rights, an assessment is required whereby it is verified whether the State complied with the negative and positive obligations inherent to those human rights norms. However, as a result of the fact that human rights instruments regulate the relation of the individual *vis-à-vis* the State, these positive and negative obligations have been consistently interpreted and applied with a view to state responsibility. International organisations as such do not have the same competences or abilities as do States. Is it thus warranted and desirable to simply transpose the substantive content of these positive and negative obligations to organisations without due regard as to the tenacity and feasibility thereof in view of the differing characteristics which define such organisations as opposed to MS? In any event, this has yet to be decided. In view of this legal fog which taints the accountability landscape, it is hard – if not currently impossible – to determine to what extent indeed the EU has committed a breach of its international obligations when it is not clear what precise positive and/or negative obligation has been violated under international human rights norms.

Applied to the case at hand a number of observations can be made. Under the *non-refoulement* prohibition, States are held – as part of the positive obligations inherent to this norm – to ensure that a mechanism is in place to effectively appeal asylum decisions. Applied to the EU and its involvement in the Statement, the question may arise as to what organ of the EU would have to be responsible for this – if any organ at all. Should the EU establish or have established an overarching and trans-boundary appeal mechanism, which ensures that asylum claims are dealt with as prescribed, including appeals in times of crisis? Clearly asylum procedure is subject to severe constraints in particularly affected MS such as Greece. Would the positive obligations under the *non-refoulement* principle thus require the EU to incorporate corrective action where MS fall short in enactment of the Statement or prior thereto? Furthermore, would the enactment of legislation such as the Dublin Regulation III be in violation of this obligation insofar it does not provide for a corrective and obligatory mechanism in times of crisis, such as is the case in Greece today? As concerns the positive obligation concerning individual assessments – in this concrete matter – what should or could the EU have done to ensure that individual assessments are guaranteed effectively in view of the Statement? Is it under a positive obligation to train individuals such as seconded Frontex officials to ensure the quality of individualised assessment as it has done in the context of Joint Operations? Finally, concerning the obligation for States to ensure the enactment of a mechanism which would deter conduct contrary to the *non-refoulement* principle – can this be expected from the EU beyond the *de iure* reference to this principle in its constituent instruments? Would the European Commission be required in such instances to intervene via the instigation of potential infringement proceedings or other modes of intervention, thereby ensuring that the Union as an international organisation doesn't facilitate and/or authorise violations of the *non-refoulement* principle.

Mindful of the foregoing, the ARIO may at first glance appear to be a workable point of departure for the determination of international responsibility for human rights violations by international organisations including its reference to the applicable *lex specialis*. However, when effectively applying the foregoing it

appears that this may not actually be the case, particularly in the case of the EU in matters pertaining to external action in asylum and migration. The efficacy for the victim of human rights violations, of the applicable accountability regime from an international and EU perspective, is at the very least incredibly dubious. What is more, the apparent ambiguities inherent to the current accountability regime, raise politically delicate and tricky questions which touch upon the very notions of sovereignty and the autonomy of the EU as a legal order – questions that warrant durable and perceptive solutions in view of continuously increasing international cooperation via the means of international organisations.

2. *De Facto* Accountability for the Member State

As aforementioned, the ARIO encompass a two-fold approach whereby both the organisation as well as its signatory States can be held accountable for acts falling within the ambit of the international organisation. Within this context, there are 5 grounds upon which MS can incur responsibility for acts committed within the domain of action by an international organisation. Firstly, a MS can incur accountability when aiding or assisting the international organisation in the commission of an internationally wrongful act (1), when directing and controlling the acts of an international organisation (2), when coercing the actions of an international organisation (3), when circumventing human rights obligations as a result of membership of an international organisation (4), and lastly, when the MS acknowledges its own responsibility. Theoretically, this entails that an individual victim of human rights violations resulting from EU action in the field of asylum and migration, will result theoretically in ample means for redress as accountability for the MS based upon one or more of these five grounds. However, equally so, MS accountability for action falling within the ambit of the competences of an international organisation, may be harder to effectively establish than initially anticipated.

Rules on the attribution of an internationally wrongful act by an international organization to its signatory States are not enshrined in the ARIO. Rather they can be found in Articles 4 – 9 of the Articles on Responsibility of States for Internationally Wrongful Acts as referenced by the ARIO. Generally and without delving into the details thereof, as this is only of marginal importance to the current analysis, it can be held that the acts enumerated in Part 5 of the ARIO will be attributable to the signatory States insofar an element of governmental authority is ascertainable.

For a MS to be held accountable for an internationally wrongful act committed or contributed to by an international organisation on account of aid or assistance provided by that State, the act must have been an internationally wrongful act of the organisation. The latter is to be distinguished from an internationally wrongful act by the State as these are not necessarily identical (see *supra* §42 - 43). Particularly in the field of human rights where the positive obligations under such norms are specifically tailored to states, it is hard to decipher what the precise contours are of the positive obligations incumbent upon the

organisation. Applied to the Statement, it is hard to determine whether the positive obligations under the principle of *non-refoulement* directed at MS (see *supra* §42 - 43) can simply be transposed to international organisations. Is the EU obliged to take preventive action to ensure that its MS do not facilitate the violation of the *non-refoulement* prohibition? Does the EU have to ensure that overarching mechanisms are put in place to allow for appeals against asylum decisions in MS as a result of the Statement? Can the EU condone the determination of Turkey as a safe country status in view of the diplomatic assurance accorded by the latter? These ambiguities render it difficult to determine whether the Statement as such is thus an internationally wrongful act of the organisation. Consequently, a legal vacuum exists, rendering it hard to determine whether the MS as such knowingly aided or assisted the commission of an internationally wrongful act which thus facilitates *de facto* impunity for MS involvement in the enactment of the EU-Turkey Statement.

As concerns direction and control, it appears that yet again, MS will evade *de facto* accountability. Whilst the commentaries to the ARIO do not provide us with much guidance as to the threshold to be attained in order to establish that a MS has directed and/or controlled the actions of an international organisation, the aforementioned reasoning concerning the qualification of an internationally wrongful act of the international organisation remains valid. More specifically, for a MS to trigger its accountability under this provision, the act would yet again have to be an internationally wrongful act of the organisation. As it is currently uncertain what positive and negative obligations are effectively incumbent upon the international organisation, it cannot be clear whether MS knowingly directed and/or controlled the commission of such a wrongful act.

In addition to the aforementioned difficulties in determining when an internationally wrongful act by an international organisation has been committed, coercion will similarly, not easily result in MS liability due to its threshold that must be met. For MS to be held accountable under this provision for the acts committed within the ambit of actions by an international organisation, the organisation would have been left no effective choice but to comply with the actions prescribed by the coercing State. Applied to the EU-Turkey statement at hand, it is clear that this threshold cannot be deemed to have been met. Even in the assumption that the Statement does not, as such, legally bind the EU, its tacit consent to the implications of the Statement, cannot be deemed as being coerced by a particular and/or all Member States.

For a MS to be held accountable under the provision pertaining to circumvention, intent would have to be demonstrated whereby the MS willingly and knowingly availed itself to the organisation with the purpose of circumventing its human rights obligations. Clearly, this threshold of intent is hard to ascertain. As confirmed on numerous occasions by ECtHR jurisprudence upon which this provision is founded, MS do not relinquish fundamental rights obligations by transferring competences to an international organisation. The signatory States remain responsible for the adherence to said obligations. However, an important

corrective nuance complements said approach – namely the presumption of equivalent protection. Compliance with fundamental rights and as such, absence of will to circumvent the obligations inherent to such norms will be presumed when a system of equivalent protection exists in the organisation concerned. Clearly, the EU provides a system as such. Violations will only occur insofar a manifest deficiency has been established in the system of protection. Mindful thereof, MS will thus yet again, fairly easily evade accountability under this norm. Applied to the EU-Turkey Statement, it is incredibly difficult, not to mention politically sensitive, to insinuate that MS knowingly participated in the drafting of the Statement with the intent of circumventing their respective human rights obligations. What is more, in view of the presumption of equivalent protection, it will be even more difficult to demonstrate such intended circumvention.

Finally, a MS will incur liability for EU conduct in the field of asylum and migration when the State acknowledges its involvement and responsibility. Applied to the Statement in the current context, it appears counterintuitive and thus highly unlikely that MS would expressly acknowledge responsibility for violations of international human rights law in view of the complicity in the enactment of the Statement, by the EU as an international organisation.

Consequently, when examining the grounds upon which MS could incur liability for the actions and conduct by the EU in the field of asylum and migration which run counter to fundamental rights more diligently, it appears that these provisions will only result in accountability to a negligible extent, to the detriment of the victim of such violations.

3. Analysis

It thus appears that the applicable accountability regime to international organisations via the means of the ARIO as well as the applicable *lex specialis*, inadvertently facilitates an accountability gap within the context of fundamental rights protection. This is to be attributed to the fact that the cumulative conditions to establish an internationally wrongful act which would result in MS accountability and EU accountability – namely attribution and a breach of an international obligation – are far more difficult to determine than envisaged. Applied to the Statement at hand, this thus entails that the latter floats in a legal vacuum which seemingly under the ARIO regime leaves the EU and the MS unaffected by any accountability assertions that may arise due to dissonance of the Statement with fundamental rights provisions by which the EU is bound. In view of its status as an international organisation within the international legal order and the international human rights norms by which it is bound, of which the non-refoulement prohibition is international custom, it is inconceivable that the modes of recourse for victims of this Statement are subject to these limitations. Clearly, for a Union founded upon the notions of the rule of law and respect

for fundamental rights, an approach as such is hardly tenable and in dire need of revision to ensure the efficacy of the fundamental rights protection it so amply prescribes.

IV. Substantively Tailored Accession to the ECHR – Overcoming the Current Incongruity in Accountability?

In ensuring a tenable yet effective accountability regime whereby international organisations are held accountable for the acts they commit as subjects of international law, in violation of fundamental rights, this regime would have to balance the competing interests of international human rights protection and those of international organisations established with a view to providing solutions and remedies to transnational issues. Not inconceivably, in achieving the transnational objectives often pursued by international organisations, it would run counter to the very essence of their construct to subsequently allow national adjudication on matters of an international nature, which could very well affect legitimate concerns and objectives of other MS. Whilst this is precisely the reason certain immunities have been enacted for international organisations which hinder *national* adjudication, this could also result in varying and conflicting (national) interpretations of the fundamental rights obligations incumbent upon international organisations as such. Hence, it is warranted that the *status quo* for the reasons discussed above, be complemented by alternative means to ensure fundamental rights compliance by international organisations. Recognizing the need for enhanced accountability of increasingly competent international organisations, a number of alternatives to the traditional role of national adjudication have been formulated, in enforcing compliance by international organisations with human rights obligations.⁶⁹ Accordingly, one of these alternatives is discussed below.

An alternative approach to accountability, which would predominantly serve the purpose of elucidating the human rights obligations – positive and negative - incumbent upon international organisations, is *substantively tailored* accession by international organisations to international human rights treaties. In other words, this would provide invaluable guidance as to the contours of the human rights obligations imposed upon international organisations in the exercise of their respective competences. Indeed, practice and the Opinion 2/13 by the CJEU are demonstrative of the difficulties that persist in discussing accession of the EU to the ECHR, however this should not be deemed as an impediment thereto. Rather, it should be regarded as the point of departure to shift the focus of an envisaged accession away from the institutional and structural concerns, in the direction of substantive coherence of the ECHR regime *vis-à-vis* the EU and its agencies.

⁶⁹ Reinisch, August, “The Changing International Legal Framework for Dealing with Non-state Actors ”, in Philip Alston (ed) *Non-state Actors and Human Rights*, (Oxford: Oxford University Press, 2005) 67.

When assessing the difficulties and ambiguities inherent to the current accountability regime for determining both attribution *and* the breach of an international obligation, the most prominent issue appears to be the actual determination of the international obligations incumbent upon the organisation and the EU in particular. As such *substantively tailored* accession of the EU to the ECHR would serve the purpose of actively assessing the extent to which international human rights norms and the obligations they encompass, can simply be transposed to international organisations. This would furthermore serve the function of rendering human rights protection more feasible, effective and tenable by taking into consideration the specific characteristics of international organisations and the EU in particular, which by no means can be equated to those of a nation-State, whilst nevertheless ensuring that the essence of the fundamental rights remain guaranteed. Mindful thereof, accession to the ECHR seems indispensable, as an accession thereto would require an anticipatory assessment of the implications of certain human rights obligations towards international organizations generally. In addition, this would unburden the CJEU from making ad-hoc assessments on how to deal with potential claims of accountability directed at the EU as an international organisation and/or its entities and agencies.

Applied to the EU-Turkey Statement, a *substantively tailored* accession would entail that the (positive) obligations under the *non-refoulement* prohibition *vis-à-vis* the EU as an international organisation would already have been determined and thus susceptible to effective judicial review by the CJEU or the ECtHR. It would ensure that the content would remain safeguarded by determining what the EU is and is not allowed to do in matters pertaining to asylum and migration with due regard for the competence division – to the effect of safeguard the *content* of that norm *vis-à-vis* the right-holders. A substantive accession agreement might possibly provide *the* platform to further delve into the contours of positive and negative obligations that the EU holds as the result of the increasingly conferred powers by MS in matters concerning asylum and migration whilst allowing sufficient regard to be had for the institutional peculiarities of the EU as an organisation. This could be done for example, by the inclusion of strict obligations as well as obligations which may fluctuate somewhat depending on the degree of effective or normative control exercised by the EU. Furthermore, it might serve as a precedent to further stimulate and accelerate the shifting of the contemporary human rights architectural framework towards an inclusionary approach *vis-à-vis* international organizations – much needed in a world where a lack of such international cooperation is unthinkable.

Conclusion

The ambiguous nature of the EU-Turkey Statement renders any assessment of fundamental rights violations and accountability in this respect particularly difficult. However, it provides for an interesting angle to assess the efficacy of the applicable accountability regime to the EU for violations of fundamental

rights. Precisely due to the controversy and outcry emanating therefrom, an assessment was warranted as to whether the EU should and can be held accountable within the contemporary architectural human rights framework for violations of the principle of *non-refoulement*.

Having discerned a number of negative and positive obligations inherent to the principle of non-refoulement as applied to States, it becomes clear that the ARIO and the reference to the *lex specialis* that may be applicable to international organisations by virtue of their internal rules, by no means result in effective and coherent findings of accountability. Despite the theoretical two-tiered approach whereby signatory States and the organisation itself may be held accountable, the application of these principles to the Statement provide insight into the lacunas, which taint the current accountability regime, to the detriment of the right-holders that have fallen victim to human rights violations (in-)directly contributed to by the EU. Within this vein it appears that these impediments to accountability are however, in large part to be attributed to the lacking insight into the contours and thresholds of actual positive obligations incumbent upon the EU in the contemporary international human rights framework. Without this requisite legal clarity and certainty as to the substantive content of these precise human rights obligations *vis-à-vis* the EU in matters concerning asylum and migration, the finger-pointing will persist between the EU and MS, to the detriment of the irregular TCN's, who will see any form of legal recourse and justice dissipate in the ruckus of political discourse.

To contend that substantively tailored accession of the EU to the ECHR would resolve and do away with any and all human rights concerns in the exercise of EU competence in asylum and migration, would be preposterous. Not only do a plethora of immunities bar access to recourse before national jurisdictions, the procedural obligations required to be met for access to the ECtHR, the procedural requirements for the various procedures before the CJEU as well as the fact that the ARIO cannot be invoked by individuals by virtue of Article 45 thereof, render access to justice extremely arduous for TCN victims of fundamental rights violations contributed to by the EU. However, it is clear that in view of these difficulties and the distinct omission concerning the content and scope of the positive and negative human rights obligations incumbent upon the EU, substantively tailored accession would prove to be a precedent-setting and requisite exercise whereby the legal uncertainty as to the contours and thresholds of the positive and negative obligations inherent to the respective human rights would be dispelled. In turn this would ensure a more coherent and above all, effective application of fundamental rights.