Introduction

1 EU Hotspots as a Critical Challenge to Human Rights

In November 2019, the EU Fundamental Rights Agency (FRA) concluded that the EU hotspot approach, i.e., the approach to conduct asylum procedures in refugee camps at external borders, 'brings along built-in deficiencies' and 'creates fundamental rights challenges that appear almost unsurmountable.'[1] The agency's head was even more straightforward when they told the European Parliament that 'the EU hotspot approach as implemented in Greece is the single most worrying fundamental rights issue that we are confronting anywhere in the European Union'.[2]

The list of reports substantiating fundamental rights violations in EU hotspots is long. Consistent and extensive documentation by UN bodies, the Council of Europe, EU bodies, Greek national bodies, and NGOs clearly shows that deficiencies in EU hotspots are widespread and structurally inherent to their administration.[3] Fundamental rights violations, including violations of the prohibition of inhuman treatment as enshrined in Art. 3

1 Fundamental Rights Agency, Feb 2019, Update of the 2016 Opinion on fundamental rights in the 'hotspots' set up in Greece and Italy, p. 7. This study understands 'human rights' as encompassing 'fundamental rights'.

2 EU observer, 7 November 2019, Greek migrant hotspot now EU's 'worst rights issue', https://euobserver.com/migration/146541 (all links last accessed 1 May 2024, unless indicated otherwise).

3 For a few relevant reports, see, OHCHR, 3 November 2017, UN Special Rapporteur on the human rights of migrants concludes his follow up country visit to Greece, https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19976&LangID=E; Council of Europe, 19 February 2019, Report to the Greek Government on the visit to Greece carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 10 to 19 April 2018, CPT/Inf (2019) 4; Médecins Sans Frontières, 5 September 2019, A disastrous policy: vulnerable people trapped on the Greek islands pay the price of inhumane policies of the EU-Türkiye deal, https://www.doctorswithoutborders.ca/article/disastrous-policy-vulnerable-people-trapped-greek-islands-pay-price-inhumane-policies-eu; Danish Refugee Council, October 2017, Fundamental Rights and the EU Hotspot Approach, https://drc.ngo/media/4051855/fundamental-rights_web.pdf; Greek Ombudsman, Andreas Pottakis, April 2017, Special Report. Migration flows and refugee protection. Administrative challenges and human rights issues, https://www.synigoros.gr/?i=human-rights.en.recentinterventions.434107.

of the Convention of on Human Rights (ECHR) and Art. 4 of the EU Charter of Fundamental Rights (ChFR), occur regularly and result from the construction of the procedure as such. In this sense, the EU hotspot administration can be described as systemically deficient.[4]

Two kinds of systemic deficiencies can be distinguished: those related to reception conditions and those related to asylum procedures. Reception-related deficiencies include instances of inhuman or degrading treatment in violation of Art. 4 ChFR due to disastrous living conditions, in particular for vulnerable persons,[5] and violations of Art. 6 ChFR resulting from systemic detention practices.[6] Procedure-related deficiencies include violations of the right to be heard under Art. 41 ChFR, of the specific procedural guarantees for children under Art. 24 ChFR, and of the procedural dimension of the prohibition of refoulement as enshrined in Art. 4, 18, 19 ChFR.[7]

Systemic violations of fundamental rights in EU hotspots should not be seen in isolation. As numerous studies by scholars and NGOs have shown, the European asylum system as a whole has come to rest on practices that either per se constitute fundamental rights violations[8] or de facto result

4 On the concept of systemic deficiencies see Armin von Bogdandy, Michael Ioannidis, „Systemic Deficiency in the Rule of Law: What it is, what has to be done, what can be done", *Common Market Law Review* 51 (2014), p. 59-96, p. 60, 91; similarly, Iris Canor, „My brother's keeper? Horizontal solange: 'An ever closer distrust among the peoples of Europe'", *Common Market Law Review* 50 (2013), p. 383-422, p. 385: 'a systemic violation of core European fundamental rights'. For the concept in the specific context of the asylum system see Evangelia (Lilian) Tsourdi, Cathryn Costello, „'Systemic Violations' in EU Asylum Law: Cover or Catalyst?", *German Law Journal* 24 (2023), p. 982-994. On the qualification of the deficiencies in the EU hotspots as systemic see chapter 2, 3.

5 See the ECtHR's jurisprudence cited in fn. 33. Further chapter 2, 3.

6 This is more contentious, because the ECtHR has so far not found a violation of Art. 5 ECHR in the cases that were submitted to it. In detail on the argument for a violation of Art. 6 ChFR see chapter 2, 3.

7 See chapter 2, 3.

8 Consider, for instance, the practice of systemic pushbacks at the EU's external borders with Belarus during the 2020 (see further Catharina Ziebritzki, „Warum die ‚Instrumentalisierung'" Asylsuchender kein Argument für die Aussetzung ihrer Grundrechte ist", *Kritische Justiz* 55 (2022), p. 152-166) or the practice of systemic pushbacks at the EU's external border with Türkiye (see ECRE, 30 Sept 2022, Greece: Systematic Pushbacks Continue by Sea and Land as MEPs Demand EU Action, Deaths Up Proportionate to Arrivals, Number of People in Reception System Reduced by Half – Mitarachi Still Not Satisfied, https://ecre.org/greece-systematic-pushbacks-continue-by-sea-and-land-as-meps-demand-eu-action-deaths-up-proportionate-to-arrivals-number-of-people-in-reception-system-reduced-by-half-mitarachi-still-not/).

in fundamental rights violations and even the death of persons seeking refuge.[9] Considering this, it is truly unsettling that the second package of reforming the Common European Asylum System (CEAS), adopted in spring 2024, does not remedy existing shortcomings[10] but, on the contrary, further consolidates and partially even exacerbates practices that have already proven dysfunctional over the past decade.[11]

At a societal level, the current state of the European asylum system appears to reflect a gradual shift in attitudes towards forced displacement. After the Second World War, when the political focus was on refugees from Europe, European societies largely agreed that persons on flight must be offered refuge.[12] Seventy years later, this political and moral consensus seems to have eroded significantly. As the prevailing narrative increasingly conceptualises migration as a danger or threat – to security and social prosperity, to labour markets and education systems, or more generally to identity in terms of culture, religion, or race[13] – a deeply ingrained fear of 'others' prevails.[14] As a result, fundamental rights violations and even the death of persons on flight are increasingly considered empirically 'normal' and normatively acceptable. This shift in political evaluation is clearly reflected in current media coverage as a barometer of social attention: deaths

9 For the rising number of deaths see only UNHCR, Operational Data Portal as of 15 February 2022, Europe: Dead and Missing At Sea, https://data2.unhcr.org/en/dataviz/95; The Guardian, 20 June 2018, The list: It's 34,361 and rising: how the List tallies Europe's migrant bodycount, https://www.theguardian.com/world/2018/jun/20/the-list-europe-migrant-bodycount.

10 For a similar account, see, Evangelia (Lilian) Tsourdi, Cathryn Costello, „'Systemic Violations' in EU Asylum Law: Cover or Catalyst?" (fn. 4), p. 993: 'It is important to understand the role of EU law in creating the conditions for systemic breaches, (…). Where the CEAS leads to systemic human rights violations, then its reform is the appropriate response.'.

11 For the reform package see EU Official Journal L series daily view, 22 May 2024, https://eur-lex.europa.eu/oj/daily-view/L-series/default.html?&ojDate=22052024.

12 As reflected in the adoption of the Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (hereinafter: Refugee Convention), which was – prior to the adoption of Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 (hereinafter: 1967 Protocol) – applicable only to refugees originating from Europe.

13 On the construction of identity based on these and further parameters see Kwame Anthony Appiah, *The Lies That Bind: Rethinking Identity. Creed, Country, Colour, Class, Culture*, Liveright Publishing 2018.

14 Zygmunt Baumann, *Strangers at Our Door*, Polity Press 2016.

during crossings to European shores, for instance, have long ceased to make the headlines.

From a legal perspective – with the standard being the law of the European society, including the ECHR as the minimal consensus on human rights as well as the ChFR as the corresponding document in EU constitutional law[15] – the EU's asylum policy has, in substantial parts, become unlawful. Practices that are commonly implemented by national authorities and EU bodies, and are partially even normatively sanctioned by EU secondary law, violate basic fundamental rights standards as enshrined in the ChFR. Examples range from regular pushbacks to inhumane reception conditions, the denial of children's and women's rights, or the deprivation of basic procedural rights.[16] In sum, the European asylum system in its current form is normatively misguided and empirically dysfunctional to an extent that structurally calls into question human rights and the rule of law. Put differently, the EU's asylum policy as of 2024 constitutes a threat to the EU's own foundational values as enshrined in Art. 2 of the Treaty on European Union (TEU).[17] This problem does not only concern refugees and asylum seekers. It concerns all EU citizens.[18]

15 On European law in a broad sense as the law of the European society, see Armin von Bogdandy, *The Emergence of European Society through Public Law. A Hegelian and Anti-Schmittian Approach*, Oxford University Press 2024 p. 15 et seq.

16 For a comprehensive assessment of the EU's asylum policy from the perspective of fundamental rights, see Jürgen Bast, Frederik von Harbou, Janna Wessels, *Human Rights Challenges to European Migration Policy. The REMAP Study*, Nomos 2022.

17 Art. 2 TEU reads: 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.'.

18 Similarly, Barbara Grabowska-Moroz, Dimitry Vladimirovich Kochenov, „The Loss of Face for Everyone Concerned. EU Rule of Law in the Context of the 'Migration Crisis'", in V Stoyanova, S Smet (ed.), *Migrants' Rights, Populism and Legal Resilience in Europe*, Cambridge University Press 2022, p. 187-208; Evangelia (Lilian) Tsourdi, Cathryn Costello, „'Systemic Violations' in EU Asylum Law: Cover or Catalyst?" (fn. 4), p. 994, concluding that 'the CEAS (Common European Asylum System) itself brings about systemic human rights violations' (parenthesis added by the author).

2 Europe's Largest Refugee Camps

When the *New York Times* wrote about the most prominent EU hotspot – *Moria*, located on the Greek island of Lesbos – they referred to it as 'Europe's largest refugee camp'.[19] This is an insightful description. First, it makes explicit that EU hotspots, despite the somewhat euphemistic legal term, are, in fact, refugee camps.[20] Second, it correctly reflects the figures. The EU hotspots at the EU's external borders with Türkiye, located on five islands in the Greek Aegean, are indeed the largest refugee camps in Europe. *Moria* had hosted approximately 12,000 refugees and asylum seekers before it was destroyed in September 2020. In total, about 355,000 asylum seekers have stayed in EU hotspots between 2016 and 2023.[21] Third, and perhaps most importantly, the description aptly reflects the European dimension.

The original EU hotspot approach was put forward by the European Commission (Commission) in May 2015.[22] The main novelty in this

19 New York Times, 20 Sept 2020, Fire Destroys Most of Europe's Largest Refugee Camp, on Greek Island of Lesbos, https://www.nytimes.com/2020/09/09/world/europe/fire-refugee-camp-lesbos-moria.html.

20 In its broadest meaning, the term 'refugees' means forced migrants, i.e. all persons entitled to international protection and internally displaced persons, see e.g. UNHCR, Global Trends in Forced Displacement 2020, available online: https://www.unhcr.org/60b638e37/unhcr-global-trends-2020, p. 2. In the colloquial meaning, and the one that is referred to in this study where no other indication is given, refugees are persons entitled to international protection, i.e. refugees in the sense of the Refugee Convention (see fn. 12) and persons entitled to complementary protection under human rights law. The notion 'asylum seekers' is broader insofar as it encompasses all those who have lodged an application for international protection.

21 Per month, between 2,500 and 42,000 persons have stayed in EU hotspots. In 2023, the official capacity in total was between 13,000 or 17,000 places, depending on the source. The number of people staying in the EU hotspots changes on a weekly basis. For an overview and current figures see Boat Refugee Foundation, EU-Türkiye Deal. Visualising data from the Greek hotspots, 2016–2023, https://reliefweb.int/report/greece/eu-Türkiye-deal-visualising-data-greek-hotspots-2016-2023; UNHCR, Operational Data Portal, https://data.unhcr.org/en/search?type=news&sv_id=11&geo_id=640; Hellenic republic Ministry of Migration and Asylum Statistics, https://migration.gov.gr/en/statistika/; Scribr, Uploads by Hellenic Ministry of Migration and Asylum, https://de.scribd.com/user/507807805/Hellenic-Ministry-of-Migration-and-Asylum.

22 European Commission, 13 May 2015, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A European Agenda on Migration, COM(2015) 240 final (hereinafter: European Agenda on Migration), p. 6; European Commission,

approach was that EU agencies – including the European Asylum Agency (EUAA, formerly European Asylum Support Office, EASO), Frontex (European Border and Coast Guard), FRA, Europol (European Union Agency for Law Enforcement Cooperation), Eurojust (European Union Agency for Criminal Justice Cooperation) and eu-LISA (European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice) – as well as the Commission itself were closely involved in the administrative procedures on the ground. Specifically, the agencies were tasked with providing administrative support and the Commission was entrusted with overall coordination and supervision.[23] In terms of geographical scope, the EU hotspot approach was conceived for implementation in several member states and EU hotspot camps were established in Italy and Greece.[24] Yet, this study focuses on the EU hotspots in Greece, which have functioned, since 2015 and until today, as a 'law and governance blueprint' or 'testing ground' for the EU's increased administrative involvement.[25]

In fact, the main difference between EU hotspots and other refugee camps located at the EU's external borders is that the former are co-managed by the European Union itself. EU hotspots are conceptualised and administered jointly by EU bodies and by national authorities. This specificity becomes clear when comparing the refugee camps located at the Hungarian-Serbian border to those at the Greek-Turkish border.[26] Both were established in the aftermath of the 2015 crisis of the CEAS when the EU was confronted with an increased number of asylum claims; both were situated at the EU's external borders; both operated on the basis of physical

July 2015, Explanatory Note on the 'Hotspot' Approach, available at: http://www.statewatch.org/news/2015/jul/eu-com-hotsposts.pdf (hereinafter: EU Hotspot Explanatory Note). See further chapter 1, 2.

23 See further chapter 1, 3.

24 For an overview see European Parliament, 2023, Briefing: The hotspot approach in Greece and Italy, https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2023)754569.

25 See further chapter 1, 2. The EU hotspots in Greece are located on the Aegean islands of Lesvos, Chios, Kos, Samos and Leros. This study takes into account developments from 2015 to 2022.

26 The Hungarian 'transit zones' were closed in May 2022, as a consequence of CJEU, Court (Grand Chamber), judgement of 17 December 2002, European Commission v Hungary, C-808/18. See ECRE, Country Report Hungary, 2022 Update, https://ecre.org/2022-update-aida-country-report-hungary/, p. 54.

confinement;[27] and both applied a border procedure that was based on a safe third country clause.[28] The difference, however, lies in the responsible public actors. Whereas the Hungarian camps were conceptualised and run by national authorities, the camps in Greece are conceptualised and co-managed by national authorities in close cooperation with EU bodies.[29]

Since 2015, the EU hotspot approach has been adjusted to changing practical needs and political preferences numerous times, with two milestones being of particular importance. The first was the adoption of the EU-Türkiye Statement in March 2016.[30] From the day of the entry into force of that Statement, the purpose of the EU hotspot administration was overhauled. Whereas EU hotspots had initially been conceived as relocation centres from where asylum seekers would be transferred to other member states, they were now reconceptualised as deportation centres from where asylum seekers would be forcibly returned to Türkiye. The criticism of this idea as a rather blunt externalisation strategy notwithstanding, the return policy also proved to be completely dysfunctional in practice. Between March 2016 and March 2020, only approximately 2,000 deportations to Türkiye were carried out,[31] and since March 2020, the return policy has even come to a complete standstill.[32] As a result, the number of asylum seekers that were 'trapped' in EU hotspots – not being allowed to travel to the Greek mainland or to other member states, but also not being returned

27 With differences in detail and over time. In more detail on the practice in the EU hotspots see chapter 2, 3.1.b. Only some practices qualify as 'detention', while others qualify simply a restriction of movement.

28 Again, with differences in detail and over time. In more detail on the practice in the EU hotspots see chapter 2, 3.2.c. The 'safe third country clause' is a specific 'protection elsewhere clause' which allow to reject asylum claims as inadmissible without examining the substance of the claim. The 'safe third country concept' presupposes that a person has already found protection in another country; it is similar to the 'country of first asylum concept' which presupposes that a person could find protection in another country.

29 On the EU's inconsistent approach towards Hungary and Greece see chapter 3, 2.1.

30 European Council, Press Release, EU-Türkiye statement, 18 March 2016, https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-Türkiye-statement/. See further chapter 1, 2.

31 UNHCR, Returns from Greece to Türkiye (in the framework of the EU-TUR Statement) as of 31 March 2020, https://data.unhcr.org/en/documents/details/75075. The main reason for these low numbers was that Türkiye did not qualify as a 'safe third country' for most asylum seekers, see further chapter 2, 3.2.c.

32 EU Observer, 19 Jan 2021, Türkiye snubs Greece on migrant returnees; European Commission, 24 May 2022, Sixth Annual Report on the Facility for Refugees in Türkiye, COM/2022/243 final, p. 3.

to Türkiye – grew exponentially. At the same time, the conditions in the camps deteriorated gravely, to the point that the European Court of Human Rights (ECtHR), in several cases, found a violation of the prohibition of inhumane treatment under Art. 3 ECHR.[33]

Eventually, these fatal developments resulted in an event that has become the second milestone in the history of EU hotspots. In September 2020, an uncontrolled fire broke out in the largest EU hotspot, *Moria,* and almost entirely destroyed the camp.[34] As it was clear that the EU hotspot had to be rebuilt in any case and considering the severe deficiencies in terms of administrative dysfunction and ongoing fundamental rights violations, the Commission took the opportunity to present an EU hotspot reform. The reform, enshrined in a Memorandum of Understanding between Greece and the EU,[35] has changed the operation of the EU hotspot administration so profoundly that it is referred to here as 'EU hotspot approach 2.0'. The most important novelty, apart from an expansion of detention practices, was a further increase of the EU's own involvement. The tasks of the EUAA and Frontex were further expanded, and the Commission's role was strengthened to the extent that EU hotspots are now truly 'co-managed' by Greece and the EU.[36]

33 ECtHR, Decision on interim measure of 14 May 2020, A.B. v Greece, Application no. 19614/20; ECtHR, Decision on interim measures of 7 April 2020, M.A. v. Greece, Application no. 15782/20; ECtHR, Decision on interim measures of 26 March 2020, M.A. v. Greece, Application no. 15192/20; ECtHR, Decision on interim measure of 16 April 2020, E.I. and Others v Greece, Application No 16080/20 (available at: https://www.proasyl.de/news/egmr-urteil-fluechtlinge-aus-moria-muessen-menschenwuerdig-untergebracht-werden/). See for further similar decisions: Refugee Support Aegean (RSA), European Court of Human Rights orders Greece to safeguard asylum seekers' life and limb on Lesvos, 24 September 2020, https://rsaegean.org/en/european-court-of-human-rights-orders-greece-to-safeguard-asylum-seekers-life-and-limb-on-lesvos/.

34 See fn. 19.

35 European Commission, Annex to the Commission Decision approving the Memorandum of Understanding between the European Commission, European Asylum Support Office, the European Border and Coast Guard Agency, Europol and the Fundamental Rights Agency, of the one part, and the Government of Hellenic Republic, of the other part, on a Joint Pilot for the establishment of a new Multi-Purpose Reception and Identification Centre in Lesvos, 2 December 2020, C(2020) 8657 final, Annex (hereinafter: MoU Joint Pilot). For now, the Joint Pilot is framed by the Commission as a Greece-specific project, thereby reinforcing the differences between the EU hotspots located in Greece and those in Italy.

36 See further chapter 1, 2; chapter 2.

As both milestones show, the development of EU hotspots is marked by informality. Neither the 2016 EU-Türkiye Statement nor the 2020 Memorandum of Understanding have a clear legal basis in primary law or even formal legal character.[37] As a consequence, the involved EU bodies initially carried out their administrative tasks on the basis of policy papers alone, and their activities were often vested with a legal basis in secondary legislation only years later.[38] Today, the main legal basis is enshrined in the EUAA Regulation and the Frontex Regulation.[39] First, they define a 'hotspot area' as 'an area in which the host Member State, the Commission, relevant Union agencies and participating Member States cooperate, with the aim of managing an existing or potential disproportionate migratory challenge characterised by a significant increase in the number of migrants arriving at the external borders.'[40] Second, they provide for specific agency teams that shall be deployed to EU hotspots for the provision of administrative support, the so-called migration management support teams (MMST).[41] Third, they define the Commission's responsibility to supervise the EU hotspot administration, providing that it 'shall establish the terms of cooperation at the hotspot area and shall be responsible for the coordination of the activities of the migration management support teams'.[42]

37 On the informal character of the EU's crisis response see chapter 1, 2.2.

38 Insofar as the activities of Frontex and the EUAA are concerned, the most important belated legalisation was adopted in the context of the first CEAS reform package between 2016 and 2021, see further chapter 1, 2.2; chapter 2, 1 and 2.

39 Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 (hereinafter: Frontex Regulation); Regulation (EU) 2021/2303 of the European Parliament and of the Council of 15 December 2021 on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010 (hereinafter: EUAA Regulation).

40 Art 2 para 23 Frontex Regulation, Art. 16 para 2 lit. l EUAA Regulation.

41 Art. 2 para 19, Art. 36 para 1 lit d, Art. 40 Frontex Regulation; Art. 16 para 2 lit l, 21 EUAA Regulation.

42 Art. 40 para 3, recital 55 Frontex Regulation; Art. 21 para 2, recital 34 EUAA Regulation. Similarly already Art. 18 para 3 Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC (hereinafter: Frontex 2016 Regulation).

3 The EU's Judicial Responsibility (Research Question)

To address fundamental rights violations, both in individual cases and at a systemic level, it is essential to determine which actor is responsible. While responsibility can be assigned through different social practices, an especially important tool in this context is law.[43] Most legal structures allow to determine who is responsible for what. However, this is not the case in the specific context of asylum policies. To date, the question of who bears responsibility for fundamental rights violations that result from asylum policies largely remains open. This is partly due to sophisticated outsourcing strategies and consistent externalisation of the 'dirtiest' tasks to third countries or private actors, which makes chains of causation extremely difficult to establish. Another reason lies in the fact that the international law framework on allocating responsibility in multi-actor situations remains structurally weak.[44] As a result, legal scholarship on the matter has emerged only recently,[45] and practical possibilities for concerned asylum seekers to claim their rights are still largely lacking.

While legal responsibilities in the context of asylum and externalisation policies remain indeterminate for most countries in the Global North, legal

43 Responsibility in the legal context is often understood as accountability. For the prevalent notion of accountability see Mark Bovens, „Analysing and Assessing Accountability: A Conceptual Framework", *European Law Journal* 13 (2007), p. 447-468, who defines accountability as 'a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences'. This study, however, focuses on legal accountability, i.e. on judicial review.

44 International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10, A/56/10 (DARS); ibid., Draft Articles on the Responsibility of International Organizations, A/66/10 (DARIO). On the applicability of the DARIO to the European Union see Andrés Delgado Casteleiro, *The International Responsibility of the European Union. From Competence to Normative Control*, Cambridge University Press 2016, p. 54–109. For an innovative proposal see André Nollkaemper, Jean d'Aspremont, Christiane Ahlborn, Berenice Boutin, Nataša Nedeski, Ilias Plakokefalos, Dov (collaboration) Jacobs, „Guiding Principles on Shared Responsibility in International Law", *European Journal of International Law* 31 (2020), p. 15-72.

45 Notably, Cathryn Costello, Itamar Mann, „Border Justice: Migration and Accountability for Human Rights Violations", *German Law Journal* 21 (2020), p. 311-334; and the other articles in the cited special issue; Violeta Moreno-Lax, Mariagiulia Giuffré, „The Rise of Consensual Containment: From 'Contactless Control' to 'Contactless Reponsibility' for Forced Migration Flows", in Satvinder Singh Juss (ed.), *Research Handbook on International Refugee Law*, Edward Elgar 2019, p. 82-108.

responsibility of the EU is particularly understudied. Research on whether, and if so, under which circumstances and in which manner, the EU bears responsibility for fundamental rights violations that occur as a result of its asylum policies remains scarce.[46] Although scholarly discourse has recently become increasingly aware of the necessity to examine the EU's role and its responsibilities in the asylum system, its findings to date remain rather limited. Most contributions focus on the EU's responsibility under international law[47] – an approach that comes with built-in practical obstacles and conceptual shortcomings.[48] Contributions that focus on the EU's responsibility under EU law often remain limited to non-judicial review fora such as the European Ombudsman or agency-internal complaints mechanisms.[49]

The lack of research on the EU's legal responsibility is striking when taking into account that the EU has become a very powerful, perhaps the most powerful, public actor in the European asylum system. The EU sets the central legal standards, concludes international agreements, negotiates influential 'deals', and increasingly implements its policies at the administrative level.[50] In terms of content, the EU pursues harsh externalisation policies. In short, the EU has become an 'ordinary' public actor of the Global North. Earlier conceptualisations of the EU as a human rights orga-

46 With research on the responsibility of Frontex in the context of border control being a notable exception.

47 See, for instance, Roberta Mungianu, *Frontex and Non-Refoulement. The International Responsibility of the EU*, Cambridge University Press 2016; Federico Casolari, „The EU's Hotspot Approach to Managing the Migration Crisis: A Blind Spot for International Responsibility?", *Italian Yearbook of International Law* 25 (2015), p. 109-134.

48 For an analysis of the conceptual shortcomings, see Itamar Mann, „Maritime Legal Black Holes: Migration and Rightlessness in International Law", *The European Journal of International Law* 29 (2018), p. 347-372.

49 A notable exception in this regard is the work of Melanie Fink, *Frontex and Human Rights. Responsibility in 'Multi-Actor Situations' under the ECHR and EU Public Liability Law*, Oxford University Press 2018; Melanie Fink, „The Action for Damages as a Fundamental Rights Remedy: Holding Frontex Liable", *German Law Journal* 21 (2020), p. 532-548.

50 For a comprehensive analysis of the EU's role in the administrative context, see Catharina Ziebritzki, *The EU's Responsibility in the Asylum Administration. Administrative Integration, Judicial Protection and the Case of the EU Hotspots*, Dissertation at Frankfurt University, Law Department January 2024.

nisation seem quite out of place.[51] Today, there can hardly be any doubt that the EU poses a severe threat to the fundamental rights of asylum seekers.

From an EU constitutional perspective, however, the EU's role continues to be conceived almost as if it still was a human rights organisation: its responsibilities lack legal contours.[52] There is no tailor-made remedy that would allow individuals to hold the EU responsible before the Court of Justice of the European Union (CJEU). Non-judicial review fora are designed in a deficient manner and, in any case, cannot replace judicial protection.[53] As the CJEU has consistently held since *Les Verts*, the rule of law – more precisely, the fundamental right to effective judicial protection enshrined in Art. 47 ChFR and the principle of effectiveness – require that all public acts, including those issued by the EU itself, are subject to judicial review.[54] This guarantee of judicial protection is comprehensive and applies regardless of whether the conduct in question is formally-binding or factual in nature.[55] Hence, the fact that the EU, in the context of the asylum administration, mainly acts through non-formally binding measures is no argument against judicial review.[56]

The question of the EU's responsibility becomes particularly acute in the case of EU hotspots where administrative integration is particularly ad-

51 Armin von Bogdandy, „The European Union as a Human Rights Organization? Human Rights and the Core of the European Union", *Common Market Law Review* 37 (2000), p. 1307-1338, p. 1317, 1336.

52 Jürgen Bast, Frederik von Harbou, Janna Wessels, *The REMAP Study* (fn. 16), p. 15: 'Today, the European Union (EU) has established itself as a powerful actor in migration policy (…) The EU has yet to adjust to its new role as potential threat to the Human Rights of migrants.'.

53 See further chapter 3, I.

54 CJEU, Court, judgement of 23 April 1986, Parti écologiste 'Les Verts' v European Parliament, 294/83, para 23; CJEU, Court, judgement of 25 July 2002, Unión de Pequeños Agricultores v Council of the European Union, C-50/00 P, para 38–39: '[T]he European Community is, however, a community based on the rule of law in which its institutions are subject to judicial review of the computability of their acts with the Treaty and with the general principles of law which include fundamental rights. Individuals are therefore entitled to effective judicial protection (…)'.

55 For a comprehensive assessment of judicial review against the EU's factual conduct see Timo Rademacher, *Realakte im Rechtsschutzsystem der Europäischen Union*, Mohr Siebeck 2014; Timo Rademacher, „Factual Administrative Conduct and Judicial Review in EU Law", *European Review of Public Law* 30 (2017), p. 399-435.

56 In more detail on the EU's mode of operation, which can be described as 'determining without deciding', chapter 1, 4.3; chapter 2, 1 and 2.

vanced.[57] Close cooperation between EUAA, Frontex and the Commission, on the one hand, and national authorities, on the other, makes it especially difficult to establish who is responsible for what. Certainly, the host member state bears one share of the responsibility. This is apparent already from the numerous interim measures and judgements of the ECtHR condemning Greece for violations of Art. 3 ECHR and obliging it to provide humane reception conditions.[58] But blaming the host member state alone is too easy.[59] The EU's involvement – ranging from the conceptualisation of the EU hotspot approach to the provision of funding and the implementation at the operational level – strongly suggests that the EU bears its share of the responsibility, too. Power comes with responsibility, after all.

Yet, the question of the EU's legal responsibility for systemic fundamental rights violations in EU hotspots remains unanswered. The EU's role and its failures in the EU hotspots have not yet been subject to review before the CJEU. As this study will show, the main reason for this is that relevant stakeholders have no political interest in initiating judicial proceedings on these issues, and affected individuals have not yet been able to fully explore the potential of the EU legal protection system for that matter.[60] So far, there is also no pragmatic scholarly proposal on how to ensure judicial review. Research is mostly limited to evaluating non-judicial review mechanisms – but these fall short of the constitutional requirements, especially the fundamental right to an effective judicial remedy under Art. 47 ChFR, and have, moreover, brought little clarity. Although some proceedings have been initiated before the European Ombudsman, for instance, against the EUAA for its mistakes in connection with asylum interviews in the EU

57 Further on EU hotspots as a paradigm example and 'testing ground' for the EU's new role as central actor in the asylum administration see chapter 1, 2.

58 See fn. 33.

59 Relying on judicial remedies against Greece alone is neither conceptually convincing nor practically effective. Greece systemically fails to implement ECtHR judgements, especially in the areas of migration, borders and asylum, see European Parliament, Resolution of 7 February 2024 on the rule of law and media freedom in Greece, 2024/2502(RSP), para 15. The gravity of the implementation failures is such that the European Parliament in para 27 called 'for a Commission assessment under the Rule of Law Conditionality Regulation (i.e. Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget) of the consequences of the failure to implement relevant judgments by the European courts' (parentheses added by author).

60 See further chapter 3, 2 and 3.

hotspots[61] and against the Commission for its failures in planning and supervising the EU hotspot administration,[62] the Ombudsman's decisions appear to be characterised not only by a lack of enforceability but also by a lack of courage. Her inquiries regularly end with a mere reminder to the administration to do better in the future. Procedures before the agency's internal complaints mechanisms have remained futile, too. The EUAA's complaints mechanism is not even set up yet, and Frontex's mechanism is difficult to access and structurally weak.[63] Based on these or similar findings, existing studies tend to conclude that the EUAA appears 'out of control', that it is almost a 'mission impossible' to hold the EU accountable for its failures in the asylum system or even diagnose an outright 'failure of law' in the EU hotspot context.[64]

61 European Ombudsman, Decision of 5 July 2018, on the European Asylum Support Office's (EASO) Involvement in the Decision-Making Process Concerning Admissibility of Applications for International Protection Submitted in the Greek Hotspots, in particular Shortcomings in Admissibility Interviews, Case 735/2017/MDC; Decision of 30 September 2019, on the Conduct of Experts in Interviews with Asylum Seekers Organised by the European Asylum Support Office, Case 1139/2018/MDC.

62 European Ombudsman, Decision of 11 June 2023, How the European Commission ensures respect for fundamental rights in EU-funded migration management facilities in Greece, Case OI/3/2022/MHZ.

63 As a result, Frontex's complaints mechanism is also of limited practical relevance: between 2016 and 2021, only 69 complaints have been lodged, out of which only 22 were deemed admissible, see European Ombudsman, Decision of 15 June 2021, on the functioning of the European Border and Coast Guard Agency's (Frontex) complaints mechanism for alleged breaches of fundamental rights and the role of the Fundamental Rights Officer, Case OI/5/2020/MHZ. See further chapter 3, I.

64 Salvatore F. Nicolosi, David Fernandez-Rojo, „Out of control? The case of the European Asylum Support Office", in Miroslava Scholten, Alex Brenninkmeijer (ed.), *Controlling EU Agencies. The Rule of Law in a Multi-jurisdictional Legal Order*, Edward Elgar 2020, p. 177-195; Evangelia (Lilian) Tsourdi, „Holding the European Asylum Support Office Accountable for its role in Asylum Decision-Making: Mission Impossible?", *German Law Journal* 21 (2020), p. 506-531; Max Pichl, *The "Moria Complex". Irresponsibility, Incompetence and Disenfranchisement Five Years After the EU-Turkey Accord and Launch of the Hotspot System. A Study for medico international*, 2021, p. 14–17. Similarly also Gaia Lisi, Mariolina Eliantonio, „The Gaps in Judicial Accountability of EASO in the Processing of Asylum Requests in Hotspots", *European Papers* 4 (2019), p. 589-602, concluding at p. 600 that 'effectively exerting control over the hotspot activities and in particular EASO's contribution (…) is frowned with considerable difficulties'.

4 The EU's Liability for EU Hotspots (Thesis)

This is where the present study seeks to contribute. Based on a comprehensive analysis of the EU hotspot administration, it makes two central claims.[65] The first is that the EU is the central actor in the EU hotspot administration. More precisely, it will be shown that EU bodies, although they refrain from issuing legally binding decisions towards individuals, de facto steer and guide the course of the EU hotspot administration. The second thesis is that the EU, in certain cases, bears legal responsibility for the fundamental rights violations occurring in EU hotspots. Specifically, it will be argued that the relevant EU bodies, i.e. the EUAA, Frontex and the European Commission, can be held responsible via the action for damages under Art. 41 para 3 ChFR, Art. 340 para 2 of the Treaty on the Functioning of the European Union (TFEU).[66]

With regard to the first thesis, it must be noted that analysing the EU's role in the EU hotspots is important not only for the sake of understanding the case as such but also for understanding the EU's new role in the asylum administration more generally. Since 2015, the EU has gradually evolved into a critical administrative actor, and its new role is particularly evident in the context of the EU hotspots where administrative integration is most advanced. What is more, the EU hotspots in Greece function as an 'administrative experiment' where advanced administrative integration is 'tested' – albeit often at the cost of fundamental rights.[67] As a result of this 'testing', the relevant practices are then perpetuated insofar as they are deemed 'useful' by the political actors in charge through subsequent consolidation in secondary law. The process is well illustrated with the

65 Building on earlier research, in particular: Catharina Ziebritzki, „Refugee Camps at the EU External Border – Is the Union responsible? The Integrated EU Hotspot Administration and the Potential of EU Public Liability Law", in Markus Kotzur, David Moya, Ülkü Sezgi Sözen, Andrea Romano (ed.), *The External Dimension of EU Migration and Asylum Policies. Human Rights, Development and Neighbourhood Policies in the Mediterranean Area*, Nomos 2020; Catharina Ziebritzki, *The EU's Responsibility in the Asylum Administration* (fn. 50).

66 On the details of the legal basis see chapter 3, 4.3. As will be shown in chapter 5 and in the conclusion, this argument is partly confirmed and partly challenged by the recent judgement in CJEU, General Court (Sixth Chamber), judgement of 6 September 2023, WS et al v Frontex, T-600/21.

67 Note that the fundamental rights of third country nationals are at stake here. If it were about the rights of EU citizens, the outcry would undoubtedly be huge – and rightly so.

CEAS reform of April 2024. The new standard procedure, consisting of a pre-entry screening, an extended border procedure, and a crisis mode,[68] largely appears as a consolidation of practices that have been implemented in the EU hotspots since 2015.[69]

The second thesis is useful beyond the specific case of the EU hotspots, too, because it shows that the most promising procedural option to hold the EU responsible for its non-formally binding conduct is via the action for damages. The argument hence implies that the action for damages has evolved into a 'makeshift' fundamental rights remedy.[70] While the most common counterarguments against this understanding refer to doctrinal difficulties in the context of causation and attribution, a comprehensive analysis in light of the CJEU's relevant case law will show that these arguments cannot persist. Based on the doctrine of EU liability law as it currently stands, the action for damages indeed allows concerned individuals to hold the EUAA, Frontex and the European Commission responsible for their misconduct. The present study's analysis thus points to a practically feasible way to hold the EU responsible for its failures not only in the specific context of the EU hotspots but also for other aspects of the asylum administration – e.g. for the provision of EU funding – and beyond that in all areas of the administration where the EU acts in non-formally binding ways.

Given the scarcity of legal research on the EU's legal responsibility in the context of the asylum system, two limitations concerning the second thesis require clarification. First, the focus here lies on the responsibility *of the EU*, leaving aside questions concerning the legal responsibility of the host member state or of the participating member states.[71] Second, the focus is

68 Regulation (EU) 2024/1349 of the European Parliament and of the Council of 14 May 2024 establishing a return border procedure, and amending Regulation (EU) 2021/1148 (hereinafter: Return Border Procedure Regulation 2024); Regulation (Eu) 2024/1356 of the European Parliament and of the Council of 14 May 2024 introducing the screening of third-country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817 (hereinafter: Screening Regulation II 2024); Regulation (EU) 2024/1359 of the European Parliament and of the Council of 14 May 2024 addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147 (hereinafter: Crisis Regulation).

69 On the EU hotspot procedure see chapter 2, 1.3.

70 In more detail on this understanding chapter 3, 3.

71 Thus, when this study concludes that the EU is liable, that finding must not to be misunderstood as implying that only the EU is liable; questions of joint liability simply

on the responsibility of the EU and its bodies *under EU law*. Questions concerning the EU's responsibility under international law will hence not be addressed.[72]

5 State of Research and Contribution of this Study

This study makes several contributions to European legal scholarship. Its findings contribute, first, to established studies on the integrated European administration, second, to rapidly evolving and increasingly relevant research on European asylum law, and third, to emerging scholarship on fundamental rights remedies against the EU. Fourth, and at a more general level, the study also contributes to recent research on strengthening the rule of law in the EU.

As regards the first relevant field, the integrated European administration, it should be recalled that increasing administrative cooperation of member state authorities and EU bodies is a much-debated and widely analysed phenomenon. The terms and concepts offered to describe and understand that phenomenon are accordingly numerous and diverse.[73] This study adopts the understanding of an integrated European administration, comprising national authorities and EU bodies, united by their function to implement EU law.[74] On this basis, it provides a reconstruction of the development and structure of the integrated EU hotspot administration.

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fall outside the scope of this study. For an analysis of the host member state's and the participating member states' responsibility under the ECHR and under EU liability law in the case of Frontex operations see Melanie Fink, *Frontex and Human Rights* (fn. 49), p. 80–316. On joint liability more generally see Peter Oliver, „Joint Liability of the Community and the Member States", in Ton Heukels, Alison McDonnell (ed.), *The Action for Damages in Community Law*, Wolters Kluwer 1997, p. 285-309; John E. Noyes, Brian D. Smith, „State Responsibility and the Principle of Joint and Several Liability", *Yale Journal of International Law* 132 (1988), p. 225-267.

72 For an analysis of Frontex's responsibility under international law see Roberta Mungianu, *Frontex and Non-Refoulement* (fn. 47). For an analysis of responsibility of all involved actors in the EU hotspot approach under international law see Federico Casolari, „The EU's Hotspot Approach to Managing the Migration Crisis: A Blind Spot for International Responsibility?", *Italian Yearbook of International Law* 25 (2015), p. 109–134.

73 For an overview see Paul Craig, *EU Administrative Law*, Oxford University Press 2018, p. 3–4.

74 See, in particular, Herwig C. H. Hofmann, Alexander Türk, „The Development of Integrated Administration in the EU and its Consequences", *European Law Journal* 13 (2007), p. 253-271; Eberhard Schmidt-Aßmann, „Einleitung: Der Europäische

As will be explained in more detail below, this case study is particularly well-suited to further the study of the integrated asylum administration more broadly and integrated administration in other policy fields. The case study of the EU hotspots exemplifies with particular clarity and persistence the constitutional challenges and structural tensions underlying administrative integration. On the one hand, the challenges related to the EU's competences are aggravated by traditional sovereignty-related concerns, and on the other hand, challenges related to individual judicial protection come with pressing urgency due to fundamental rights violations occurring at a large scale.

This leads to the second field to which this study seeks to contribute, European asylum law. It provides an in-depth understanding of the European asylum administration and the EU's responsibility within it, thereby contributing to addressing the challenge of holding the EU responsible for outsourced or externalised human rights violations. Although legal research on the CEAS has increased exponentially since 2015, most contributions focus on substantial asylum law, thereby leaving the administration and administrative law relatively under-investigated. Where research on the European asylum administration is undertaken, it usually remains limited to specific parts thereof and has long focused on horizontal cooperation.[75] More recent studies take into account vertical forms of cooperation but still remain limited to individual aspects, and they usually adopt a rather policy-oriented perspective.[76] In particular, knowledge of the EU hotspot

Verwaltungsverbund und die Rolle des Europäischen Verwaltungsrechts", in Eberhard Schmidt-Aßmann, Bettina Schöndorf-Haubold (ed.), *Der Europäische Verwaltungsverbund. Formen und Verfahren der Verwaltungszusammenarbeit in der EU*, Mohr Siebeck 2005, p. 1-23.

75 For instance Cathryn Costello, „Administrative governance and the Europeanisation of asylum and immigration policy", in Herwig C.H. Hofmann, Alexander H. Türk (ed.), *EU Administrative Governance*, Edward Elgar 2006, p. 287-340, dedicating only p. 306–309 to Frontex; Jürgen Bast, „Transnationale Verwaltung des europäischen Migrationsraums: Zur horizontalen Öffnung der EU-Mitgliedstaaten", *Der Staat* 46 (2007), p. 1-32; Matthias Wendel, „The Refugee Crisis and the Executive: On the Limits of Administrative Discretion in the Common European Asylum System", *German Law Journal* 17 (2016), p. 1005-1032.

76 In particular the work of Evangelia (Lilian) Tsourdi, „Bottom-Up Salvation? From Practical Cooperation Towards Joint Implementation Through the European Asylum Support Office", *European Papers* 1 (2017), p. 997-1031; Evangelia (Lilian) Tsourdi, „Beyond the 'Migration Crisis': The Evolving Role of EU Agencies in the Administrative Governance of the Asylum and External Border Control Policies", in Johannes Pollak, Peter Slominski (ed.), *The Role of EU Agencies in the Eurozone and Migration*

administration – which is important to understand the functioning of the European asylum administration more generally – so far largely remains in the world of practitioners. As scholars have noted repeatedly, there is a 'knowledge gap' or 'simply a lack of information' on how the EU hotspots operate.[77]

Third, this study contributes to emerging research on individual remedies, and more specifically, fundamental rights remedies, against the EU. As EU agencies work hand in hand with member states, scholars devote increasing attention to agencification, including the question of legal protection.[78] At the same time, research on legal protection against the European Commission is increasing, too, both in the traditional context of competition law and, more recently, in the context of the Eurozone crisis.[79] Remarkably, however, the results of this research have not yet been sufficiently explored in the context of the asylum system, with research on Frontex's responsibility in the context of the border administration remaining a notable exception.[80] Research on the responsibilities of the Commission

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Crisis. Impact and Future Challenges, Palgrave Macmillan 2021, p. 175-203. See also David Fernández-Rojo, *EU Migration Agencies. The Operation and Cooperation of FRONTEX, EASO and EUROPOL*, Edward Elgar 2021.

77 Sergio Carrera, Leonhard Den Hertog, Joanna Parkin, „The Peculiar Nature of EU Home Affairs Agencies in Migration Control: Beyond Accountability versus Autonomy?", *European Journal of Migration and Law* 15 (2013), p. 337-358, noting at p. 353 that 'there is often a simple lack of information'; David Fernández-Rojo, *EU Migration Agencies* (fn. 76), stating at p. 17 that 'a knowledge gap exists between the operational functions de jure conferred on Frontex, EASO and Europol and the activities that these agencies increasingly conduct de facto on the ground.'.

78 See only Madalina Busuioc, *European Agencies: Law and Practices of Accountability*, Oxford University Press 2013, p. 191–220; Merijn Chamon, *EU Agencies. Legal and Political Limits to the Transformation of the EU Administration*, Oxford University Press 2016, p. 327–368; Mariavittoria Catanzariti, Alexander H. Türk, „EU agencies and the rise of a mixed administration in the EU multi-jurisdictional setting: facing the challenges of the rule of law", in Miroslava Scholten, Alex Brenninkmeijer (ed.), *Controlling EU Agencies. The Rule of Law in a Multi-jurisdictional Legal Order*, Edward Elgar 2020, p. 18-38.

79 For an overview see Alexander Türk, „Judicial review of integrated administration in the EU", in Herwig Hofmann, Alexander Türk (ed.), *Legal Challenges in EU Administrative Law: Towards an Integrated Administration*, Edward Elgar 2009, p. 218-256; Mariolina Eliantonio, Nikos Vogiatzis, „Judicial and Extra-Judicial Challenges in the EU Multi- and Cross-Level Administrative Framework", *German Law Journal* 22 (2021), p. 315–324.

80 See in particular the work of Melanie Fink (fn. 49). See further, albeit from the perspective of international law, Roberta Mungianu, *Frontex and Non-Refoulement* (fn. 47); Matthias Lehnert, *Frontex und operative Maßnahmen an den europäischen*

and the EUAA, as well as on the EU's responsibility in the EU hotspot administration, is still largely lacking.

As scholars largely agree that judicial protection against the EU is constitutionally required but deficient in practice, the main discussion today concerns the question of which procedure is best suited to hold the EU responsible for its misconduct. One strand seeks to make use of the action for annulment,[81] and another argues in favour of the action for damages.[82] Contributing to the latter strand, this study explores the potential of the action for damages in the specific case of the EU hotspots.[83] It thereby tests and confirms the scholarly argument that the action for damages functions as a fundamental rights remedy and contributes to intricate doctrinal discussions on attribution and causation in the context of the integrated administration.[84] As set out above, these discussions are relevant beyond the asylum administration. EU institutions more generally tend to rely on non-formally binding measures such as EU soft law[85] and factual

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Außengrenzen. Verwaltungskooperation – materielle Rechtsgrundlagen – institutionelle Kontrolle, Nomos 2014, p. 273–436.

81 See, in particular, Giulia Gentile, „Ensuring Effective Judicial Review of EU Soft Law via the Action for Annulment before the EU Courts: a Plea for a Liberal-Constitutional Approach", *European Constitutional Law Review* (2020), p. 466-492; for an overview see Herwig Hofmann, Morgane Tidghi, „Rights and Remedies in Implementation of EU Policies by Multi-Jurisdictional Networks", *European Public Law* (2014), p. 147-164, p. 155.

82 See, in particular, the work of Melanie Fink (fn. 49); Timo Rademacher (fn. 55); Nina Półtorak, „Action for Damages in the Case of Infringement of Fundamental Rights by the European Union", in Ewa Bagińska (ed.), *Damages for violations of human rights. A comparative study of domestic legal systems*, Springer 2016, p. 427-441; Angela Ward, „Damages under the EU Charter of Fundamental Rights", *ERA Forum* 12 (2012), p. 589-611.

83 The possibility of making use of the action for damages to hold the EU liable for misconduct in EU hotspots was already noted by Sergio Carrera, Leonhard Den Hertog, Joanna Parkin, „The Peculiar Nature of EU Home Affairs Agencies in Migration Control" (fn. 77), p. 344–345, however without further analysis. Similarly, Gaia Lisi, Mariolina Eliantonio, „The Gaps in Judicial Accountability of EASO in the Processing of Asylum Requests in Hotspots" (fn. 64), p. 601 conclude that 'further research is certainly needed to explore the potential for the liability action to ensure some degree of protection to individuals.'.

84 See, for instance, Melanie Fink, „EU Liability for Contributions to Member States' Breaches of EU Law", *Common Market Law Review* 56 (2019), p. 1227-1264; Martin Weitenberg, *Der Begriff der Kausalität in der haftungsrechtlichen Rechtsprechung der Unionsgerichte*, Nomos 2014.

85 On the notion of EU soft law see Francis Snyder, „Soft Law and Institutional Practice in the European Community", in Stephen Martin (ed.), *The Construction of Europe*.

administrative conduct. Examples include the Covid-19 pandemic and the Common Security and Defence Policy,[86] but also more traditional fields such as competition law.[87]

This leads to the last point. Seen from a broader constitutional perspective, this study also contributes to recent research on strengthening the rule of law in the European Union, which is urgently required in the context of the asylum system.[88] Unlike most existing studies,[89] however, it does not focus on enforcing EU law against member states; instead, it focuses on enforcing EU law against the EU itself. As set out above, the rule of law implies that all public entities, including the EU itself, are subject to judicial scrutiny. In the context of the asylum system, however, this guarantee largely runs empty. Overly complex and insufficiently regulated administrative structures lead to responsibility blurring and shifting. Consequently, the most powerful actors – including the EU – are mostly not held responsible, and fundamental rights violations persist. In order to address systemic deficiencies in the asylum system, it is thus fundamental to disentangle its administrative structures and hold EU bodies responsible for their misconduct. In this sense, the analysis of the EU's responsibility contributes to building an asylum system that is, not only on paper but also in administrative reality, based on the rule of law and human rights. Developing and advancing constitutional arguments, the core of which is anchored in Art. 2 TEU, contributes to building an EU that is closer to its

Essays in honour of Emile Noël, Springer 1994, p. 197-227; Fabien Terpan, „Soft Law in the European Union. The Changing Nature of EU Law", *European Law Journal* 21 (2015), p. 68-96.

86 Carolyn Moser, *Accountability in EU Security and Defence. The Law and Practice of Peacebuilding*, Oxford University Press 2020, in particular p. 6–7 where she notes that the 'discrepancy between law and practice in EU civilian crisis management is intriguing, not least because the de facto shift in power is likely to hamper or even harm accountability'.

87 Oana Andreea Stefan, „European Competition Soft Law in European Courts: A Matter of Hard Principles?", *European Law Journal* 14 (2008), p. 753–772.

88 Barbara Grabowska-Moroz, Dimitry Vladimirovich Kochenov, „The Loss of Face for Everyone Concerned" (fn. 18).

89 Armin von Bogdandy, Michael Ioannidis, „Systemic Deficiency in the Rule of Law" (fn. 4); Armin von Bogdandy, Pál Sonnevend (ed.), *Constitutional Crisis in the European Constitutional Area. Theory, Law and Politics in Hungary and Romania*, Nomos 2015, p. 204–267; András Jakab, Dimitry Kochenov (ed.), *The Enforcement of EU Law and Values. Ensuring Member States' Compliance*, Oxford University Press 2017.

own normative aspirations.[90] Ultimately, this study is hence motivated by the hope that change can be achieved through law.[91]

6 Typical Case Constellations

To illustrate and substantiate its findings, this study refers to six case constellations which describe typical situations in EU hotspot camps in Greece between 2015 and 2022.[92] These cases will be used as reference points and serve to support, substantiate and exemplify the argument of this study.

The cases were construed on the basis of on publicly available reports and practical experience of the author.[93] All cases reflect standard situations that affect a large number of persons. For the sake of argumentative clarity, however, the construed cases focus on one or two specific legal problems, whereas in practice, several of these issues would usually occur and overlap in a single case.

The legal assessments involved – including the findings of fundamental rights violations – are based on a comprehensive review of available reports by different actors, including EU institutions, UN bodies and NGOs, of the ECtHR's relevant case law on Art. 3 ECHR, especially in the context of EU

90 In the same direction Evangelia (Lilian) Tsourdi, Cathryn Costello, „'Systemic Violations' in EU Asylum Law: Cover or Catalyst?" (fn. 4) who at p. 993–994 conclude 'asylum-related failings should (…) be identified as rule of law issues and be incorporated in processes seeking to probe risks to EU values.'.

91 Karl E Klare, „Legal Culture and Transformative Constitutionalism", *South African Journal on Human Rights* 14 (1998), p. 146-188, at p. 150 speaks of 'transformative hopes'. For an application of this idea to the EU see Armin von Bogdandy, *The Emergence of European Society through Public Law* (fn. 15), p. 3 et seq., p. 78 et seq., p. 157 et seq., p. 242 et seq.

92 What is not typical, of course, is that the persons concerned claim compensation from the EU. Also, case 4 is not typical insofar as the number of deportations to Türkiye has been very low ever since March 2016, and that no deportations have been carried out since March 2020, see chapter 2, 2.1.c and 3.2.c. For the sake of the consequentiality of the case study, the cases are based on CEAS as it stood between 2015 and 2022. For the sake of actuality, however, reference is made – in addition – to the the legal basis under the reformed CEAS of 2024.

93 For an overview of the systemic deficiencies in the EU hotspot administration see chapter 2, 3. For the author's practical experience see fn. 103.

hotspots, and of the CJEU's relevant case law, including on Art. 4 and 41 ChFR in the context of the asylum system and external borders.[94]

Case 1 – Sara Esmaili – Inhumane reception conditions – Art. 4 and 41 ChFR
Sara Esmaili and her 9-year-old daughter Ayla, both of Afghan nationality, suffered from the living conditions in camp Moria during winter 2018. Ms Esmaili is a 35-year-old woman, single mother and pregnant. She is also a victim of severe sexual and gender-based violence and thus qualifies as vulnerable. According to the then applicable law, she should, therefore, have been exempted from the border procedure and referred to the Greek mainland.[95] The EUAA, however, failed to conduct a correct vulnerability assessment. The procedural mistakes were so grave that they amounted to a violation of Art. 41 ChFR. As a result of the deficient interview, Ms Esmaili was registered as non-vulnerable and obliged to stay in the EU hotspot camp. As the conditions in the camp amounted to inhumane and degrading treatment in the sense of Art. 4 ChFR, prolonged exposure to the dire conditions resulted in severe long-term consequences on the physical and psychological health of Ms Esmaili and her daughter. Ms Esmaili now claims compensation for violation of Art. 41 and of Art. 4 ChFR from the EUAA, the Commission, or the Union.

Case 2 – Magan Daud – Deficient asylum interview – Art. 41 ChFR
Magan Daud, a 40-year-old man of Syrian nationality, arrived on the island of Kos on 1 June 2019. Mr Daud qualified as vulnerable because he is a survivor of torture and suffers from a severe chronic heart disease. The EUAA, however, conducted the asylum interview in a deficient manner and failed to conduct a vulnerability assessment. On this basis, the EUAA concluded that Mr Daud was not vulnerable and that Türkiye could be considered a safe third country for him. It also recommended rejecting the asylum claim. The procedural errors committed by the EUAA were sufficiently grave to amount to a violation of Art. 41 ChFR. Yet, and in line with usual practice, the Greek Asylum Service rubber-stamped the EUAA's recommendation without any further examination, with the result that Mr Daud's claim for asylum was rejected. Mr Daud claims

94 See fn. 3 for relevant reports, and fn. 33 for the ECtHR's case law; further throughout this study.
95 See Art. 60 para 4 lit f Law 4375/2016 as reformed in April 2016.

compensation for the violation of Art. 41 ChFR from the EUAA, the Commission, or the Union.

Case 3 – Daniat Kidane – Age assessment through visual inspection – Art. 24, 41 and 4 ChFR
Daniat Kidane, a 16-year-old unaccompanied girl of Eritrean nationality, arrived to the island of Lesbos on 1 June 2018. The responsible Frontex expert estimated her age purely based on her physical appearance and informed the Greek authorities that she was born on 1 January 2002. Although this mistake amounts to a violation of the procedural rights of the child under Art. 24, 41 ChFR, the Greek authority accepted Frontex's assessment without further inquiry. Consequently, Daniat was neither exempted from the border procedure nor given access to the camp section dedicated to unaccompanied minors. Instead, she stayed in a camping tent like all other adults and families and was deprived of access to medical services; this situation severely affected her physical and mental health. The seriousness of her injuries was such that the threshold of a violation of Art. 4 ChFR was reached. The complete absence of state support also violated her rights as a child under Art. 24 para 1 and 2 ChFR. Daniat Kidane claims compensation for the violation of Art. 24, 41 and Art. 4 ChFR from Frontex, the Commission, or the Union.

Case 4 – Nabeeh Al Badawi – Return to Türkiye – Art. 4, 18, 19 ChFR
Nabeeh Al Badawi, a 22-year-old man of Syrian nationality, was deported from Lesbos to Türkiye on 1 December 2019. Given the specific circumstances of the case, and taking into account that Turkish authorities had forcibly returned Mr Al Badawi to Syria already in 2018, Türkiye could not be considered a safe third country for him. The deportation hence constituted a breach of the non-refoulement principle as enshrined in Art. 4, 18, 19 para 2 ChFR. Yet, Frontex supported the Hellenic Police by providing a vessel and escort officers, and failed to react to Mr Al Badawi's concerns raised during the process of deportation. After his arrival in Türkiye, Mr Al Badawi was subject to prolonged administrative detention and then again forcibly returned to Syria. Back in Aleppo, Mr Al Badawi claims compensation for the violation of the non-refoulement principle as enshrined in Art. 4, 18, 19 ChFR through his return to Türkiye from Frontex, the Commission or the Union.

Case 5 – Kareem Rashid – Limbo situation – Art. 41 and 4 ChFR
In March 2021, the asylum claim of Kareem Rashid, a 35-year-old man of Syrian nationality, was rejected as inadmissible in the EU hotspot in Chios. Due to the halt of readmissions since March 2020, it was clear that he would not be able to enter Türkiye. Yet, the EUAA applied its standard reasoning, concluded that Türkiye was safe, and recommended that he should seek protection there. Although this procedural mistake was so grave that it amounted to a violation of Art. 41 ChFR, neither the agency nor the Commission had adjusted the general operating procedures to the changed circumstances since March 2020. As a result, Mr Rashid was obliged to stay on the island of Chios, where, due to his status as a rejected asylum seeker, he did neither have access to any support services nor to the labour market. The prolonged stay of Mr Rashid in this limbo situation seriously harmed his physical and mental health, which amounted to a violation of his rights under Art. 4 ChFR. Mr Rashid thus claims compensation for the violation of Art. 4 ChFR from the EUAA, the Commission or the Union.

Case 6 – Reem Saeed – Prolonged detention – Art. 6 ChFR
Reem Saeed, a 30-year-old woman of Syrian nationality, arrived on the island of Kos in June 2020. Upon her arrival, she was immediately arrested and placed in detention. When her asylum claim was rejected in June 2021, a new detention order was issued, now referring to her imminent deportation as justification, notably despite the fact that readmissions to Türkiye had been effectively halted since March 2020. In October 2021, Ms Saeed found a lawyer representing her interests and, upon her intervention, was eventually released. As explained above, this generic detention scheme was a usual practice on Kos, yet the Commission failed to address the matter at the supervisory level.[96] Therefore, Ms Saeed claims compensation for the violation of her rights under Art. 6 ChFR from the Union or the Commission.

7 Method

This study relies on a combination of three methods: contextual doctrinal reconstruction, classical legal analysis, and empirical findings. The first

96 See chapter 2, 2 and 4.3.

method is to reconstruct the relevant legal field in order to provide a clear understanding of the object of investigation.[97] For instance, the EU hotspot administration is conceptualised as an integrated entity, encompassing member states' administrations and the relevant EU bodies including their horizontal and vertical interactions. This kind of defining and structuring a field of law on the basis of general principles, thereby giving legal and administrative phenomena a form and a name, can be referred to as doctrinal reconstruction. The reconstruction is contextual insofar as, in addition to the law, it also takes into account non-formally binding texts such as communications, policy notes, operational plans and internal administrative guidelines.[98] This is necessary because the European asylum administration evolves quicker than the formal law and, to a significant extent, operates on the basis of informal documents.[99]

Second, the study relies on classical legal analysis to develop a proposal on how to hold the EU responsible for its involvement in fundamental rights violations. Unlike other contributions, which often focus on developing proposals for doctrinal or legislative reform, this study's focus lies on proposing an interpretation of the law as it currently stands. This interpretational exercise is based on a comprehensive analysis of the CJEU's case law and is thus closely linked to legal practice. In this sense, the approach of this study can be seen as pragmatic: rather than proposing politically

97 See on that method, albeit with reference to the example of international law, Matthias Goldmann, „Dogmatik als rationale Rekonstruktion: Versuch einer Metatheorie am Beispiel völkerrechtlicher Prinzipien", *Der Staat* 53 (2014), p. 373-399.

98 In order to provide such contextual doctrinal reconstruction, several access to documents requests were made, not all of which were successful: Unlike in other fields of the AFSJ, the relevant documents are often not publicly available. The author has made numerous requests under Regulation (EC) No 1049/2011 of May 2011 regarding public access to European Parliament, Council and Commission documents (hereinafter: Transparency Regulation). Frontex has denied access to several documents with reference to the security exemption under Art 4 para 1 lit c Transparency Regulation. All documents obtained by EASO/EUAA, Frontex and the European Commission are on file with the author.

99 On the necessity of such approach for the analysis of the Area of Freedom, Security and Justice (hereinafter: AFSJ) more broadly see Jörg Monar, „Der Raum der Freiheit, der Sicherheit und des Rechts", in Armin von Bogdandy, Jürgen Bast (ed.), *Europäisches Verfassungsrecht. Theoretische und Dogmatische Grundzüge*, Springer 2009, p. 749-797, 753.

unrealistic reform,[100] it aims at developing practicable solutions to ensure fundamental rights under the law as it currently stands.

Third, these traditional legal methods are embedded within empirical findings. Empirical evidence is essential to understanding the operation of EU hotspots. The EU hotspot administration – and the European asylum administration more generally – develops at such a pace and often works on the basis of ad hoc agreements, or simply practical needs, that reading the law alone is not sufficient to understand what is actually going on. This is particularly true where implementation deficits are significant, widespread, and persisting. Accordingly, the reconstructive parts of this study draw on publicly available authoritative reports[101] and semi-structured qualitative interviews with representatives of the Commission and the EUAA.[102] These findings are supplemented by anecdotal insights gained by the author through her work as a practising lawyer.[103] Finally, the six typical cases described above are presented here. As explained, these cases were construed on the basis of authoritative reports and case law and, thus, reflect empirical reality. As will become clear in the course of this study, working with these case examples makes the argument more vivid and easier to understand, especially when it comes to intricate operational, administrative or doctrinal details. In sum, the added value of case examples is

100 In this direction, for instance, David Fernández-Rojo, *EU Migration Agencies* (fn. 76), who concludes at p. 157 that 'a legislative instrument that would regulate and detail the operational powers of Frontex, EASO and Europol should be adopted. Such a legislative instrument would (inter alia) clarify the allocation of responsibilities among the several actors that closely cooperate in the hotspots (…).'.

101 Including by EU bodies, UN bodies, and NGOs, see fn. 3.

102 Interviews with the EASO Union Contact Point conducted on 13 December 2019 and on 19 February 2021; interviews with Commission representative 1 (Unit C4) and Commission representative 2 (Unit C4) conducted on 12 February 2021; interview with Commission representative 3 (Unit C4) conducted on 16 February 2021; interview with Commission representative 4 (Unit E2) conducted on 26 February 2021; interview with Commission representative 5 (Dedicated Taskforce) conducted on 7 April 2021. Frontex has not replied to the author's requests for an interview. All interview transcripts are are on file with the author; the interviews will be referred to in the relevant footnotes.

103 The author is co-founder and board member the Greek-German NGO Equal Rights Beyond Borders which provides free legal services in the EU hotspots of Chios and Kos and engages in strategic litigation in European asylum law, see www.equalrights.org. Between 2016 and 2018, she has worked as legal advisor for refugees and asylum seekers in Chios.

twofold: it makes the work easier to access and addresses the gap between law on paper and administrative reality on the ground.