Themistoklis Tzimas

Two Years After: Evaluation of the EU Refugee Policy from an International and European Law Perspective

Geneva Jean Monnet Working Papers 11/2017

CENTRE D'ÉTUDES JURIDIQUES EUROPÉENNES
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Christine Kaddous, Director

Ramses Wessel, Co-editor of this Paper presented at the ESIL Interest Group Workshop "The European Union as a Global Actor"

Centre d'études juridiques européennes

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UNIVERSITÉ DE GENÈVE

ISSN 2297-637X (online)

Université de Genève – Centre d'études juridiques européennes
CH-1211 Genève 4

The Geneva Jean Monnet Working Papers Series is available at:
www.ceje.ch

Publications in the Series should be cited as:
AUTHOR, TITLE, Geneva Jean Monnet Working Paper No ./YEAR [URL]

Two Years After: Evaluation of the EU Refugee Policy from an International and European Law Perspective

by

Themistoklis Tzimas*

Abstract

Almost two years ago, the EU-Turkey agreement was adopted as a cornerstone of EU policy in the face of the growing refugee crisis. Since then, it constitutes one of the main tools for the restrain of refugee influxes in the EU. Two years later, a legal assessment of its impact from the international as well as the European law perspective is necessary.

Apart from the fore-mentioned analysis, the article will address the issue of the influence of EU refugee policy on the relevant field of international law. Such influence is articulated on a double basis: first in relation to the actual compliance of EU policies with international law; second and in furtherance of the former, in regards with the potential precedent which is set by the EU policies in relation to the implementation of international law about refugees in general.

The argument of the article is that the EU, in the name of a state-centered security approach to the issue, either directly breaches the principles of international law on the matter or to say the least, promotes policies which deteriorate the living conditions of refugees and the undermine the fulfillment of their rights under international law.

Keywords: European Union; International law; Refugees; Asylum seekers; Greece; Turkey

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Introduction

The EU policy concerning the current refugee crisis is at large based on its agreement with Turkey, through which the EU attempts to restrain the numbers of incoming asylum-seekers. The prevalence of this goal determines up to some -at least - extent, the substance, as well as the extent of compliance of the EU with international - and European - law.

The article focuses exactly on that; on the overall assessment of the EU-Turkey agreement at two levels: first, in order to determine the extent of compliance of the EU with international as well as with its own, law; second, at the potential precedent which is set by the EU, concerning the implementation of international law about refugees.

The main argument is that the EU policies regarding the current crisis, as they are determined in its agreement with Turkey interpret and implement international, as well as EU law, in ways which distort the guiding principles and norms of the fore-mentioned legal framework, in the sense of deteriorating the living conditions of refugees of undermining the fulfillment of their lawful rights and of paving the way for similar interpretations of international law, by other actors. Especially in terms of the last point a brief reference to the role of the EU as a global actor is necessary.

In order to reach my conclusions, I analyze the current EU refugee policy, the cornerstone of which is its agreement with Turkey. In order to assess the impact of EU policies on international refugee law I briefly refer in general to the role of the EU regarding the formation of international law.[1]

[1] This is up to a large extent a political issue or at least an issue lying at the edge between politics and international law.

I. The EU response to the developing refugee crisis

A. The framework of the EU policy in the face of the current crisis, prior to the agreement with Turkey

1. The Dublin Regulations precedents

The EU refugee policy as it is formulated through its relationship with Turkey is examined on a triple basis: first in relation to the compliance or not, of the EU, primarily with international law but with EU law to. This is the an explicitly normative test. Second, regarding the indirect but actual consequences on the ground that the EU policies bear with them, in parallel to the purely and direct normative evaluation. It is in a way the indirect or implied normative assessment. And third in relation to the potential impact of the former two on international law interpretation in general. In this part, the analysis involves only the first two bases.

An initial remark in relation to the examination of the current theme is that apart from its general commitment to international law, the Treaty on the Functioning of the EU, in article 78, endorses the Geneva Convention and the additional protocol as integral parts of its own legal order. In the same article, the EU is committed into the principle of non-refoulment.[2] In principle this should have led to a concrete EU role as an advocate of international law about refugees. However, the reality of the EU stance has been up to some extent different, even before the contemporary crisis.

The main aspiration of the EU is the establishment of a Common European Asylum System - CEAS. Its backbone is consisted of the Dublin Regulations I, II and III.[3] The way that Dublin regulations are articulated is significant both because of its actual impact on the contemporary refugee crisis, as well as in indicative terms. That is to say that they are indicative of the combination of attempts to regulate in a coherent way the asylum procedures throughout the EU, as well as in line with international law, which however quite often fall short of their expectations.[4] The Dublin regulations are based on the assumption that all

[2] However, in directive 2013/33/EU, a contradiction between the directive and the Geneva Convention it is supposed to comply with, emerges. The directive in article 8 introduces a series of exceptions to the absolute prohibition of detention on the grounds of illegal entry or presence to safe states territories. In article 10, even imprisonment is foreseen, under certain conditions, contrary to article 31 of the Convention Relating to the Status of Refugees.
Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection.

[3] Here, are only parenthetically mentioned.

[4] The major goals are to establish a clear method for the determination of the member-state which is responsible for the examination of the asylum application, the adoption of objective criteria for the fore-mentioned determination, the review of the impact of the Dublin regulation and the protection of the applicants' rights.
ECJ, Case C- 36/15, Mehrdad Ghezelbash v Staatssecretaris van Veiligheid en Justitie, Opinion of the Advocate General Sharpston, (March 7, 2016), para. 10.

member-states respect equally international and European law.[5] Nevertheless, for a variety of reasons, this is not always the case.

A positive effect of Dublin regulation III is that it clarified up to some extent the issue of effective remedy against "a decision not to examine an application and to transfer the asylum seeker to the Member State responsible, or to apply for such a decision to be reviewed."[6]

The Dublin regulations constitute efforts to balance between the common EU framework and inter-state agreement on the one hand and the balance between the control of influxes and the protection of the applicants' rights on the other hand.[7] This double balance effort, in spite of being in principle correct is often proven too difficult to be achieved.

The "first host country" provision, on the one hand was proven dysfunctional on the basis of adding too much pressure on specific states, such as Greece and Italy,[8] while on the other hand, it has been criticized concerning the respect towards international law about refugees, although Dublin regulation III has been considered as improved compared to regulation II.

"Some reports of the European Council on Refugees and Exiles (ECRE) have documented that asylum seekers are sent from one EU country to the other without any one country

[5] Ibid, para. 37.
[6] CJEU, Case C-394/12, Shamso Abdullahi v Bundesasylamt, Judgment of the Court (Grand Chamber), (December 19, 2013), para. 50.
[7] Ibid para. 57.
[8] Susan Fratzke, Not adding up, The fading Promise of Europe's Dublin System, Migration Policy Institute Europe, (*Safe Country Provisions in Canada and in European Union: A Critical Assessment*, March 2015) <http://www.migrationpolicy.org/research/not-adding-fading-promise-europes-dublin-system>, accessed 03-04-2016, 4,7, 8.
It must be noticed though that in the study above, the Dublin convention is presented as also having some advantages, in terms of a more equal than in the past, distribution of refugees among EU member- states. The fact however that most refugees and immigrants have to pass through these states, combined with the specific states' administrative inefficiencies, as well as stricter controls on behalf of destination states, creates from time to time a situation of great masses of immigrants blockaded in these states. Especially in the case of Greece, the dysfunction was so severe that a halt of transfers to Greece under the Dublin convention was widely advocated.
Ibid, at p. 11.
In such a sense one may pay attention to the case ECHR, M.S.S. Vs Belgium and Greece, no.30696/09, (January 21, 2011).
The Court in it decision held that "The Belgian authorities should not simply have assumed that the applicant would be treated in conformity with the Convention standards; they should have verified how the Greek authorities applied their asylum legislation in practice; ... In respect of Greece, the Court found a violation of Article 13 taken in conjunction with Article 3 of the Convention because of the deficiencies in the Greek authorities' examination of the applicant's asylum application and the risk he faced of being removed directly or indirectly back to his country of origin without any serious examination of the merits of his application and without having had access to an effective remedy. As far as Greece is concerned, the Court further held that there had been a violation of Article 3 (prohibition of degrading treatment) of the Convention both because of the applicant's detention conditions and because of his living conditions in Greece. Lastly, under Article 46(binding force and execution of judgments) of the Convention, the Court held that it was incumbent on Greece, without delay, to proceed with an examination of the merits of the applicant's asylum request that met the requirements of the European Convention on Human Rights and, pending the outcome of that examination, to refrain from deporting the applicant."
ECHR, Press Unit, "Dublin Cases" Factsheet, (July 2015), <www.echr.coe.int/Documents/FS_Dublin_ENG.pdf>, accessed 3-4-2016.
Similar were the findings of the Court in the Mohammed V Austria, Sharifi and other V Italy and Greece and Tarakhel V Switzerland, cases.
Harriet Grant & John Domokos, 'Dublin Regulation leaves asylum seekers with their fingers burnt', *theguardian*, (October 7, 2011).

taking responsibility for the application for asylum, the end result being refoulment to the country of persecution"[9] resulting in the "lowest common European denominator".[10]

In general, the Dublin regulations - and especially the initial one - have been criticized for "objectifying" the asylum-seeker and therefore for compromising the equivalent rights in favor of state interests.[11] This stance could be rephrased as an imbalance between state and human security imperatives at the expense of the latter.

In this framework, the Dublin regulations have formulated a precedent of an in- principle invocation of international law commitments on behalf of the EU, while at the same time, both de jure and de facto, the latter attempts to restrict the influxes of asylum seekers, both on an EU and on a member-state basis, adopting thus an "outsourcing" or "externalization" of migration control, externally, as EU, or even internally by accepting an intra-member-state division.[12]

In addition, the EU legal framework has been criticized as fragmented, dispersed and complicated.[13] That leads to defects in relation to inter-state solidarity. The same conditions endanger for the asylum-seekers' rights and compromise the compliance of the EU with international law. While the EU manifests a certain extent of respect for international law, the praxis often falls short of the expectations. It was in this template, that the most policies about the current crisis were adopted.

2. The EU "Managing the refugee crisis" document

In light and on the basis of such precedents, the EU adopted on 29.9.2015 the document which is entitled "Managing the refugee crisis: immediate operational, budgetary and legal measures under the European Agenda on Migration". The document assessed the situation from a political perspective on the one hand and included some basic provisions on the other hand. It was adopted in a framework of growing attention - if not shock - for the

[9] N. Abell, 'Safe Country Provisions in Canada and in European Union: A Critical Assessment', (1997), 31(3), The International Migration Review, 569, at p. 572.
[10] *Ibid*, 573.
[11] E. Guild, The Europeanisation of Europe's Asylum Policy, (2006), 31(3), *International Journal of Refugee Law*, 630, at pp. 630-651.
J.-F. Durieux, The Vanishing Refugee: How EU Asylum Law Blurs the Specificity of Refugee Protection, in Lambert, H., McAdam, J. and Fullerton, M. (eds.), *The Global Reach of European Refugee Law*, (2013, Cambridge University Press), at pp. 225-257.
Characteristically, "Article 14(1) of Regulation No 1560/2003 – currently Article 37 of Regulation No 604/2013 – provides that, in various situations where the Member States cannot resolve a dispute regarding the application of Regulation No 343/2003, they may have recourse to a conciliation procedure in which members of a committee representing three Member States not connected with the matter participate, but in which it is not envisaged that the applicant for asylum will even be heard."
Shamso Abdullahi v Bundesasylamt, para. 58.
[12] T. Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control*, (2011, Cambridge University Press), at pp. 7-8.
E. THIELEMANN, and C. ARMSTRONG, Understanding European Asylum Cooperation under the Schengen/Dublin System: A Public Goods Framework, (2013), 22(2), *European Security*, 148, at pp. 148-149.
[13] S. Carrera, D. Gros and E. Guild, What Priorities for the New European Agenda on Migration?, *Centre for European Policy Studies*, (April 22, 2015), (www.ceps.eu/system/files/MigrationPriorities.pdf, access. 21-1-2018).

movement of refugees as well as of concern - if not open hostility - of several EU member-states in the face of the possibility of receiving portion of these populations.

The European Commission characterized the situation as a "... a test for the European Union",[14] emphasizing on its grave impact.[15] The document determined as main goals of the EU policy: "... tackling the immediate crisis, but also action inside and beyond the EU to reshape how we fulfill our obligations towards those in need of protection, how to help the most affected Member States, to respect EU and international obligations on asylum, to return those who do not need protection to their home countries, to manage our external borders, and to address the root causes motivating people to embark on perilous journeys to Europe in the first place, as well as looking at Europe's long term need for legal migration."[16] The effort was again to balance among the protection of the EU external borders through the restrain of incoming asylum seekers, the inter-state solidarity and the asylum seekers' rights.

In furtherance of these goals some immediate policies were adopted, with the main one being a temporary relocation scheme but also medium-term proposals were included too, focusing on the adoption of a common asylum policy and the deterrence of incoming asylum seekers before reaching the EU shores.[17]

The EU document invoked international law guarantees, humanitarian responsibilities and internal EU solidarity among its member-states regarding its goals. It is in furtherance of these goals that a partial and temporary exception from the Dublin regulations about the first host country was adopted with the temporary relocation scheme. The idea was that given the unprecedented number of incoming asylum-seekers, who were attempting to enter Europe, mainly through Greece and Italy, in case the Dublin regulations were left unaltered - even temporarily - the burden for the two first entrance countries would have been too much to bear. On the basis of a combination of criteria, including each member-state's

[14] EU Commission, Communication To The European Parliament, The European Council And The Council, Managing the refugee crisis: immediate operational, budgetary and legal measures under the European Agenda on Migration, EU: COM(2015) 490, Celex No. 515DC0490, (29-9-2015).
[15] *EU Commission, Managing the refugee crisis.*
In order to capture the "mentality" behind the EU approach, we need not to forget that it bears the "stamp" of EU member-states governments as well as right wing and xenophobic parties. Characteristically, the so-called Visegrad group countries, is continuously calling for closed borders.
Visegrad Group, Joint Statement on Migration, (February 15, 2016).
Fear of the "other" and the "stranger" has further intensified,on the bases either of terrorist threator of a threat to standards of living of the citizens of the EU member-states.
Thomas Faist, '"Extension du domaine de la lutte": International Migration and Security before and after September 11, 2001', (2002), 36(1), The International Migration Review, 7, at p. 7.
Gallya Lahav & Marie Courtemanche, 'The Ideological Effects of Framing Threat on Immigration and Civil Liberties', (2012), 34(3), Political Behavior, 477, at p. 480.
[16] *EU Commission, Managing the refugee crisis.*
[17] S. Carrera, S. F. Blockmans, D. Gros & E. Guild, The EU's Response to the Refugee Crisis: Taking Stock and Setting Policy Priorities, (2015), 20, *CEPS*, at p. 4.

GDP, population etc., a number initially of 40.000 asylum seekers and later of 120.000 were supposed to be relocated.[18]

While, the temporary relocation scheme was designed as a means for the relief of first entrance countries and of the asylum-seekers themselves, some worrying elements were inherent in it: the first such element is the provision for the relocation of only 160.000 refugees and asylum seekers. Although it remains a right of each state to admit or not an individual in its territory, the incursion by the EU of a quantitative criterion and limit is ethically ambivalent - to say the least - and legally unjustified.[19]

Given that, in praxis, the level of benefits and of respect of their rights is not the same for asylum-seekers and refugees, among the different EU member-states, secondly, the unequal treatment of refugees is established. It is not their status and their needs under international law, which determine the level of their protection but the needs and the criteria of each state's own interests. On top of the fore-mentioned, the asylum-seekers should come from countries "... with an average recognition rate of above 75%."[20]

The EU, while accurately chose to "bypass" the Dublin regulations, instead of following a policy based on the fundamental legal principle of the equal treatment and of the individualization of each refugee application adopted an "arithmetical" approach on the basis of criteria which are either defined by each member-state without sufficient clarity or are biased in favor of specific states of origin. In such a sense it introduced or at least legitimized implicitly, a fundamental shift from the human-centered approach to the refugee issue, to the prevalence of a state-centered approach, on the basis of the interests of the receiving states.

Even further, the provisions for the temporary relocation scheme included no judicial remedy for the applicants whose relocation application was rejected, expanding thus the grey zone between legal norms and political statements.

In addition, the compliance of the member-states with the provisions of the document is far from obligatory and in this sense, the whole scheme was partially inefficient, open to political calculations and manipulations. Last but not least, the maximum number of potentially relocated asylum seekers was too small in the first place, in the face of the incoming

[18] *Carrera, Blockmans, Gros & Guild, The EU's Response to the Refugee Crisis: Taking Stock and Setting Policy Priorities*, at p. 5.

[19] Even more problematic is article 3 of the Council Decision 2015/1601, according to which "Relocation pursuant to this Decision shall be applied only in respect of an applicant belonging to a nationality for which the proportion of decisions granting international protection among decisions taken at first instance on applications for international protection as referred to in Chapter III of Directive 2013/32/EU of the European Parliament and of the Council is, according to the latest available updated quarterly Union-wide average Eurostat data, 75 % or higher." Another arbitrary, collective and non- individualized approach to the fate and the rights of refugees is endorsed by the EU.
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, article 3.

[20] F. Trauner, Asylum policy: the EU 's 'crises' and the looming policy regime failure, (2016), 38(3), *Journal of European Integration*, 311, at p. 319.

asylum-seekers and of the incapacities of the first entrance EU member-states. Even further, even this insufficient relocation scheme was temporary in the first place. Until now, the EU has failed to reach an agreement on a reform of the Dublin regulation aiming at enhanced protection of asylum-seekers.

Although, the EU through the relocation provision did not typically and directly contradict a specific Geneva Convention article, it violated the "spirit" and the imperatives of international law, interpreting and implementing them in ways which practically deteriorate the already vulnerable position of refugees and the fulfillment of their rights. Concerning the setting of a legal precedent such distortions could be proven even more dangerous than a direct violation of international law.[21]

EU policies contained provisions which were undermining international legal norms, even before its agreement with Turkey. The EU formulated a framework which was already keen in compromising its responsibilities under international as well as under its own law, violating the provisions of the Geneva convention and the refugees' "migration choice".[22] It was in such a framework, that the EU-Turkey agreement was adopted.

B. The EU-Turkey agreement:

1. The nature of the EU-Turkey agreement: treaty or not?

The European agenda was followed by the EU-Turkey agreement which constitutes until now, the main instrument of the EU policy in the current crisis. An initial question refers

[21] In addition, it cannot be overlooked that the fore-mentioned policy contradicts EU law as well. Under Council Directive 2003/109/EC of 25 November 2003 about the status of third-country nationals who are long-term residents, it is provided that it "...should be approximated to that of Member States' nationals and ... [that] a person who has resided legally in a Member State for a period of time to be determined and who holds a long-term residence permit should be granted in that Member State a set of uniform rights which are as near as possible to those enjoyed by citizens of the European Union." A quantitative limit such as the one of 160.000 refugees concerning relocation, regardless of the potential granting of asylum in a first entrance EU member- state and the subsequent long term residence is contradictory to the fore- mentioned provision.
Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, para. 2.
This same directive in article 3 contains a provision that it"... does not apply to third-country nationals who (d) are refugees or have applied for recognition as refugees and whose application has not yet given rise to a final decision;" In this sense and given that even after the potential granting of asylum by an EU member- state, refugees will not have the right to relocate, there is still violation of EU own law.
Another EU directive is also breached. The Family Reunification Directive determines that "To protect the family and establish or preserve family life, the material conditions for exercising the right to family reunification should be determined on the basis of common criteria", as well as that "Special attention should be paid to the situation of refugees on account of the reasons which obliged them to flee their country and prevent them from leading a normal family life there. More favorable conditions should therefore be laid down for the exercise of their right to family reunification." The imposition of the 160.000 relocated refugees limit, if comprehended as a benchmark for limiting the number of incoming refugees in general, implies a negative attitude towards the spirit and the goals of the directive.
Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, paras. 6,8.
Last but not least, the relocation provisions intensify legal uncertainty as they do not exemplify in the courts of which state the applicant has the right to appeal against a negative decision, especially when the request is rejected by the authorities' state of potential origin and not by Greece or Italy. In practice that could lead to a denial of justice for thousands of applicants.

[22] Ryan Bubb, Michael Kremer & David Levine, 'The Economics of International Refugee Law', (2011), 40(2), The Journal of Legal Studies, 367, 370.

to the legal characterization of the agreement: is it an international agreement, under article 216 of the treaty for the European Union - TEU - between the EU and Turkey and is therefore binding for all member-states or merely a political declaration?

On the one hand there is the denial of its comprehension as a treaty:[23] it did not follow the procedure which is foreseen in article 218 of TEU, the wording of the document is different from that of treaties and it is labeled as a statement[24]-bearing thus only political consequences in case it is violated.[25]

The completely opposite approach, argues that is "a full-fledged normative scheme, spelling out specific conduct for the parties."[26] Analyses, invoking for example the ICJ decisions in the Aegean Sea Case[27] and in the case of Maritime Delimitation and Territorial Questions between Qatar and Bahrain,[28] which interpreted the definition of treaty on the basis of the true will of the states participating in it, suggest that the true will of EU and Turkey was to establish a treaty between them.

The same argumentation refers also to the fact that new obligations are imposed through the agreement.[29] The wording of the agreement implies an identical classification. Characteristically, it is provided that "The EU and Turkey today decided to end the irregular migration from Turkey to the EU. In order to achieve this goal, they agreed on the following additional action points".[30]

The EU General Court gave an inconclusive hint, in its T-192-/16- Order, by suggesting that "an international agreement could have been informally concluded during the meeting of 18 March 2016".[31] While the general wording indicated a great deal of reluctance on behalf of the Court to explicitly recognize the agreement as an international treaty, it still did not exclude such a classification of the agreement.

The second argument seems more accurate than the primary. The significance that both parties attribute to the implementation of their agreement and the intended bindingness of its provisions indicate that the scope of the agreement was be approached as a treaty, that it functions as a treaty and that therefore it must be considered as a treaty. This is not a matter of "legal scholasticism". Apart from the actual consequences that the agreement has on refugees regardless of its characterization for as long as it is implemented, its recognition as a treaty further influences international legal norms on the issue, sets binding standards

[23] G. F. Arribas, The EU- Turkey Agreement: A Controversial Attempt at Patching Up a Major Problem, (2016), 1(3), *EuropeanPapers*, 1097, at p. 1098.
[24] *Spijkerboer, Minimalist Reflections on Europe,* 551-552.
[25] *Arribas, The EU- Turkey Agreement, at* p. 1098.
[26] E. Cannizzaro, *Disintegration Through Law?* , (2016), 1(1), *EuropeanPapers*, 1, at p. 4.
[27] *Aegean Sea Continental Shelf(Greece v. Turkey)*, [1978], ICJ.
[28] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain(Qatar v. Bahrain)*,[1994], ICJ.
[29] *Spijkerboer, Minimalist Reflections on Europe,* 553-554.
[30] *Cannizzaro,* Disintegration Through Law?, at p. 4.
[31] *Order Of The General Court T-192-/16, par. 72.*

for the signatory members and provides rights to individuals in terms of challenging the agreement's provisions.

The approach to the "statement" as a treaty "upgrades" its significance and subsequently its positive or negative effect on asylum seekers and in relation to the compliance of the EU with the substance of international law. Summing up, the nature of the agreement as a treaty seems to be the prevalent in theory and most well justified approach. On such a basis it is analyzed below within the framework of international law, as well as of EU law - which is after all continuously invoked in the administrative process which takes place in accordance with the agreement.

2. Evaluation of the treaty in a normative framework

The assessment of the legal impact of the EU-Turkey agreement as treaty is articulated on an explicit and implicit basis or in other words both in a purely normative, as well as a factual basis. The agreement met fierce criticism in terms of the compliance to international and EU law.

Some of its controversial provisions have been the following: "All new irregular migrants crossing from Turkey into Greek islands as from 20 March 2016 will be returned to Turkey. This will take place in full accordance with EU and international law, thus excluding any kind of collective expulsion. All migrants will be protected in accordance with the relevant international standards and in respect of the principle of non-refoulment. It will be a temporary and extraordinary measure which is necessary to end the human suffering and restore public order ... For every Syrian being returned to Turkey from Greek islands, another Syrian will be resettled from Turkey to the EU taking into account the UN Vulnerability Criteria. A mechanism will be established, with the assistance of the Commission, EU agencies and other Member States, as well as the UNHCR, to ensure that this principle will be implemented as from the same day the returns start. Priority will be given to migrants who have not previously entered or tried to enter the EU irregularly ... Turkey will take any necessary measures to prevent new sea or land routes for illegal migration opening from Turkey to the EU, and will cooperate with neighboring states as well as the EU to this effect."[32]

The point which refers to the return of all new irregular migrants crossing from Turkey into Greek islands seems to imply a collective expulsion, in violation of the EU Charter and the ECHR, prohibiting refoulment.[33] The United Nations High Commissioner for Refugees has already expressed his deep concern over the lawfulness of the agreement, under

[32] European Council, EU-Turkey statement, (18 March 2016).
[33] Steve Peers, The final EU/Turkey refugee deal: a legal assessment, EU Law Analysis, (March 18, 2016), <eulawanalysis.blogspot.gr/2016/03/the-final-euturkey-refugee-deal-legal.html> accessed 26-03-2016).

both international and European law on the grounds among other things of this provision as well.[34]

Again, it is important to stress the difference between explicit and implicit policies. It is true that the rest of the provision attempts to ease the fear about collective expulsion, making reference to the equivalent commitment of the EU to the principle of non-refoulment. It is also true though, that the EU, on the basis of such provisions and their implicit meaning has attempted to accelerate the repatriation of asylum seekers not always on a correct legally and factually approach.

On the contrary, they have adopted an approach of collective denial of the refugee status and expulsion on the basis of the country of origin, with the most characteristic case being that of Afghanistan, in the case of which and on the basis of uts cooperation with the EU, the latter encouraged its member-states to swiftly implement repatriation of asylum seekers to Afghanistan and implicitly to be more reluctant in attributing international protection to asylum-seekers coming from Afghanistan, regardless of the conditions in the latter. In addition, one has to pay attention to the reports about falsified "voluntary" repatriations.[35]

As for the returns of "illegal migrants", in the EU commission report, one year after the agreement, the EU data referred to 1504 returns, compared to the 627 in 2016.[36] It is true that the number of returns from Greece to Turkey have not been high, up to the extent that it has been considered as endangering the sustainability of the agreement, especially because of the denial of the Hellenic asylum service committees to comply with the imperatives of the agreement. Nevertheless, the pressure from the agreement in terms of accomplishing its goal to minimize the restrain of influxes to the EU member-states and to secure the EU "internal borders" led indirectly but clearly to the "shame" of the "hotspots" in the Greek islands, prohibiting the free movement of asylum seekers in Greece, which was the case before the EU-Turkey agreement.

The scope of the agreement, which is to discourage the flow of asylum seekers through the imposition of a nexus of administrative barriers has led to poor - if not awful - living conditions, massive imposition of geographical restrictions which are lifted only for very serious cases of vulnerabilities, long delays in the asylum procedure and eventually violations

[34] UNHCR, UNHCR's reaction to Statement of the EU Heads of State and Government of Turkey, 7 March, (March 8th, 2016), <www.unhcr.org/56de9e176.html>, accessed 28.03.2016.

[35] European Council on Refugees and Exiles, EU Migration Policy and Returns: Case Study of Afghanistan, at pp. 2, 22-24, (www.ecre.org/wp-content/uploads/2017/11/Returns-Case-Study-on-Afghanistan.pdf, access. 27-1-2018).
In this framework, Amnesty International has condemned the expulsion of 10.000 Afghanis from EU governments, despite the fact that they face threats for their life, of torture etc.
A. Shea, European governments return nearly 10,000 Afghans to risk of death and torture, Amnesty International, (October 5, 2017), (www.amnesty.org/en/latest/news/2017/10/european-governments-return-nearly-10000-afghans-to-risk-of-death-and-torture, access. 27-1-2018).

[36] European Commission, EU-Turkey Statement, One Year On (ec.europa.eu/home-affairs/sites/home-affairs/files/what-we-do/policies/european-agenda-migration/background-information/eu_turkey_statement_17032017_en.pdf, access. 27-1-2018).

of human rights and international law standards.[37] Where the forced returns to Turkey did not work, the "voluntary" repatriations because of the condition of a practically indefinite detention has been proven much more effective.[38]

The deliberate, bureaucratic obstacles to quick asylum procedures have taken the form of a nexus of administrative practices, which can be hardly identified textually, leading to an equivalent lack of information for asylum seekers and to further violations of their rights[39] and to deterioration of their living conditions, not only in the short-term but also in the long-term.[40] Greek judicial authorities have also mainly conformed with the imperatives of the administration.

[37] M. J. Alpes, S. Tunaboylu, I. V. Liemprt, Human Rights Violations by Design: EU- Turkey Statement prioritizes from Greece over access to Asylum, 2017(29), European University Institute, p. 2, (www.statewatch.org/news/2017/nov/eui-greece-turkey.pdf, access. 27-1-2018).

[38] Ibid, at pp. 5-6.

[39] There is a characteristic variety of practices which can be identified only through field work and which are designed in order to delay and discourage potential asylum- seekers from applying for asylum, not only in the islands but in the mainland too. For example, while Greek Law 4375/2016, following the equivalent EU regulations, foresees that as soon as an individual expresses the will to apply for asylum should not be further detained, albeit for exceptional reasons related to public order and national security, the practice of the authorities is the imposition of administrative detention varying from a few days- usually for Syrians- up to 18 months- usually for Pakistanis, Bangladeshis etc. The same practice is extensively used for immigrants whose asylum applications have been rejected and who cannot be forcefully returned to their country of origin. Administrative detention constitutes almost a national strategy for dealing with asylum seekers or immigrants, in violation of international, EU law, as well as the Greek constitution. While this situation did not emerge solely after the EU- Turkey agreement, the latter has further deteriorated it.
E. Koutsouraki, The Indefinite Detention of Undesirable and Unreturnable Third-Country Nationals in Greece, (2017), 36(1), *Refugee Survey Quarterly*, 85, at pp. 85-106.
On top of that, the standard practice is for individuals who express their will to seek for asylum while detained to face prolonged detention, until the decision- several months later- has been issued by the asylum service. On the contrary, if they do not express their will they might be released with a police note ordering them to deport from the country usually within 30 days. In the meantime they attempt to have access to the asylum service, via skype, which in most cases is impossible within such a limited period of time. Under such conditions they continuously re-enter the vicious circle of administrative detention, depicting the failure in terms of compliance with international and EU law, of the implementation of the EU provisions in Greece.
The European Court of Human Rights, in several cases has reached decisions which find unlawful, administrative detention for far less amount of time. Indicatively see:
ECHR, Shamsa v Poland, (2003);
ECHR, Riad and Idiab v Belgium, (2008);
ECHR, Khlaifia and Others v Italy, (2016);
ECHR, Ilias and Ahmed v Hungary, (2017);
However, in the J.R. And Others v Greece, case, the Court found that there had not been violation of Article 5 par. 1, regarding the right to liberty and security, since the center where they were detained, after their first month of detention had become a semi-open center. There was however a violation of article 5, para. 2, regarding their right to be properly informed of their rights and reason for detention.
In numerous other cases, the Court found violations in relation to article 3, prohibiting inhumane and degrading conditions of detention.
ECHR, Dougoz v Greece, (2001);
ECHR, S.D. v Greece, (2009);
ECHR, A.A. V Greece;
ECHR, M.S.S. V Belgium and Greece, (2011);
ECHR, R.U. V Greece, (2011)- where also a violation of article 13 was found;
ECHR, A.F. V Greece, (2013);
ECHR, Horshill v Greece, (2013);
ECHR, Sakir v Greece, (2013);
The fore-mentioned cases about inhumane treatment took place before the current crisis and the EU-Turkey agreement. That is indicative of another deliberate omission of the agreement, namely the fact that the EU denied to take into account the poor results of Greece in relation to the protection of immigrants' and asylum-seekers' human rights, even before the emergence of the current situation. By imposing extra burden on an already highly inefficient state mechanism, the results were not difficult to be foreseen.

[40] Indicatively: Human Rights Watch, EU/Greece: Asylum Seekers' Silent Mental Health Crisis, (July 12, 2017), (www.hrw.org/news/2017/07/12/eu/greece-asylum-seekers-silent-mental-health-crisis, access. 28-1-2018).

Another side-effect lies in the substitution in praxis, of the individualization principle by a "nationalization" principle. In other words, the prevalence of unofficial administrative practices "allows" the discrimination of asylum-seekers on the basis of their country of origin, in line with the asylum ratio. Potential asylum-seekers from countries of origin with small percentage of acceptances face harsher treatment, in terms of detention and access to the asylum service, in comparison with asylum seekers from countries with high percentage of acceptances.

From the analysis above it becomes apparent that the main point of concern and of problematic compliance of the EU-Turkey agreement, with international and EU law is not only or mainly the exact wording of the agreement, but the consequences which emerge out of the scope of the agreement and the specific implementation that the former necessitates, given the conditions on the ground. The agreement is designed in a way which does not let it explicitly contradict human rights and international law standards, although it sets the framework for such a development.

Another controversial point of the agreement is that Turkey is recognized as a safe third country, meaning as "... a non-EU country where an asylum-seeker can apply for asylum and be granted access to asylum procedures and reception conditions in line with international and EU law."[41] The recognition of Turkey as a safe third country is necessary in order for the EU to appear as acting in conformity with article 33 of the Geneva Convention, when agreeing on the return of potential asylum seekers to Turkey. Article 33 provides that "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."[42]

Parenthetically, it must be mentioned that the invocation of the concept of the safe third country is not a panacea. In the Geneva Convention there is no direct reference to the concept of safe third country but only implicit reference in article 33. In addition, these implicit references are related to the non-prosecution on the grounds of illegal trespassing of the borders of a state. There is no mention of potential rejection of an asylum application on the grounds that it should have been submitted at a safe third country.[43] In such a sense, the insistence on the safe third country, according to certain, well-justified approaches could undermine the inherent scope of the Geneva Convention and more specifically, article 31.[44] Under such an approach, the whole structure of the EU in general and of the EU-Turkey

[41] Steve Peers & Emanuela Roman, The EU, Turkey and the Refugee Crisis: What could possibly go wrong? EU Law Analysis, (February 5, 2016), <eulawanalysis.blogspot.gr/2016/03/the-final-euturkey-refugee-deal-legal.html>, accessed 26-03-2016).
[42] *Convention Relating to the Status of Refugees,* Article 33.
[43] E. Roman, T. Baird & D. Radcliffe, Analysis: Why Turkey is not a "Safe Country", *Statewatch*, (February, 2016), at p. 6.
[44] R. Byrne, & A. Shacknove, The Safe Country Notion in European Asylum Law, (1996), 9, *Harvard Human Rights Journal*, 185, at pp. 189-190.
C. Costello, The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection? (2005), 7, *European Journal of Migration and Law*, 35, at p. 40.

agreement could be placed under serious doubt, regarding its lawfulness under international law.

Nevertheless, it must be taken into account that the UNHCR, in its 1991 "Background Note" recognized "that it has some basis in the phraseology of the Convention". Under certain preconditions namely that the asylum-seeker "can enter and remain there, is protected there against refoulment and is treated in accordance with basic human standards, will not be subject there to persecution or threats to safety and liberty (on this, see also Conclusion No. 15, para (k)), has access to a durable solution" the safe third country principle can be acceptable.[45]

It is true that a general abolition of the safe third country principle seems out of place in the current circumstances, given the legal arguments in its favor as well as the need for administrative efficacy. Nevertheless, it is true that a general reliance on the labelling of a country as safe third country in order to collectively reject asylum applications is in violation of international law - and as is indicated below of EU law too. In addition, the determination of the safe third country should genuinely comply with the above criteria, which especially in relation to the criterion of durable solution should include socio-economic factors too.

According to article 38 of the of the EU Asylum Procedures Directive, the standards for a third country to be recognized as safe are that " life and liberty shall not be threatened on account of race, religion, nationality, membership of a particular social group or political opinion; there shall be no risk of serious harm - i.e. death penalty; torture or inhuman or degrading treatment; or a serious threat to the applicant's life due to indiscriminate violence in situations of conflict; the principle of non-refoulment in accordance with the Geneva Convention shall be respected; and the possibility shall exist for the applicant to claim refugee status and to receive protection in accordance with the Geneva Convention."[46]

The same directive, in paragraph 2(c) also determines that "The application of the safe third country concept shall be subject to rules laid down in national law, including: rules in accordance with international law, allowing an individual examination of whether the third country concerned is safe for a particular applicant which, as a minimum, shall permit the applicant to challenge the application of the safe third country concept on the grounds that the third country is not safe in his or her particular circumstances. The applicant shall also be allowed to challenge the existence of a connection between him or her and the third country in accordance with point (a)."[47]

[45] UNHCR, Background Note on the Safe Country Concept and Refugee Status Background Note on the Safe Country Concept and Refugee Status EC/SCP/68, (1991).
[46] Official Journal of the European Union, Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013on common procedures for granting and withdrawing international protection (recast), article 38.
[47] *Ibid.*

In simpler terms, the term "safe third country" describes "a state through which a person fleeing from his or her country of origin has passed and where he or she could have found protection, but has not done so."[48]

The EU legislation for safe third country has been criticized as too broad, since it does not call explicitly for "fair and efficient asylum procedure" and because of the discretion it leaves upon national states.[49] In regards with the EU-Turkey agreement though, the matter of debate is the compliance or not of the agreement with these - possibly already problematic - EU law standards.

The recognition of Turkey as a safe third country gathered extensive criticism from the undersigning of the agreement. As Peers and Roman comment: "First, Turkey ratified the 1951 Geneva Convention and its 1967 Protocol, but maintains a geographical limitation for non-European asylum-seekers, thus recognizing refugees originating only from Europe (i.e. from countries which are members of the Council of Europe) ... Moreover, Syrians represent a particular case. They were at first received as 'guests' and then subject to a temporary protection regime...Syrians have a right to reside in the country but are denied the prospect of a long-term legal integration. They have access to limited rights compared to asylum-seekers in the 'normal' procedure... Secondly, Turkey should respect the principle of *non-refoulment*, a prohibition on returning a person to a place where he or she faces a risk of persecution, torture, or inhuman or degrading treatment. However, several reports suggest that Turkey has engaged in *refoulment* and push-back practices throughout the years 1990s and 2000s ... Thirdly ... Turkey has a record of treating asylum-seekers and refugees harshly in detention: episodes of torture or inhuman or degrading treatment have been reported by NGOs ... and condemned by the ECtHR in a series of judgments."[50]

Serious allegations by refugees concerning their treatment by Turkish authorities cannot be simply overlooked.[51] It is indicative that in the second report of the EU Commission on the progress about EU-Turkey agreement, in terms of refugees' living conditions and rights, most of the "progress" on Turkey's side is consisted of "written assurances" and limited visits on behalf of EU officials in refugee camps in Turkey.[52]

In such a sense, the main objections against the recognition of Turkey as a "safe third country" focus on four characteristics of Turkey: the internal conditions of human rights, especially at the aftermath of the coup and the allegations about illegal refoulment; the active involvement of Turkey into the Syrian internal conflict against mainly - but not only -

[48] *Roman, Baird & Radcliffe, Analysis: Why Turkey is not a "Safe Country"*, at p. 6.
[49] *Roman, Baird & Radcliffe, Analysis: Why Turkey is not a "Safe Country"*, at p. 7.
[50] *Peers & Roman, The EU, Turkey and the Refugee Crisis: What could possibly go wrong?*
[51] C. Letsch, Turkey putting Syrian refugees 'at serious risk of human rights abuse, *The Guardian*, (November 27, 2015).
[52] European Commission, Communication from the Commission to the European Parliament, the European Council and the Council, Second Report on the progress made in the implementation of the EU-Turkey Statement, (15-6-2016), 5.

the Kurdish population; the non-ratification of the Geneva Convention; the lack of durable solutions for asylum seekers and of a credible asylum system, leading to large scale exploitation and destitution of asylum-seekers;[53]

Apart from the skepticism towards the status of asylum-seekers residing in Turkey in general, the status of Syrian asylum-seekers poses a distinct issue, with its own severity. Turkey imposed a special status to Syrians, recognizing them as "guests" instead of refugees and thus excluding them from the UNHCR protection scheme and from the refugee status. Still Syrians are entitled to some extent of temporary protection which resembles to that of international protection - such as the non-refoulment principle - without meeting the Geneva convention standards though.[54] Their status, despite its protection clauses,[55] in general lacks legal certainty, increasing their vulnerability, insecurity and manipulation for political reasons on behalf of the Turkish government.[56] On top of these conditions, a distinction between Syrians residing in camps and Syrians residing in border - or other cities - needs to be made in relation to their living conditions.[57] The complicated status of Syrians in Turkey which excludes them from international protection and resettlement to other states too is characteristic of analyses about the precarious conditions which arise out of uncertainty - among other things - about the interpretation and the implementation of law.[58]

Such considerations led second-level Greek asylum committees to overturn decisions which initially had rejected Syrian refugee's requests not to be expelled to Turkey, bringing at the fore-front the concerns about the lawfulness of the agreement.[59] They formed into line with the recommendation by the UNHCR in its report about the EU-Turkey agreement.[60]

However, and despite the even more serious concerns which have been raised following the attempted coup in Turkey and the ongoing Turkish invasion in Syria, the EU is persistent in treating Turkey as a safe third country, for profound political reasons. Taking into

[53] R. Killig, Turkey's Evolving Migration Identity, *Migration Policy Institute*, (July 24, 2014) (Available at http://www.migrationpolicy.org/article/turkeys-evolvingmigration-identity, access. 29-1-2018).
[54] O. Durukan, AIDA, Asylum Information Database, Country Report Turkey, *European Council on Refugees and Exiles*, (December, 2015), at pp. 105-107.
[55] The principle of non-refoulment is endorsed. Some guarantees about residence and access to social services, although not in explicit ways and unlimitedly, regarding the right to work, to education and social assistance.
M. Ineli-Ciger, Implications of the New Turkish Law on Foreigners and International Protection and Regulation no. 29153 on Temporary Protection for Syrians Seeking Protection in Turkey, (2015), 4(2), *Oxford Monitor of Forced Migration*, 28, at pp. 30-32.
[56] S. Özden, Syrian Refugees in Turkey, *MPC- Migration Policy Centre, European University Institute*, (2013), at p. 6-7.
[57] F. Baban, S. Ilcan & K. Rygiel, Syrian refugees in Turkey: pathways to precarity, differential inclusion, and negotiated citizenship rights, (2016), *Journal of Ethnicand Migration Studies*, 1, at p. 6.
[58] Feyzi Baban, Suzan Ilcan & Kim Rygiel (2016): Syrian refugees in Turkey: pathways to precarity, differential inclusion, and negotiated citizenship rights, (2016), *Journal of Ethnic and Migration Studies,* 1 at pp. 6-8.
[59] A. Fotiadis, H. Smith & P. Kingsley, Syrian refugee wins appeal against forced return to Turkey, *theguardian*, (May 20, 2016)
[60] UNHCR, 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, (March 23, 2016).

account the conditions on the ground and the legal framework, the attribution of the status of safe third country to Turkey is unjustified.[61]

Another point of the agreement, which initially had gathered criticism is the one foreseeing that "For every Syrian being returned to Turkey from Greek islands, another Syrian will be resettled from Turkey to the EU taking into account the UN Vulnerability Criteria. The criteria for such a trade-off were left unclarified. It was not clear under what criteria some refugees would return to Turkey, while others would remain in Greece or even further move further onto their desired destinations.

While this provision was not implemented in practice at a large extent, still as an idea indicated an approach, which instead of equality under international law attempted to establish unequal treatment, giving rise to ethic-political issues. Even worse, the principle of non-refoulment in fact and in practice could have been compromised had the agreement been fully implemented.

The fore-mentioned trade-off was supposed to take place solely between Greece and Turkey and in this sense, it was again indicative of mainly state-centered approach on behalf of the EU to the "refugee crisis".

Equally arbitrary is the point of the agreement which places a differentiated treatment of refugees arriving up to the 20th of March of 2016 and the ones after that date. Refugees before the 20th of March are entitled to relocation while the rest are excluded. There is however no factual or normative - in terms of international or EU law - ground for such unequal and arbitrary treatment, which clearly contradicts the guiding principles of international law both regarding the individualization of the refugee and the right to equal treatment which must govern all legal systems invoking the rule of law. The emergency situation in terms of asylum-seekers influxes did not cease after the 20th of March of 2016. Even currently, that the influxes remain strong albeit at a lesser extent than during 2016, the "entrapment" of asylum-seekers in Greece piles up but the temporary relocation scheme is absent. In a certain way, the EU stance towards the issue follows the media coverage and the deterioration of the internal within the EU political attitude towards the "refugee crisis".

A last, important remark is the one about the choice of "extra-territorialization" on behalf of the EU, which partially is adopted in relation to the agreement with Turkey, too.[62] The

[61] Among other reasons, Turkey as well as Greece, contrary to the Geneva Convention, have detained refugees for the sole reason of illegal entrance.
"The detention of applicants should be applied in accordance with the underlying principle that a person should not be held in detention for the sole reason that he or she is seeking international protection, particularly in accordance with the international legal obligations of the Member States and with Article 31 of the Geneva Convention."
Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection.
[62] The same choice is more profound in its relationship with Libya.

extra-territorialization refers to the strategy of migration control outside one's own territory, such as the EU in this case.[63] The spirit of the agreement as well as part of it - more explicitly - transfer to Turkey the responsibility to keep refugees in its territory, instead of moving into EU territory, so that only a portion of them is later chosen for admission into the EU. In the case of its agreement with Turkey the extra-territorialization resembles more to "outsourcing" and assignment.

The "advantages" from the EU, prevalent, state-security perspective are the diffusion of political pressure on EU member-states governments and the - even - less judicial and administrative that refugees have at their disposal outside EU territory. A question which arises is whether the EU bears responsibility for the refugees who reside in Turkey because of its agreement with the latter,[64] in the context of extraterritorial responsibility.[65]

According to article 16 of the International Law Commission - ILC - report on state responsibility "A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:(a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State."[66]

According to ILC report commentary, the article refers for example to cases "... where a State voluntarily assists or aids another State in carrying out conduct which violates the international obligations of the latter, for example, by knowingly providing an essential facility or financing the activity in question."[67] The provision of aid or assistance, together with the knowledge of the wrongfulness of the act constitute prima facie evidence for meeting the threshold of article 16.

Concerning the EU-Turkey agreement, while the EU does not exercise control over Turkish authorities actions and despite the fact that refugees and asylum seekers do not reside in Turkey solely because of the agreement, a significant portion of them are trapped in Turkey because of the agreement, for the implementation of which the EU aids Turkey, despite being aware of the violations of asylum seekers' and refugees' rights as long as they

[63] B. Ryan, Extraterritorial Immigration Control: What Role for Legal Guarantees?, in B. Ryan & V. Mitsilegas, *Extraterritorial Immigration Control: Legal Challenges*, (2010, Martinus Nijhoff), at p. 3.
[64] A way out of this discussion lies with the European Court decision which is analyzed below and according to which the EU-Turkey statement is -at most- an agreement between the individual governments and Turkey. Even if it is accepted as an accurate decision, the responsibility could lie with each government. However, the argument of the article is that the European Court decision is wrong in the interpretation of the true nature of the agreement.
[65] While the latter refers to state responsibility, the analysis in the last part about the EU as a subject of international law justifies the analogical implementation of the articles about state responsibility in the EU case as well.
[66] Articles on Responsibility of States for Internationally Wrongful Acts (2001) UN doc. A/Res/56/83.
[67] *Ibid,* at p. 66.

reside in Turkey.[68] In such a sense both the subjective and the objective elements are present and therefore the EU bears responsibility for the commitment of wrongful acts.[69]

Concluding on the fore-mentioned analysis, a brief reference to its assessment from the perspective of the EU order policy needs to be done. The scope of the EU asylum policy has been declared as being "to develop a common policy on asylum, subsidiary protection and temporary protection, with a view to offering an appropriate status to all third-country nationals who need international protection, and to ensure that the principle of non-refoulment is observed."[70]

A necessary precondition for that though is a common policy for the management of external borders, with the scope of combining state and EU security concerns with humanitarian concerns. The EU-Turkey agreement has been a corner-stone for the security of external EU borders and from such a perspective it has been proven rather efficient. The data from Greek Asylum Service as well as from EU authorities indicate a restrain of incoming asylum-seekers in the EU territory.[71]

The prevalence of the security perspective, in combination with the political developments in EU member-states determined up to a large extent the formation, the interpretation and the implementation of the EU-Turkey agreement. This is why the fore-mentioned analysis focused not only on the exact wording of the agreement but on its implicit meaning, as well as its consequences on the ground, in the following part.

3. Evaluation on the basis of the conditions on the ground

While the fore-mentioned analysis provides a picture of the level of compliance of EU policies with international law in a purely normative framework, the consequences of these policies on the ground are equally important in terms of fulfillment of refugees' and asylum seekers' rights and therefore regarding the compliance with international law.

[68] The European Court of Human Rights- ECHR- in the "Ivantoc and Others vs The Republic of Moldov and Russia" case found that the provision of economic support is cause for finding that a state is extraterritorially responsible fr wrongful acts. In that case, the degree of dependency of the separatist area from Russia was overal, much more extensive compared to the EU- Turkey relationship. However, regarding the presence of certain refugees in Turkey, the agreement with the EU and the assistance from the latter is also absolutely crucial and catalyst.
European Court of Human Rights, Extra-territorial jurisdiction of States Parties to the European Convention on Human. Rights, (February 2016), (http://www.echr.coe.int/Documents/FS_Extra-territorial_jurisdiction_ENG.pdf, access. 14-8-2017).
[69] B. Vandvik, Extraterritorial Border Controls and Responsibility To Protect: A View From Ecre, (2008), 1(1), *Amsterdam Law Forum*, 27, at p. 31.
[70] European Parliament, Migratino and Asylum: A Challenge for Europe, Fact Sheets on the European Union, (January 10, 2018), (www.europarl.europa.eu/RegData/etudes/PERI/2017/600414/IPOL_PERI(2017)600414_EN.pdf, acces. 30-1-2018).
[71] EU Commission, EU- Turkey Statement, One Year On, (ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/eu_turkey_statement_17032017_en.pdf, access. 30-1-2018), at p. 2.

From the wording of the agreement with Turkey it becomes obvious that the main burden of the management on the ground lies with the first-entrance, EU countries.[72] The administrative burden is maximized concerning the countries of first entrance, while the rest take on the responsibility to provide help on a more or less voluntary basis but, most important, from a safe distance. Due to that, on the one hand extended delays concerning the assessment and the response to the refugees' claims take place, together on the other hand with highly problematic standard livings in refugee camps, deteriorating both their residence and the exercise of their rights.[73]

The pace of the examination of relocation, re-unification and asylum applications has been slow. The 14th report of the European Commission on Relocation and Resettlement, which was issued at the 26th of July, 2017 characteristically mentioned that "in total, more than 24,600 people have now been relocated as 24 July 2017 (16,803 from Greece and 7,873 from Italy)", compared to 160.000 people goal. "In Italy, there is still a significant number of migrants eligible for relocation".[74]

Greece - almost - completed the registration for relocation procedure as late as of summer of 2017. The pace of relocation accelerated during 2017 but still was uneven-ranging from 2000 the most, in June 2017 to 1.600 in July 2017.[75] In addition, with a pace of 2000 relocations per month at most, it would take years for the threshold of 160.000 relocations to be met. In the same report the stretching of Italian authorities' capacities to deal with the situation is pointed. Eventually, according to the data which is provide by the International Organization for Migration - IOM - from both Greece and Italy, until January 2018, a total of 33,459 asylum-seekers were relocated.[76]

Below the surface of this rather diplomatic language, the actual conditions on the ground remain bleak. In the special committee of the Greek Parliament for Equality, Youth and Human Rights discussion for refugee policy at July 27th of 2017, the legal counselor of the ministry of migration policy admitted that in the Greek islands the situation "... is not good" and that 15.000 asylum seekers remain trapped, due to the geographical restrictions. He also acknowledged that 1350 unaccompanied minors did not have access to "safe-zones"

[72] "Only national authorities can set up (with the support of EU funding) and manage well- functioning reception infrastructures, provide the direction and the link with key players such as local authorities, social services, law enforcement and the managers of reception facilities."
[73] The EU data speak for themselves: "The total number of irregular migrants who have reached the EU by sea and land (i.e. via Greece and Bulgaria) was 56 887 until 29 February. Most of them i.e. 56 335 or 99% crossed the Aegean Sea to the Greek islands. The daily average of irregular crossings to Greece was 1 943 until 29 February, 19 to Bulgaria and the total was 1 962. On a weekly basis, irregular arrivals to Greece were on average 13 358...The total numbers of irregular arrivals from Turkey to Greece in September, October, November, December 2015, January and February 2016 were respectively 147 639, 214 792, 154 381, 104 399, 61 602 and 56 335.For the same months the corresponding daily averages were 4 921 persons, 6 929,5 146, 3 368, 1 987 and 1 943." EU Commission, European Union Preparatory Acts, Report from the Commission to the European Parliament and the Council, EU-Turkey Joint Action Plan - Third implementation report, EU: COM(2016) 144 Celex No. 516DC0144, (February 10, 2016).
[74] EU Commission, "Report from the Commission to the European Parliament, the European Council and the Council, Fourteenth report on relocation and resettlement", Brussels, 26.7.2017, COM(2017) 405 final, pp. 1-2.
[75] Ibid, at pp. 3-4.
[76] IOM Office in Greece, EU Relocation Programme, (greece.iom.int/en/eu-relocation-programme, access. 30-1-2018).

or accommodation centers.[77] A consequence of that is the adoption of the measure of "protective custody", which is in fact a type of unofficial detention in police stations.[78]

In a more outspoken analysis, the Greek Ombudsman in the special report of April 2017 referred to living conditions of asylum-seekers and refugees in the islands of Easter Aegean, under geographical restriction because of the EU-Turkey agreement, as failing to meet even the minimum, acceptable standards.[79]

The criticism of the Greek Ombudsman extended to the administrative practices, regarding both the general population and the most vulnerable groups. Indicatively it mentioned that: "However, still today, more than a year after the Statement, there is still no integrated management plan, with a clear, stated and coherent narrative, with milestones and deliverables, targets and time frames of implementation that are complied with."[80] An important aspect of the Ombudsman's report is that while it does not overlook the Greek authorities responsibilities, it still stresses that those are connected with the EU-Turkey agreement framework as - up to a large extent - an outcome of the latter too.

The "hot-spots" model which was adopted both in Greece and in Italy[81] constitutes an

[77] Greek Parliament, Special Permanent Committee of Equality, Youth and Human Rights, Minutes of 27 July, 2017, (asylo.gov.gr/wp-content/uploads/2017/07/%CE%A0%CF%81%CE%B1%CE%BA%CF%84%CE%B9%CE%BA%CE%AC%CF%83%CF%85%CE%BD%CE%B5%CE%B4%CF%81%CE%AF%CE%B1%CF%83%CE%B7%CF%82-%CE%95%CE%B9%CE%B4%CE%B9%CE%BA%CE%AE%CF%82%CE%95%CF%80%CE%B9%CF%84%CF%81%CE%BF%CF%80%CE%AE%CF%82%CE%92%CE%BF%CF%85%CE%BB%CE%AE%CF%82-27.7.2017.pdf, access. 13-8-2017).

[78] Both geographical restrictions and "protective custody", apart from deteriorating the living conditions of asylum seekers, in addition violate article 7 of the Greek Constitution according to which "There shall be no crime, nor shall punishment be inflicted unless specified by law in force prior to the perpetration of the act, defining the constitutive elements of the act.", article 5 of the European Convention on Human Rights about the right to liberty and security, as well as articles 3,5 and mainly article 9 of the Universal Declaration of Human Rights.
Hellenic Parliament, The Constitution of Greece, Article 7, para. 1, (www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20aggliko.pdf, access. 13-8-2017);
European Convention on Human Rights, Article 5, (www.echr.coe.int/Documents/Convention_ENG.pdf, access. 13-8-2017);
Universal Declaration of Human Rights, Articles 3, 5 &9, (www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf, access. 13-8-2017).

[79] The Greek Ombudsman, Special report on migration flows and refugee protection, (April 2017), p. 8, (www.synigoros.gr/resources/docs/greek_ombudsman_migrants_refugees_2017_en.pdf, access. 13-8-2017).

[80] *Ibid*, at p. 9.

[81] In relation to Italy reference should be made not only to the EU-Turkey agreement but to the even more problematic in terms of compliance with international law.
OXFAM, Oxfam Media Briefing, You Aren' t Human Anymore, (August 9, 2017), (www.oxfam.org/sites/www.oxfam.org/files/file_attachments/mb-migrants-libya-europe-090817-en.pdf, access. 13-8-2017).
The "sinful" history of the collaboration of the EU with Libya goes back into the past. Even before the civil war and the collapse of the Libyan state the conditions for the refugees in Libya violated the lowest standards of international protection: "At least hundreds, possibly thousands, are said to be held in police stations, prisons and camps around the country. Some are held temporarily for a matter of days, while others are left to languish in cells for months and even years, often without understanding the whys and wherefores of their detention."
S. Hamood, African Transit Migration Through Libya To Europe: The Human Cost, The American University in Cairo, Forced Migration and Refugee Studies, (January, 2006), (schools.aucegypt.edu/GAPP/cmrs/reports/Documents/African_Transit_Migration_through_Libya_-_Jan_2006_000.pdf, access. 13-8-2017).
D. Lutterbeck, Migrants, weapons and oil: Europe and Libya after the sanctions, (2009), 14(2), *The Journal of North African Studies*, 169, at pp. 170-184.
Obviously, the conditions have deteriorated even further since Libya became a failed state. Still, the EU continues to work with the Libyan authorities, despite the fore-mentioned conditions.

essential part of the EU refugee policy.[82]

More than a year after their initiation they have done very little to ease the concerns about the fulfillment of international legal standards. A recent report which has been compiled by several NGO's acting on the field both in Greece and Italy found that procedural guarantees as well as guarantees against refoulment are not always respected at a satisfactory level, the swiftness of administrative practice is not always of the appropriate level, there is legal uncertainty regarding their function, little positive contribution into the relocation procedure and of course: "Reception conditions are inadequate and often below standard ... Conditions in the hotspots do not entirely fulfil the demands for safety, health and hygiene, including basic amenities and security of the place. Repeated security incidents in the two countries show that the safety of those accommodated in the hotspots cannot be fully guaranteed. Moreover, these transit sites are used for prolonged accommodation, whereas they should only be used for a few days."[83]

The common denominator of all of the fore-mentioned reports as well as of many more is that the deteriorating and non-satisfying conditions on the ground, is not an outcome merely of national authorities in competencies but also a direct or indirect result of the EU-Turkey agreement. Again, the same condition comes at the forefront: it is not only about the explicit wording of the agreement; possibly even more important are the implications and the implicit goals and consequences of the agreement both at the normative level and on the ground. The agreement per se and its provisions raised concerns; its implementation under the prevalent securitization approach within it has caused distress if not desperation. This is not always directly attributable to the EU. Greek authorities' incomptencies have their own significant part. Still, it is the EU which despite knowing these defects adopted a framework which it was obvious or at least easily assumed that would lead to their deterioration.

C. The ECJ decision: lack of judicial guarantees?

A rather unexpected paragon deteriorating the judicial guarantees of asylum seekers and refugees in the framework of the EU-Turkey agreement has been the EU Court of Justice decision following an application of three applicants of Pakistani and Afghan nationality.

[82] "...in such a "Hotspot" approach, "the European Asylum Support Office, Frontex and Europol will work on the ground with frontline Member States to swiftly identify, register and fingerprint incoming migrants. The work of the agencies will be complementary to one another. Those claiming asylum will be immediately channelled into an asylum procedure where EASO support teams will help to process asylum cases as quickly as possible. For those not in need of protection, Frontex will help Member States by coordinating the return of irregular migrants. Europol and Eurojust will assist the host Member State with investigations to dismantle the smuggling and trafficking networks."
Explanatory Note on the 'hotspots' approach, (www.statewatch.org/news/2015/jul/eu-com-hotsposts.pd, access. 13-8-2017).

[83] A. Papadopoulou et al., The Implementation of the Hotspots in Italy and Greece, A Study, Sutch Council for Refugees, (www.ecre.org/wp-content/uploads/2016/12/HOTSPOTS-Report-5.12.2016.pdf, access. 13-8-2017).
Also, about Italian hotspots, indicatively see: Amnesty International, Hotspoty Italy: Abuses of Refugees and Migrants, (www.amnesty.org /en/latest/campaigns/2016/11/hotspot-italy/, access. 13-8-2017).

The applicants turned against the European Council, arguing that their rights were endangered and violated on the basis of a potential risk of refoulment to Turkey or 'chain refoulment to Pakistan or Afghanistan.

In addition, they claimed that they were "compelled to make their applications for international protection in Greece." Their pleas against the agreement invoked: "failure to comply with the procedures set out in Article 218 TFEU and/or 78(3) TFEU; failure to apply Council Directive 2001/55/EC of 20 July 2001;incompatibility with EU fundamental rights, notably with Articles 1, 18 and 19 of the Charter of the Fundamental Rights, invalidity on the grounds that the case law of the European Court of Human Rights and the Court of Justice shows that there are serious flaws in the present Greek asylum system at all levels, including absence of an effective remedy and deficient reception facilities; incompatibility with the prohibition of direct and indirect refoulment; invalidity on the grounds of being based on the unlawful conclusive assumption that Turkey is a safe country; invalidity on the grounds of breach of the prohibition of collective expulsion."[84]

Seemingly, the EU-Turkey agreement would at least have a positive side-effect in the sense that it could give to the individuals the right to challenge the agreement in front of the Court of Justice of the EU - CJEU - or the European Court of Human Rights - ECHR.[85]

However, in a disappointing first decision, the General Court declared that it lacks jurisdiction. The EU, which in numerous occasions refers publicly to the EU-Turkey agreement as binding for both parts and as guided by international and EU law[86] through the Council argued in front of the Court that "to the best of its knowledge, no agreement or treaty in the sense of Article218 TFEU or Article 2(1)(a) of the Vienna Convention on the law of treaties of 23 May 1969 had been concluded between the European Union and the Republic of Turkey. The EU-Turkey statement, as published by means of Press Release No 144/16, was, it submitted, merely 'the fruit of an international dialogue between the Member States and [the Republic of] Turkey and - in the light of its content and of the intention of its

[84] Council of the European Union, Information Note from Legal Service to Permanent Representative Committees, (June 7, 2016).
[85] *Spijkerboer, Minimalist Reflections on Europe,* at p. 556.
[86] Apart from the announcement of the agreement per se, indicatively reference can be made to the EU Commission fact sheet of December 8, 2016, entitled " Implementing the EU-Turkey Statement – Questions and Answers" in which it is characteristically mentioned that it was EU too-apart from its member states- and Turkey which agreed on the specific terms of the agreement, that President Juncker appointed the EU coordinator for the implementation of the agreement, that a "...steering committee, chaired by the Commission with Greece, the European Asylum Support Office (EASO), Frontex, Europol, and representatives of the Council Presidency, France, the United Kingdom and Germany, oversees the implementation of the Statement", as well as that "EU Agencies are providing substantial and critical support to the implementation of the Statement."
Even more, in the same document it is provided that "People who apply for asylum in Greece will have their applications treated on a case-by-case basis, in line with EU and international law requirements and the principle of non-refoulment – the EU-Turkey Statement has made this very clear."
European Commission, European Commission - Fact Sheet, Implementing the EU-Turkey Statement – Questions and Answers, (December 8, 2016), (http://europa.eu/rapid/press-release_MEMO-16-4321_en.htm, access. 3-4-2017).

authors - [was] not intended to produce legally binding effects nor constitute an agreement or a treaty'."[87]

The applicant opposed this argumentation by referring to the content and the circumstances of the agreement. The Court did refer to the fact "that the action for annulment laid down in Article 263 TFEU must be available in the case of all measures adopted by the institutions, bodies, offices and agencies of the Union, whatever their nature or form, provided that they are intended to produce legal effects"[88] and declared that it must seek for the true nature of the act on the basis of its content and of the surrounding circumstances.

However, it unfortunately accepted more or less the argumentation of the Council,[89] failing to capture accurately the actual nature of the agreement, the most favorable - towards refugees - version of formal wording of the Press Release No 144/16, as well as the profound political circumstances and legal consequences, which clearly indicate that the EU organs comprehend the agreement with Turkey as a legally binding document, that has been concluded in the name of the EU or in other words as a treaty, the implementation of which is of vital significance not only for the EU member-states but for the EU per se, too.

It was held that "For the sake of completeness, with regard to the reference in the EU-Turkey statement to the fact that 'the EU and [the Republic of] Turkey agreed on … additional action points', the Court considers that, even supposing that an international agreement could have been informally concluded during the meeting of 18 March 2016, which has been denied by the European Council, the Council and the Commission in the present case, that agreement would have been an agreement concluded by the Heads of State or Government of the Member States of the European Union and the Turkish Prime Minister."[90]

Such decisions further deteriorate the legal protection of asylum seekers and refugees and generate legal uncertainty. Especially in relation to the relocation procedure it deprives asylum seekers of any actual judicial guarantee and review towards administrative acts.[91]

Given that the implementation of relocation is based on a trilateral relationship - among Turkey and two EU member-states - or at least on a bilateral horizontal relationship be-

[87] *Order Of The General Court T-192-/16, par. 27.*
[88] *Order Of The General Court T-192-/16, par. 42.*
[89] Despite regretting the "ambiguous terms of the EU-Turkey statement".
Order Of The General Court T-192-/16, par. 66.
[90] Order Of The General Court T-192-/16- Order(First Chamber, Extended Composition), ECLI:EU:T:2017:128, (28 February 2017), par. 72.
[91] In such as sense, reference must be made to Cannizzaro's argument that the agreement was concluded in violation of article 218 of TEU and that therefore the only source of legitimacy could be the consent of the member-states of the EU making the agreement therefore a treaty of international law.
Cannizzaro, Disintegration Through Law? , at p. 5.

tween two EU member-states under the framework of the EU-Turkey agreement, the approach to the latter as a sum of bilateral agreements of individual states with Turkey, in essence deprives it of its horizontal, legal nature and of judicial remedies at the EU level.

Conveniently enough for itself, the EU implements its decisions in a grey semi political - semi legal area, with as little as possible accountability on its part. The Court of Justice decision has up to now deprived asylum seekers of essential guarantees and in such a sense has further deteriorated the EU legal framework.

II. The EU influence on the formation of international law

The last remark that needs to be examined, on the basis of the fore-mentioned analysis refers to the actual impact of EU policies on the matter, from the perspective of international law. The questions are two: do EU policies comply with international law, implementing it up to a satisfying extent? What kind of precedent do they set? The answer to the first question is that the compliance of EU in relation to its agreement with Turkey, with international law is not satisfying. The actual terms of the agreement raised serious concerns. The implementation of the agreement proved these concerns to be accurate.

The second question requires some extent of further analysis, including a brief examination of the way of international law formation.[92] International law is a porous and open to continuous transformation system,[93] on the basis of the up to a large extent - although not

[92] Through the term formation, I do not refer solely to the "defining moments" of international law and the adoption of specific treaties or conventions, but also to a continuous process, which is comprised both by defining moments as well as by gradual, legal "silting" and influences, inflicted by the variety of international community actors, state and non- state alike, taking the form both of conventional and of customary law.
A. Cassese, *International Law in a Divided World,* (1st edn, Oxford Clarendon Press, 1986), 222.
J. Crawford, Fourth Report on State Responsibility. UN Doc. A/CN.4/517 (2001).
A. Peters, Membership in the Global Constitutional Community, in J. Klabbers, A. Peters & G. Ulfstein eds., *The Constitutionalization of International Law,*(1st edn., Oxford University Press, 2009), at p. 153.
[93] Such a condition becomes apparent in relation to custom and conventions.
A. D'Amato, *The Concept of Custom in International Law*, (1st Edn. Cornell University Press, 1971), at p. 88.
M. Akehurst, 'Custom as a Source of International Law', (1977), 47, BybIL,1, 3.
Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict,* (Cambridge University Press,2004), at p. 5.
For example, article 2 paragraph 1 of the UN Charter: "The Organization is based on the principle of the sovereign equality of all its Members."
UN Charter, Article 2, par. 1.
The diversity of the actors, exceeding the sole participation of states in the international community constitutes a factor for further pressure towards a de-centralized structure.
Fourth Report on State Responsibility. UN Doc. A/CN.4/517 (31 March 2001) (Professor James Crawford).
However, such an absolute position in favor of a unilateral, state-centered, de-centralized approach to the international community fails to comprehend important legal as well as political developments, which widen and deepen the centralized, legal institutionalization of the international community. Similar impact has the tendency of proximity of international law and national legal orders. However and despite the fore-mentioned significant developments, still a completely centralized international community, under for example a universal government or statehood, is far from being present. It is on such a basis that states but also regional organizations remain highly influential actors.
C. Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century, General Course on Public International Law', (1999), 281, *Recueil Des Cours,* 9, at p. 161.
Klabbers, Setting the Scene, 11.
N. Tsagourias, The Will of the International Community as a Normative Source of International Law, in I.F. Dekker & W. G. Werner eds., *Governance and International Legal Theory,* (Martinus Nijhoff Publishers, 2004), 101-103.
Thomas Franck, *The Power of Legitimacy among Nations,* (1st Edn, .Oxford University Press, 1990), 196-197.

solely - horizontal structure of the international community,[94] within which states and international organizations play a crucial role.[95]

In such a framework not only the original "enactment" or conclusion of international legal norms but also their implementation, by a variety of actors, determines up to a large extent its development. In particular, a generalized interpretation of international legal norms, even a distorted one, could set the precedent for the gradual erosion of international legal standards.[96]

The EU role in the formation of international law is derived from the unique, "state-like" nature of the EU, which attributes to it an even stronger impact. As the EU legal adviser noted at the Sixth Committee of the International Law Commission, "the European Union has legal personality and is subject of international law exercising rights and bearing responsibilities."[97]

The EU possesses an advanced role, since it constitutes a sovereign entity, of quasi-federal type, establishing up to some extent direct, primary and autonomous procedures of law-making, of self-legitimization and sustainment.[98]

One way for the implementation of the EU role as subject of international law is through its participation as a signatory member to international treaties.[99] Not only it is not doubted

[94] G. Schwarzenberger, 'International Jus Cogens?', (1965), 43, Texas Law Review, 455, at p. 467.
D. Shleton, 'Normative Hierarchy In International Law', (2006), 100, American Journal of International Law, 291, 291.
As professor Greenwood explains, contrary, to domestic legal systems, "There is no "Code of International Law". International law has no Parliament and nothing that can really be described as legislation... The result is that international law is made largely on a decentralized basis by the actions of the 192 States which make up the international community."
C. Greenwood, Sources of International Law: An Introduction, (United Nations- Office of Legal Affairs, 2008) < http://legal.un.org/avl/pdf/ls/greenwood_outline.pdf,> accessed 6-8-2016.
[95] A stable point of reference in such a direction is the Lotus case and its reasoning concerning the role of states in the formation of international law.
The case of the S.S. 'Lotus' (France v Turkey),[1927], PCIJ, Publ., Series A, No. 10, at p. 18.
J. Kammerhofer, 'Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems', (2004), 15(3), EJIL, 523 at pp. 528-529, 550.
[96] J. D' Aspremont, 'The Idea of Rules in the Sources of International Law', (2014), 84(1), British Yearbook of International Law, 103, at p. 116.
[97] Statement on behalf of the European Union by Eglantine Cujo, Legal Adviser, Delegation of the European Union to the United Nations, at the Sixth Committee on Agenda item 78 on Identification of customary international law, 3 November 2014, <http://eu-un.europa.eu/eu-statement-united-nation-6th-commission-identification-of-customary-international-law/> accessed 10-8-2016).
The EU has endorsed this principle. As the European Court of Justice held in the "Anklagemyndigheden v. Peter Michael Poulsen and Diva Navigation Corp." case, "...the European Community must respect international law in the exercise of its power...".
ECJ, Case C–286/90, Anklagemyndigheden v. Peter Michael Poulsen and Diva Navigation Corp. [1992] ECR I–6019, para. 9.
Identical was the reasoning in the A. Racke case.
Case C–162/96, *A. Racke GmbH & Co. v Hauptzollamt Mainz* [1998] ECJ ECR I–3655, para. 45.
[98] According to article 189 of the Treaty of Rome: "In order to carry out their task the Council and the Commission shall, in accordance with the provisions of this Treaty, make regulations, issue directives, take decisions, make recommendations or deliver opinions. A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States."
The Treaty of Rome, (25 March, 1957), (www.gleichstellung.uni-freiburg.de/dokumente/treaty-of-rome, access. 29-1-2015).
Lindseth, Democratic Legitimacy And The Administrative Character Of Supranationalism, at p. 636.
P. Lindseth, 'The Contradictions Of Supranationalism: Administrative Governance And Constitutionalization In European Integration Since The 1950s', (2003), 37, Loyola of Los Angeles Law Review, 363, at p. 363.
[99] That is after all why the Vienna Convention on the Law of Treaties between States and International Organizations and between International Organizations , in article 2 foresees that "treaty" means an international agreement governed by international law and concluded in written form: (i) between one or more States and one or more international organizations; or (ii) between international

that the EU can be a member to international treaties, as is by now the case with more than 1.000 treaties, but even further it is clear that the EU plays a major role in the conclusion of these treaties and the formation of international law.[100]

The EU reserves for itself an identical role, in relation to custom. Again, the EU legal adviser in front of the ILC held that "international community considers an organization such as the EU as also capable of contributing to the development of international law in other contexts, including the formation of customary international law."[101]

There is another aspect also, of EU influence on international law which is related to the situation under examination: the majority of refugees attempt to reach or reside in EU member-states. That means that the EU policies, practically determine whether international legal norms will be implemented or not and up to what extent, in the context of the current crisis.

In addition, the self-perception of the EU as an entity committed to the rule of law, to international law and to human rights, as well as the rather extended consensus over this view means that the EU problematic compliance to international law, could "justify" a more "flexible" interpretation and implementation of international law by other actors as well.[102]

Last but not least, the EU policies in general and even more in particular have significant effects on its member-states and through them to international law. Given for example that states always possess the essential authority to attribute the status of refugee and rights flowing out of it, to an individual or not,[103] EU policies and practices indirectly influence international law, through its member-states as well.[104]

organizations, whether that agreement is embodied in a single instrument or in two or more related instruments and whatever its particular designation".
Vienna Convention on the Law of Treaties between States and International Organizations and between International Organizations, 1986, Article 2.

[100] Ramses Wessel, 'Flipping the Question: The Reception of EU Law in the International Legal Order, (*Paper presented at the Annual Conference of the European Society of International Law, Interest Group, The European Union as a Global Actor, Riga, Latvia,* September 7-9, 2016*)*,<https://euglobal.files.wordpress.com/2016/08/flipping-the-question-wessel-esil-riga-paper-1.pdf>, accessed 28-8-2016, 8.
Marise Cremona, 'The Union as a Global Actor: Roles, Models, and Identity', (2004) 41, Common Market Law Review, 553, 557

[101] *Statement on behalf of the European Union by Eglantine Cujo.*

[102] *Wessel, Flipping the Question: The Reception of EU Law in the International Legal Order,* at pp. 19-20.

[103] Vaughan Lowe & C. Warbrick, 'Refugees; Investment Promotion And Protection Agreements; The International Tin Council', (1987), 36(4), British Institute of International and Comparative Law, 924, 925.
Lydia Morris, 'Globalization, Migration and the Nation-State: The Path to a Post-National Europe?', (1997), 48(2), The British Journal of Sociology, 192 at p. 198.

[104] Here lies another source of concern though, given that the implemented practices on behalf of member-states differ at large concerning both the living conditions and the asylum procedures. Failures in the Common European Asylum System most often emerge on the basis of failure or denial on behalf of member-states to comply even with the problematic or inefficient standards, provided in it.
T. Spijkerboer, 'Minimalist Reflections on Europe, Refugees and Law', (2016), 1(2), European Papers, 533, 538.

Conclusions

Even before the current crisis, there were indications that the immigration and refugees' influxes were confronted by the EU mainly through national state security perspective, leading to a non-satisfying compliance with international law standards.[105] Apart from some controversial provisions of Dublin regulations, reference may be made to the opt-outs of EU member-states from the regulations themselves.[106] In the current crisis, such attitude by member-states reached the level of further breach to the righteous core of the EU: the Schengen treaty.

The critical point in order to comprehend the shaping of EU policy on the issue of the current and ongoing "refugee crisis" is that while its external border policy, attempts to balance between international law imperatives and its member-state concerns, the latter is gaining over time momentum at the expense of the former.[107] In this framework, a "securitization" approach becomes prevalent, in the sense of altering or re-interpreting existing legal norms - or introducing new ones - from the perspective of member-states' security necessities, quite often in an emergency framework too.[108]

Even further, the fact that, because of its inherent characteristics, the EU security approach is fragmented among its member-states creates a situation of internal and often contradictory security concerns, which up to a significant extent compromise further the compliance

[105] J. Pirjola, 'European Asylum Policy: Inclusions and Exclusions Under the Surface of Universal Human Rights Language', (2009), 11, European Journal of Migration& Law, 347, at pp. 347-366.

[106] N. El Enany, EU Migration and Asylum Law under the Area of Freedom, Security, and Justice, in A. Arnull & D. Chalmers, *The Oxford Handbook of European Union Law,* (1st edn., Oxford University Press, 2015), 871.

[107] Up to an increasing extent, contemporary EU approach bears the "stamp" of EU member-states governments as well as right wing and xenophobic parties. The so-called Visegrad group countries, although not only them, play a leading role in the state-centered approach to securitization of the refugee crisis, calling for closed borders. This same mentality expands to other states gradually, such as Germany, too.
Al Jazeera, Hungarian PM: We don't want more Muslims, (September 4, 2015).
J. Huggler, Austria threatens to send in troops to stop asylum-seekers, *The Telegraph*, (February 13, 2016).
Visegrad Group, Joint Statement on Migration, (February 15, 2016).
DW, Poland abamdons promise to take in refugees after Brussels attacks, (23.03.2016).
M. Arens, Austria Coloses its Borders to Refugees, Center for Research on Globalization, (January 26, 2016), <www.globalresearch.ca/austria-closes-its-borders-to-refugees/5503754>, accessed 27.03. 2016).
Xenophobic, right- wing populist parties took the advantage at the fastest pace of the last decades, especially since last year. Countries such as Hungary, Poland, Netherlands, Sweden, Finland, Denmark, Germany, Austria, France, Italy, Slovakia, Greece, Belgium pose some striking examples of the emergence of far- right and xenophobic if not openly fascist parties, either through significant election results or through their participation in national governments.
One of the points all these parties and movements share is that they label refugees and immigrants as a threat, mainly in terms of terrorism, criminality and breaching of cultural homogeneity, necessitating the maximization of state security. These conditions within the EU, indicate the reasons and the extent up to which, the EU agenda on refugee and immigration is formulated on the basis of state interests and concerns.
Other parties too however, not only xenophobic find it hard to overcome the "refugee crisis" implications, as the recent political developments in Germany indicate.
DW, Grand coalition talks adjourned over key refugee issue, (29-1-2018), (www.dw.com/en/grand-coalition-talks-adjourned-over-key-refugee-issue/a-42346390, access. 30-1-2018).

[108] A. W. Neal, Securitization and Risk at the EU Border: The Origins of Frontex, (2009), 47(2), *JCMS*, 333, at p. 335.

of the EU as a whole with international law standards, as well as the rights and living conditions of asylum-seekers too.[109]

This is one of the two main areas for the consequences of the EU-Turkey agreement: the distortion of the perspective through which the refugee crisis is approached. Being a refugee instead of being primarily approached from the prism of potential risk and necessary protection of the person at risk,[110] is at a large extent - if not prevalently - approached through the prism of national and EU security.

After all, it is not coincidental that while much ink has been spilled and much political pressure has been exercised bilaterally, for the maintenance of the agreement in terms of the (non-) passage of refugees from Turkey to Greece, much less has been done concerning refugees' living conditions their rights under international law or in terms of enhancing the administrative capacities of the states of first entrance.

On the basis of the fore-mentioned, in the article at hand, the issue of the EU-Turkey agreement has been approached in relation of its explicit and of its implicit terms. In such a framework, the EU-Turkey agreement has been found to violate certain principles and the scope of international law. On the one hand, it reverses the legal precedent of the individualization of the refugee, contrary to international law,[111] as well as EU law,[112] through the imposition of arbitrary quantitatively, timely and geographically defined criteria, leading both to violations of refugees' rights and to unequal treatment among them. It also labels as a safe third country Turkey, although the latter does not fulfill the criteria to be considered as such. On the other hand, even where there is no direct violation of international law, the whole concept leads to procedures which are slow, overlapping, confusing and degrading of refugees in terms of their living conditions and subsequently human dignity.[113]

There is another potential consequence: the EU forms - up to some extent - a precedent concerning the interpretation of international law on this issue. Such a precedent, when set by the EU bears a qualitatively upgraded "mark", given the self-approach and the attitude

[109] O. Wæver, The EU as a Security Actor: Reflections from a Pessimistic Constructivist on Post-Sovereign Security Orders, in Williams, M.C. And Kelstrup, M. (eds), *International Relations Theory and the Politics of European Integration: Power, Security, and Community*, (2000, London: Routledge), at pp. 250-294.
[110] Paul Weiss, 'The international protection of refugees', (1954), 48,(2), The American Journal of International Law, 193, 193-194
[111] *Akram,Palestinian Refugees and Their Legal Status*, 36.
[112] EU Parliament & EU Council, Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), Official Journal of the European Union, (29.6.2013), para. 19, article 5.
[113] G. DeBurca, 'The Road Not Taken: The European Union as a Global Human Rights Actor', (2011), 105(4), The American Journal of International Law, 649, 671.

of other international actors towards the EU[114] in terms of its role as a global beacon of human rights and democracy,[115] within the greater framework of human security.[116]

There are of course two last "alibies" or lines of defense of the EU: other "western" states impose much harsher treatment to refugees and asylum seekers. Australia poses for example such a case, with its infamous Manus island.[117] It is true that the EU achieves much better results from a humanitarian perspective in relation to such conditions. That is not good enough though. In fact, in a period of deteriorating positions towards asylum-seekers globally, the EU has failed to emerge as the actor which attempts to reverse this deteriorating path.

The second "line of defense" lies with the need of the EU to keep a balance among its internally diversified interests and approaches. The argument in defense of the EU-Turkey agreement is sound but still irrelevant to the assessment of its actual impact. While it is understandable that the political quarrels among EU member-states have their impact on the EU refugee policy, still it is the legal and factual outcome that is assessed.

In such a sense, it can be concluded that EU policies in the framework of the refugee crisis undermine international law, on the one hand by failing to meet up to it standards and by directly or indirectly breaching its principles and on the other hand by potentially setting a precedent which could "legitimize" similar distortion in the future.

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[114] *G. DeBurca, The Road Not Taken: The European Union as a Global Human Rights Actor,* at p. 649.
[115] However, it is also true that the EU has been criticized for a double- standard approach differentiating between its calls concerning human rights towards non EU member states and EU member states, with the latter "enjoying" up to some extent a hands-off approach by the EU.
DeBurca, The Road Not Taken: The European Union as a Global Human Rights Actor, at p. 682.
[116] J. Matlary, 'Much Ado About Little: The EU and Human Security', (2008), 84(1), International Affairs, 131, 138.
[117] R. Hamilton, Australia's Refugee Policy is a Crime Against Humanity, *Foreign Policy*, (February 23, 2017).
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