



Can I talk to the manager, please?

Who is responsible?

Case: The Accountability of the EU within the Greek hotspots in the  
light of J.R. and others v. Greece

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Master's thesis

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14.10.2020

Tiedekunta – Fakultet – Faculty Faculty of Law		Koulutusohjelma – Utbildningsprogram – Degree Programme MICL - Public International Law	
Tekijä – Författare – Author Anna Lindberg			
Työn nimi – Arbetets titel – Title Can I talk to the manager, please? Who is responsible? Case: The Accountability of the EU within the Greek hotspots in the light of J.R. and others v. Greece			
Oppiaine/Opintosuunta – Läroämne/Studieinriktning – Subject/Study track International human rights, EU law, EU human rights protection, Responsibility of international organisations			
Työn laji – Arbetets art – Level Master's		Aika – Datum – Month and year October 2020	Sivumäärä – Sidoantal – Number of pages 60
Tiivistelmä – Referat – Abstract			
<p>The European migrant crisis led to the implementation of the hotspots in Greece and Italy. The Greek hotspots were regulated by both the hotspot approach and the EU-Turkey Statement. After I had spent the spring and summer of 2016 at the Lepida hotspot on Leros, I wanted to study the structure of it more closely. Once the judgement of the European Court of Human Rights' case J.R. and others v. Greece was published, I became interested in the accountability of the European Union within the hotspots. This thesis will therefore serve as an analysis of the hotspots in Greece and the scheme that lies behind them. The relationship of the European Union and the European Convention of Human Rights will be studied. The accountability of the European Union within the structure of the Greek hotspots will be analysed by using possible human rights violations assessed by the European Court of Human Rights as a sample.</p> <p>The first chapter presents naturally the personal aspect of the topic and the research questions as well as the method and structure of the thesis.</p> <p>The second chapter focuses on giving the reader an overview of the background that has given rise to the hotspots. Further focusing on the Greek hotspots solely. The hotspot approach and the EU-Turkey Statement are presented.</p> <p>The third chapter will dive into the EU's protection of human rights. This topic will be presented in the light of the European Convention of Human Rights. Thus, the accession of the EU will be studied as well as the reality of the doctrine of equivalent protection.</p> <p>The European Court of Human Rights' case J.R. and others v. Greece is the focus of the fourth chapter. I here also analyse the judgement of the case. The absence of the EU within the subject of responsibility of the Greek hotspots leads me further into the topic.</p> <p>The fifth chapter probes different accountability and responsibility theories of international organisation, in this case the EU. The theories are seen in the light of the human rights protection of the EU. The complexity of the topic shows that the EU cannot be held accountable for the human rights violations that are sampled.</p> <p>Finally, I conclude my thesis with my findings and recommendations towards further studies. The study reveals that the combination of the Greek hotspots and the accountability of the EU do not match within the structure that I have presented.</p>			
Avainsanat – Nyckelord – Keywords Hotspot approach, hotspot, Greece, EU-Turkey Statement, ECHR, Accession of the EU to the ECHR, Accountability of the EU, Responsibility of the EU, J.R. and others v. Greece, doctrine of equivalent protection, Draft articles on the responsibility of international organisations, Human rights obligations of the EU, human rights protection, European migrant crisis			
Ohjaaja tai ohjaajat – Handledare – Supervisor or supervisors Jan Klabbers			
Säilytyspaikka – Förvaringställe – Where deposited University of Helsinki E-Thesis Database			
Muita tietoja – Övriga uppgifter – Additional information			

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## List of Abbreviations

CEAS	Common European Asylum System
CJEU	Court of Justice of the European Union
CoE	Council of Europe
DARIO	Draft articles on the responsibility of international organizations
EASO	European Asylum Support Office
ECHR	European Convention of Human Rights, or also called the European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EC	The European Communities
EEC	European Economic Community
EU	European Union
EUROPOL	European Police Office
ICCPR	International Covenant on Civil and Political Rights
IO	International organisation
ILA	International Law Association
IOM	International Organisation for Migration
Frontex	European Border and Coast Guard Agency
RIC	Reception and Identification Centre
RIS	Reception and Identification Service
TEU	Treaty on European Union
TFEU	The Treaty on the Functioning of the European Union
UN	The United Nations
UNHCR	United Nations High Commissioner for Refugees, also called the UN Refugee Agency

## Bibliography

### Literature

*ActionAid et al. (2017a):* Transitioning to a government-run refugee and migrant response in Greece, A joint NGO roadmap for more fair and humane policies, 13 December 2017.

Published by ActionAid; Advocates Abroad; CARE; Caritas Hellas; Spanish Commission for Refugees (CEAR); Danish Refugee Council; Greek Helsinki Monitor; HIAS; IRC; JRS; Oxfam; Solidarity Now; Terre des hommes; Translators Without Borders

[[https://oi-files-d8-prod.s3.eu-west-2.amazonaws.com/s3fs-public/file\\_attachments/greece\\_roadmap\\_oxfam\\_final.pdf](https://oi-files-d8-prod.s3.eu-west-2.amazonaws.com/s3fs-public/file_attachments/greece_roadmap_oxfam_final.pdf)]  
(24.1.2020)

*ActionAid et al. (2017b):* Joint letter to Prime Minister Alexis Tsipras, signed by 19 NGOs. [<https://www.solidaritynow.org/wp-content/uploads/2017/10/UPDATEDJoint-NGO-Letter.-PM-Tsipras.-20171023.pdf>] (23.12.2019)

Published by ActionAid, Advocates Abroad, Aitima, Amnesty International, Care, Danish Refugee Council, International Federation for Human Rights (FIDH), Greek Council for Refugees (The Greek Council for Refugees endorses the text, within the framework of its actions and scope), Greek Forum of Refugees, Greek Helsinki Monitor, Hellenic League for Human Rights, Human Rights Watch, International Rescue Committee, Jesuit Refugee Council, Lesbos Legal Center, Norwegian Refugee Council, Oxfam, Praksis and Solidarity Now.

*Afouxenidis, Alex – Petrou, Michalis – Kandyli, George – Tramountanis, Angelo - Giannaki, Dora: Dealing with a Humanitarian Crisis:*

Refugees on the Eastern EU Border of the island of Lesbos,  
Journal of Applied Security Research 12:1, 7-39, 2017.

- Alston, Philip (ed.):* The EU and Human Rights, Oxford University Press 1999.
- Basilien-Gainche, Marie-Laure:* Hotspots, cold facts. Managing Migration by Selecting Migrants, in Carolus Grutters, Sandra Mantu & Paul Minderhoud (ed.), Migration on the Move. Essays on the Dynamic of Migration, Brill, 2017, pp. 153-171.
- Borchardt, Klaus-Dieter:* The ABC of European Union law, Publications Office of the European Union, 2010.
- Council of Europe:* European Convention on Human Rights, as amended by Protocols Nos. 11 and 14 supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16.  
  
[[https://www.echr.coe.int/documents/convention\\_eng.pdf](https://www.echr.coe.int/documents/convention_eng.pdf)]  
(29.9.2020)
- Council of Europe (2004):* The right to liberty and security of the person: A guide to the implementation of Article 5 of the European Convention on Human Rights, December 2004, last update: 31.08.2019. Human rights handbooks, No. 5.  
[<https://www.refworld.org/docid/49f181e12.html>]  
(24.9.2019)
- Council of Europe (2013):* Fifth Negotiation Meeting Between the CCDH ad hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights, Final report to the CCDH, (47+1(2013)008rev2), Starsbourg, 10 June 2013.  
[[https://www.echr.coe.int/Documents/UE\\_Report\\_CDDH\\_ENG.pdf](https://www.echr.coe.int/Documents/UE_Report_CDDH_ENG.pdf)] (12.12.2019)
- Council of Europe, European Court of Human Rights:* Press Release issued by the Registrar of the Court: Detention of three Afghan nationals in Vial migrant centre in Greece (case: J.R. and Others v. Greece),

Council of Europe: European Court of Human Rights, 25 January 2018.

*Council of the European Union (2012)*: EU Strategic Framework and Action Plan on Human Rights and Democracy, Luxembourg, 25 June 2012 11855/12. [https://www.consilium.europa.eu/uedocs/cms\_data/docs/pressdata/EN/foraff/131181.pdf] (11.10.2020)

*Council of the European Union (2015)*: Meeting of heads of state or government with Turkey – EU-Turkey statement, 29/11/2015, Statements and remarks. 870/15, 29 November 2015.

[https://www.consilium.europa.eu/en/press/press-releases/2015/11/29/eu-turkey-meeting-statement/] (27.1.2020)

*Council of the European Union (2016)*: EU-Turkey Statement, 18 March 2016, Press release 144/16. [https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/pdf] (27.1.2020)

*Danish Refugee Council*: Fundamental Rights and the EU Hotspot Approach, Report, October 2017.

[https://reliefweb.int/sites/reliefweb.int/files/resources/Fundamental%20rights\_web%20%281%29.pdf] (29.1.2020)

*Douglas-Scott, Sionaidh – Hatzis, Nicholas*: Research Handbook on EU Law and Human Rights, Edward Elgar Publishing, 2017.

*European Border and Coast Guard Agency*: Migratory Map.

Detections of illegal border-crossings are updated monthly in a downloadable Excel-sheet.

[https://frontex.europa.eu/along-eu-borders/migratory-map/] (21.1.2020)

*European Commission (2015a)*: A European Agenda on Migration, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions. 13



May 2015, Brussels. [[https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/communication\\_on\\_the\\_european\\_agenda\\_on\\_migration\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/communication_on_the_european_agenda_on_migration_en.pdf)] (21.1.2020)

*European Commission (2015b)*: The Hotspot approach to managing exceptional migratory flows, 11 September 2015. [[https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/2\\_hotspots\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/2_hotspots_en.pdf)] (21.1.2020)

*European Commission (2015c)*: A Proposal for a Council Decision establishing provisional measures in the area of international protection for the benefit of Italy and Greece, Brussels 27 May 2015.

[[https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/asylum/general/docs/proposal\\_for\\_a\\_council\\_decision\\_on\\_provisional\\_relocation\\_measures\\_for\\_italy\\_and\\_greece\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/asylum/general/docs/proposal_for_a_council_decision_on_provisional_relocation_measures_for_italy_and_greece_en.pdf)] (22.1.2020)

*European Commission (2016)*: ‘Communication from the Commission to the European Parliament and the Council - Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe’, COM(2016) 197 final, Brussels 6.4.2016. [<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016DC0197&from=en>] (8.10.2020)

*European Commission (2017)*: Report from the Commission to the European Parliament, the European Council and the Council, Progress Report on the European Agenda on Migration, Brussels 15 November 2017.

[<https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda->

migration/20171114\_progress\_report\_on\_the\_european\_agenda\_on\_migration\_en.pdf] (23.1.2020)

*European Commission (2018)*: EU-Turkey Statement - Two years on, April 2018, published on 14.3.2018. [[https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20180314\\_eu-turkey-two-years-on\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20180314_eu-turkey-two-years-on_en.pdf)] (8.10.2020)

*European Commission (2020)*: The EU Facility for Refugees in Turkey, Fact Sheet, Updated in January 2020.

[[https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/frit\\_factsheet.pdf](https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/frit_factsheet.pdf)] (27.1.2020)

*European Commission Press Release (2015)*: Joint Foreign and Home Affairs Council: Ten point action plan on migration, Luxembourg 20 April 2015.

[[https://ec.europa.eu/commission/presscorner/detail/en/IP\\_15\\_4813](https://ec.europa.eu/commission/presscorner/detail/en/IP_15_4813)] (24.1.2020)

*European Commission Press Release (2017)*: Future-proof migration management: European Commission sets out way forward, Brussels, 7 December 2017.

[[https://ec.europa.eu/commission/presscorner/detail/en/IP\\_17\\_5132](https://ec.europa.eu/commission/presscorner/detail/en/IP_17_5132)] (25.1.2020)

*European Court of Human Rights (2019a)*: Applicants detained in the Vial centre on the island of Chios unable to appeal against the decisions ordering their expulsion, Press Release issued by the Registrar of the Court, 21.03.2019.

*European Court of Human Rights (2019b)*: The remedies proposed to detained migrants in emergency reception centres in Greece were neither accessible nor sufficient, Press Release issued by the Registrar of the Court, 03.10.2019.

*European Database of Asylum Law: ECtHR – J.R. and others v. Greece, Application no. 22696/16, 25 January 2018.*

[<https://www.asylumlawdatabase.eu/en/content/ecthr—jr-and-others-v-greece-application-no-2269616-25-january-2018>] (22.10.2019)

*European Parliament (2018): Migration and Asylum: a challenge for Europe, Face Sheets on the European Union, 18 June 2018.*

[[https://www.europarl.europa.eu/RegData/etudes/PERI/2017/600414/IPOL\\_PERI\(2017\)600414\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/PERI/2017/600414/IPOL_PERI(2017)600414_EN.pdf)] (4.2.2020)

*European Parliament (2019a): Immigration Policy, Fact Sheets on the European Union, Author: Marion Schmid-Drüner, May 2019.*

[[http://www.europarl.europa.eu/ftu/pdf/en/FTU\\_4.2.3.pdf](http://www.europarl.europa.eu/ftu/pdf/en/FTU_4.2.3.pdf)] (25.1.2020)

*European Parliament (2019b): Legislative Train 11.2019 – 7 Area of Justice and Fundamental Rights / Up to €7BN – Completion of EU Accession to the ECHR, 20.11.2019.*

[<http://www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-completion-of-eu-accession-to-the-echr>] (5.12.2019)

*European Parliament News: Migration in Europe, Society, News, European Parliament, 39 June 2017, updated 22 July 2019.*

[<https://www.europarl.europa.eu/news/en/headlines/priorities/refugees/20170629STO78632/migration-in-europe>] (21.1.2020)

*European Parliamentary Research Service (2018): Hotspots at EU external borders: State of play, Briefing, European Parliament: European Parliamentary Research Service, Authors: Maria Margarita Mentzelopoulou and Katrien Luyten, June 2018.*

*European Parliamentary Research Service (2019): EU policies – Delivering for citizens: The migration issue, Briefing, European Parliament:*

European Parliamentary Research Service, Authors: Joanna Apap and Anja Radjenovich with Alina Dobрева, March 2019.

*European Stability Initiative:* The Refugee Crisis through Statistics. A compilation for politicians, journalists and other concerned citizens, 30 January 2017.

[<https://www.esiweb.org/pdf/ESI%20-%20The%20refugee%20crisis%20through%20statistics%20-%2030%20Jan%202017.pdf>] (22.1.2020)

*European Union Agency for Fundamental Rights:* Update of the 2016 Opinion of the European Union Agency for Fundamental Rights on the fundamental rights in the ‘hotspots’ set up in Greece and Italy February 2019, FRA Opinion – 3/2019, Vienna, 4 March 2019.

*European Union, official website:* About the EU, European Police Office (Europol) [[https://europa.eu/european-union/about-eu/agencies/eurojust\\_en](https://europa.eu/european-union/about-eu/agencies/eurojust_en)] (20.1.2020)

*European Union, official website:* About the EU, European Border and Coast Guard Agency (Frontex) [[https://europa.eu/european-union/about-eu/agencies/frontex\\_en](https://europa.eu/european-union/about-eu/agencies/frontex_en)] (20.1.2020)

*Grabewarter, Christoph:* European Convention on Human Rights – Commentary. Verlag C.H. Beck oHG, München 2014.

*Greece:* Greek Law No. 4375 of 2016 on the organization and operation of the Asylum Service, the Appeals Authority, the Reception and Identification Service, the establishment of the General Secretariat for Reception, the transposition into Greek legislation of the provisions of Directive 2013/32/EC [Greece], 3 April 2016.  
[<https://www.refworld.org/docid/573ad4cb4.html>] (7.2.2020)

- Greek Refugee Council:* Reception and Identification Procedure, Greece, The European Policy Framework: ‘hotspots’, Published by the Asylum Information Database  
[<https://www.asylumineurope.org/reports/country/greece/asylum-procedure/access-procedure-and-registration/reception-and>] (12.2.2020)
- Greek Refugee Council:* Freedom of Movement, Greece, Published by the Asylum Information Database  
[<https://www.asylumineurope.org/reports/country/greece/reception-conditions/access-and-forms-reception-conditions/freedom-movement>] (12.2.2020)
- Greer, Steven:* The European Convention on Human Rights – Achievements, Problems and Prospects, Cambridge University Press 2008.
- Harlow, Carol:* Accountability in the European Union, Oxford University Press, Oxford 2002.
- Harris – O’Boyle – Warbrick:* Law of the European Convention on Human Rights, Third Edition, Oxford University Press, 2014.
- Hert, Paul de – Korenica, Fisnik:* The doctrine of equivalent protection: Its life and legitimacy before and after the European Union’s accession to the European convention on human rights. German American Law Journal, 13(7), 2012, pp. 874-895.
- Hobolt, Sara B. – Tilley, James:* Blaming Europe? Responsibility Without Accountability in the European Union, Oxford University Press 2014.
- Human Rights Watch:* World Report 2019. Essays. European Union, Events of 2018.  
[<https://www.hrw.org/world-report/2019/country-chapters/european-union>] (27.9.2019)
- International Law Association:* Accountability of International Organisations, Final Report, Berlin Conference, 2004.

*International Law Commission: Yearbook of the International Law Commission 2001, Volume Two, Part Two, United Nations 2001.*

*International Law Commission – United Nations (2011a): Draft articles on the responsibility of international organizations, New York 2011.*

Even cited as *DARIO 2011*.

*International Law Commission – United Nations (2011b): Draft articles on the responsibility of international organizations, with commentaries. Report of the International Law Commission on the work of its sixty-third session. New York 2011.*

*Karamanidou, Lena - Schuster, Liza: Realizing One’s Right under the 1951 Convention 60 Years On: A Review of Practical Constraints on Accessing Protection in Europe, Journal of Refugee Studies, Volume 25, Issue 2, June 2012, Pages 169–192.*

[<https://doi.org/10.1093/jrs/fer053>] (22.1.2020)

*Klabbers, Jan:* Self-Control: International Organisations and the Quest for Accountability. In M. Evans, & P. Koutrakos (Eds.), *The International Responsibility of the European Union: European and International Perspectives* (pp. 75-99). Oxford: Hart publishing, 2013.

*Kourachanis, Nikos:* Asylum Seekers, Hotspot Approach and Anti-Social Policy Responses in Greece (2015-2017). *Journal of International Migration and Integration* 19 (4), 1153-1167. Springer Nature B.V. 2018.

*Lock, Tobias (2017):* The EU before the European Court of Human Rights, in: Douglas-Scott, Sionaidh – Hatzis, Nicholas (ed.): *Research Handbook on EU Law and Human Rights*, Edward Elgar Publishing, 2017.

*Majcher, Izabella:* The EU Hotspot Approach: Blurred Lines between Restriction on and Deprivation of Liberty (Part I), 04 April 2018. [<https://www.law.ox.ac.uk/research-subject-groups/centre->

criminology/centreborder-criminologies/blog/2018/04/eu-hotspot] (8.2.2020)

*Official Journal of the European Union* (2003): EU Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003L0086&from=EN] (12.11.2018)

*Official Journal of the European Union* (2010): Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office. [https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:132:0011:0028:EN:PDF] (20.1.2020)

*Official Journal of the European Union* (2012): Consolidated Version of the Treaty on the Functioning of the European Union, Official Journal of the European Union C 326, 26.10.2012. [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN] (25.1.2020)

*Official Journal of the European Union* (2013): 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) [https://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:180:0031:0059:EN:PDF] (14.10.2020)

*Official Journal of the European Union* (2015a): Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of

Greece. [<https://eur-lex.europa.eu/eli/dec/2015/1523/oj>]  
(19.10.2019)

*Official Journal of the European Union (2015 a)*: 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: [<https://eur-lex.europa.eu/eli/dec/2015/1601/oj>] (19.10.2019)

*Official Journal of the European Union (2016)*: 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.

Article 2 Definitions (10) ‘hotspot area’ [<https://eur-lex.europa.eu/eli/reg/2016/1624/oj>] (19.10.2019)

*Papoutsis, Anna – Painter, Joe – Papada, Evie – Vradis, Antonis*: The EC hotspot approach in Greece: creating liminal EU territory, *Journal of Ethnic and Migration Studies*, 45:12, pp. 2200-2212, Published online: 30 May 2018.

[<https://doi.org/10.1080/1369183X.2018.1468351>]  
(28.1.2020)

*Pastore, Ferruccio & Henry, Giulia*: Explaining the Crisis of the European Migration and Asylum Regime, *The International Spectator*, 51:1, pp. 44-57, 27 April 2016.

*Peers, Steve*: The EU’s Accession to the ECHR: The Dream Becomes a Nightmare, *German Law Journal* Volume 16 Issue 1, 01 March 2016, pp. 213-222.

*Pijnenburg, Annick*: JR and others v Greece - what does the court (not) say about the EU-Turkey statement, 21 February 2018. [<https://strasbourgobservers.com/2018/02/21/jr-and-others-v->



greece-what-does-the-court-not-say-about-the-eu-turkey-statement/] (3.4.2020)

- Refugees International:* “Like a Prison” - Asylum-Seekers Confined to the Greek Islands, Author: Izza Leghtas, Greece-Turkey, August 2017.  
[<https://www.refworld.org/docid/5992fea44.html>] (27 January 2020)
- Shelton, Dinah:* The Boundaries of Human Rights Jurisdiction in Europe, 13 Duke Journal of Comparative & International Law, pp. 95-154, 2003.
- Silverman, Stephanie J.:* The EU’s Hotspot Approach: Questionable Motivations and Unreachable Goals, E-International Relations, 17 April 2018.
- Takou, Eleni:* The implementation of the „Hotspot Approach“ and the EU-Turkey Statement in Greece: A crisis contained, but not over, Junge Wissenschaft im öffentlichen Recht e.V., JuWissBlog published on 12 December 2017, Published under CC BY NC ND 4.0. [<https://www.juwiss.de/133-2017/>] (8.10.2020)
- The Greek Ombudsman:* Migration flows and refugee protection. Administrative challenges and human rights issues, Special Report. Athens 2017.
- The Greens / EFA:* The EU-Turkey Statement and the Greek Hotspots – A failed European pilot project in Refugee Policy, published by the Greens / European Free Alliance in the European Parliament, June 2018. [<http://extranet.greens-efa-service.eu/public/media/file/1/5625>] (8.10.2020)
- UN Human Rights Council:* Report of the Special Rapporteur on the human rights of migrants on his mission to Greece, 24 April 2017, A/HRC/35/25/Add.2.  
[<https://reliefweb.int/sites/reliefweb.int/files/resources/G1709841.pdf>] (18.2.2020)

- UNHCR (1951):* Convention and protocol relating to the status of refugees, Signed 28 July 1951, Published by: UNHCR Communications and Public Information Service [http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf]
- UNHCR (2015):* Over one million sea arrivals reach Europe in 2015, UNHCR News, Authors: Jonathan Clayton and Hereward Holland, edited by Tim Gaynor, 30 December 2015.  
[https://www.unhcr.org/5683d0b56.html] (21.2.2020)
- UNHCR (2016):* 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, 23 March 2016. [[www.unhcr.org/56f3ec5a9.pdf](http://www.unhcr.org/56f3ec5a9.pdf)] (13.10.2020)
- UNHCR (2017):* UNHCR Recommendations for Greece in 2017. Bureau for Europe. The UN Refugee Agency 2017.
- UNHCR (2018):* Country Report Greece 2018. Inter-Agency Participatory Assessment Report. January 2018 – June 2018. The UN Refugee Agency October 2018.
- UNHCR - ECRE:* The Dublin Regulation, Asylum in Europe, published by: UNCHR and ECRE [http://www.unhcr.org/protection/operations/4a9d13d59/dublin-regulation.html] (last retrieved 13 November 2018)
- Verdirame, Guglielmo:* The UN and Human Rights: Who Guards the Guardians? Cambridge Studies in International and Comparative Law, Cambridge University Press 2011.
- Weissbrodt, David – Hortreiter, Isabel:* The Principle of Non-Refoulement: Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of Other International Human Rights Treaties, 5 Buff. Hum. Rts. L. Rev. 1 (1999)

[[http://scholarship.law.umn.edu/faculty\\_articles/362](http://scholarship.law.umn.edu/faculty_articles/362)]  
(13.10.2020)

*Ziebritzki, Catharina:* EU Hotspot Approach and EU-Turkey Statement in Greece: Implementing a return policy? A legal perspective, Published under CC BY NC ND 4.0. [<https://www.juwiss.de/134-2017/>]  
(06.10.2020)

## Table of Cases

*Court of Justice of the European Union:* Opinion 2/12 Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 18 December 2014, ECLI:EU:C:2014:2454.

*European Court of Human Rights:* Ahmadi and others v. Greece, no. 39065/16.

*European Court of Human Rights:* Allaa Kaak and others v. Greece, no. 34215/16.

*European Court of Human Rights:* Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland, no. 45036/98, Reports of Judgments and Decisions 2005-VI.

*European Court of Human Rights:* J.B. v. Greece, no. 54796/16.

*European Court of Human Rights:* J.R. and others v. Greece, no. 22696/16.

*European Court of Human Rights:* Kaberi v. Greece, no. 19557/17.

*European Court of Human Rights:* Matthews v. The United Kingdom, no. 24833/94, Reports of Judgements and Decisions 1999-I.

*European Court of Human Rights:* O.S.A. and others v. Greece, no. 39065/16

## 1. Introduction

My interest for this theme arose during the months I spent at the Lepida hotspot on Leros in the year 2016. Already during that time, it became evident to me that the structure and scheme behind the hotspots in Greece were somewhat difficult to grasp.

With this research I want to give an overview of the paradigms of the Greek hotspots. In addition to that I want to give the reader a better picture of the responsibility of the EU and an EU member state in the light of European Convention on Human Rights. As the title “Can I talk to the manager, please?” already reveals, will this thesis study the responsibility behind the hotspots in Greece. The hunt will conclude in the analysis of the possible accountability of the EU within structure of the Greek hotspots. I aim to open up this topic with giving a broad perspective by shedding light on governmental and institutional as well as papers from individual organisations. I want to study if the EU can be seen as responsible and accountable for the possible human rights violations that have emerged from the hotspots in Greece. I will try to answer this question by first and foremost study the structure behind the hotspots and the human rights protection within the EU in the light of the ECHR. I will then move further into the scheme of accountability of international organisations, with the EU in focus.

### 1.1 Personal experiences from Leros

When arriving to the island of Leros on the 14<sup>th</sup> of April 2016 I did not know what was awaiting me. The organisation, Echo100Plus<sup>1</sup>, which I was volunteering for, had booked my flight and the rest was uncertain for me. One of the founders and the key-coordinator at that time, Catharina Kahane, tried to explain the ‘hotspot approach’ to me via Skype a few weeks earlier. The problem was inevitable: nobody on the ground actually knew what these ‘hotspots’ would entail in practice. Naïve and clueless as I was, I ended up extending my stay on Leros from the initial plan of two to three weeks, to almost 5 months.

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<sup>1</sup> Echo100Plus is a registered Austrian charity, which was founded in 2012 by a group of friends, most of them Austrians with strong ties to Greece, who were moved to take action when the scale and intensity of the growing economic and social crisis became apparent. Echo100Plus acts as bridge between NGO’s and private initiatives in Greece and their counterpart abroad, all with the common aim to support Greece in these difficult times. For more information please see: <https://echo100plus.com/en/about>

The hotspot, called Lepida, is placed in the Greek archipelago on one of the Dodecanese islands. Leros is located roughly 85 km from the Turkish coast. On Leros, the Lepida camp was, legislatively, run by the Greek military, but in practice it functioned on an ad-hoc basis thanks to the hard work of various organisations. The only certainty was that everything was uncertain. One could not be certain if and how water, infant nutrition or even if food would be provided. Not to mention the litter and odour due to the lack of any sanitary system. It was all a scheme of improvisation and extemporisation. All ideas, on how to make the situation easier or better for the refugees, were welcome.

The hotspot is located about 45-minutes by foot from the nearest town, Lakki. The geographically remote location added to the utter feeling of abandonment. The area was fenced and closed, secured with barbed wire and supervised by police officers around the clock. The field of gravel and dust carried the sea of shipping containers ever so hopelessly. The hotspot area did not have shade from the sun, paradoxically however it was a dark domain internally. Every time I left the hotspot, I looked back at the children standing at the fence under the barbed wire. On the island of Leros, I lost the burning trust I once had in the EU.

## 1.2 Background

The European migrant crisis, with its peak in 2015, was the most serious migratory flow that Europe has experienced since the end of World War II. The crisis challenged the EU to extreme extents.<sup>2</sup> In April 2015 the European Commission drafted the hotspot approach in the European Agenda on Migration<sup>3</sup>. The Agenda was a desperate answer to the ongoing European migrant crisis. About five years after the peak and four years after the implementation of the hotspot approach in Greece and in Italy, migration is still identified as one of the main challenges of the EU. The hotspots were planned to help the two EU member states within the humanitarian and border management crisis. The conditions at the hotspots and the management of the migration flow continue to be questioned and criticised,

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<sup>2</sup> European Parliamentary Research Service 2019, p. 1.

<sup>3</sup> European Commission 2015a

even by EU bodies like the European Parliament.<sup>4</sup> In light of the hotspots in Greece, I will delve the scheme of human rights protection within the EU.

### 1.3 Tentative argument and research question

Many things can and could go wrong within the situation that the EU found itself in. Especially regarding the European migrant crisis, that resulted in the hotspots and the operation all-round. The European Court of Human Rights (henceforth called ECtHR) received applications on possible human rights violations within the Greek hotspots. When suspicions of human rights violations come to the surface, the hunt for the liable actor starts. In the case of the EU and Greece within the structure of the hotspot approach and the EU-Turkey Statement, it is not easy to find the liable individual. However, this thesis will try to research and analyse the situation by first presenting it as a whole and then diving deeper into the potential liability of the EU. The vital research question of this thesis is: Who is held liable? Can the EU be held accountable for possible human rights violations that have occurred at a Greek hotspot? And how can it be held liable?

In this thesis, I aim to research the accountability of Greece and the EU towards the Hotspot Approach within the framework of the European Convention on Human Rights (henceforth called ECHR). The research of the Hotspot Approach in the light of the ECHR will lead me to study the possible accountability and responsibility of the EU within the light of the Hotspot Approach and the possible breaches of human rights that the approach has caused according to the ECHR. I will be solely concentrating on Greece and how the Hotspot Approach has been implemented in this member state. My sample for the research question will be an ECtHR case<sup>5</sup>. The accountability of an EU member state in comparison to the potential accountability of the EU for the breaches of the convention will be studied.

One can perhaps ask why I have chosen the ECHR. There are two reasons for my choice of legal basis. The first reason is that the ECHR is fundamentally a human rights convention and its function concentrates exclusively on protecting human rights. The other reason for the choice of this treaty as my legal basis for this thesis is the fact that any individual can bring a case to this court. This fact has made the ECtHR more accessible. The accessibility

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<sup>4</sup> European Parliamentary Research Service 2018, p.1.

<sup>5</sup> European Court of Human Rights: J.R. and others v. Greece, no. 22696/16.

is vital when referring to case law in the field that we are studying. The accessibility has enabled irregular migrants or their intermediaries to bring their case to an international court without going through a national court or something of the equivalent.

The research question of how the EU can or could be held liable for the possible human rights violations within the Greek hotspots will lead me further into the topic of responsibility of international organisations. Why does not the EU take the responsibility for the breaches that the Hotspot approach has resulted in? How and by whom could they be held accountable for the breaches? The research on the potential accountability of the European Union will be examined by legal instruments such as the Draft articles on the responsibility of international organisations. I will include theories and arguments of Verdirame<sup>6</sup> and his institutional accountability based on the international organisation, the United Nations. State and institutional responsibility will also be accompanied with the “equivalent protection” of the EU.<sup>7</sup>

The tentative argument of this thesis is to show if the EU can be held accountable and take responsibility for the breaches that the Hotspot approach has caused. Additionally, if it can be held accountable, then how can it be held accountable? This because the approach is based on the policies of the EU and thus implemented by the member states, Italy and Greece. The reader will be introduced to how the EU defends its human rights per default. The ECHR and the ECtHR will be presented to the reader. The case of J.R. and others v. Greece will be analysed. Which are the effects of the case and why did they judge the case accordingly? For the time being, it can be understood that the member states take all blame for the breaches, that are caused by the hotspots. This is even though the EU indirectly or, one can state that it has even, directly invented the model.

#### 1.4 Method and structure

This thesis will first give an overview of the framework behind the Greek hotspots. I will use EU policy papers and EU-law to present the background and the reality of them. I will further dive into the Greek hotspots, in the light of the ECHR. I will continue with the ECtHR

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<sup>6</sup> Cf. Verdirame 2011, Chapter 3 “International institutional responsibility” as well as chapter 8 “Accountability”.

<sup>7</sup> See Chapter 5.1, 5.2 and 5.3.

case *J.R. and others v. Greece* that has arisen from the Greek hotspot on Chios<sup>8</sup>. The judgement of the case will lead me to the focus of the accountability and responsibility of the EU within human rights violations. Because the ECHR is used in the analysis that deals with the responsibility of the EU, I will touch upon the relationship of the EU and ECHR. In search for alternatives to this, I will delve with the legal analysis of the responsibility of the EU. When researching human rights obligations of the EU and the structure that lies behind it, I will seek for help from institutional accountability theories. I will use legal theories and international charters to research the possibility of the EU's accountability within this topic.

I will strive to begin every chapter with a brief introduction of the content that is awaiting the reader. In the first chapter I present the situation in the Lepida refugee camp on Leros during the time I was there, from April 2016 until August 2016. I further on introduce the Hotspot Approach to the reader and the situation that Greece was and is in. I will introduce the reader to my tentative argument and research question. The challenges within the research are mentioned. The keywords of the thesis will furthermore be defined.

In the second chapter, I will go more deeply into the Hotspot approach, background and key actors within the policies. I will explain how we came to this point in the first place. One must describe the circumstances of the refugee crisis in Greece and the financial crisis that Greece experienced before that. Explaining the foundation of the reality is crucial because Greece is a special case within the EU policies that arose during the European migrant crisis. Subsequently, I can dive further in the hotspot approach and the EU-Turkey statement. Moving further into the research topic, I will then present the Greek hotspots to the reader.

In the third chapter, I will explore the relationship that the EU and the ECHR have with each other. The ECHR is the legal basis for the ECtHR court case *J.R. and others v. Greece*<sup>9</sup>. The case will work as the sample for the research question: Can the EU be held responsible for the possible human rights violations? And if it can, then how? Hence, the relationship of the EU, the ECHR and the ECtHR are vital to this thesis.

The fourth chapter will mainly serve as a presentation of the ECtHR case<sup>10</sup>. Whilst I present this, the reader will naturally comprehend why it is crucial for me to analyse the

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<sup>8</sup> European Court of Human Rights: *J.R. and others v. Greece*, no. 22696/16.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*



accountability of the EU in the fifth chapter. I will probe different liability schemes for the case of the Greek hotspots towards the EU.

In the conclusion, I will present my findings of this research and give recommendations for further actions and studies.

While researching for this thesis, I stumbled upon surprises regarding facts and figures. For example, the numbers that I collected during my time on Leros, do not match the ones published by the Asylum Information Database.<sup>11</sup> I have due to this occurring trend, tried to refrain as much as possible from exact numbers. The topic of this research should be substantial enough without highly specific data, such as exact numbers on how many individuals that are residing at the individual hotspots.

### 1.5 Sources and previous studies

This research emerged from my personal experiences at the hotspot on Leros, Greece. When investigating further I noticed that the hotspot approach and the EU-Turkey Statement have been analysed and even criticized by scholars from the field of law and additionally from the field of social sciences. Basilien-Gainche gives the hard facts of the hotspots in her essay published in 2017.<sup>12</sup> The European migrant crisis ignited the reporting and monitoring of the refugee camps and later of the hotspots by several European and international NPOs and NGOs. The letter *Joint letter to prime Minister Alexis Tsipras, signed by 19 NGOs*<sup>13</sup> serves an example. The Danish Refugee Council has also analysed the Italian and Greek hotspots in the light of the EU human rights.<sup>14</sup> EU and UN reports and papers are of course also included in the paper.<sup>15</sup> I will use these analyses and reports to build on the overview of the Greek hotspots.

The ECtHR case *J.R. and others v. Greece* and its judgement have been analysed prior to my research. Pijnenburg's analysis, among others, will be utilised in this thesis to build up

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<sup>11</sup> Greek Refugee Council: Reception and Identification Procedure, Greece, The European Policy Framework: 'hotspots'

<sup>12</sup> Basilien-Gainche 2017

<sup>13</sup> ActionAid et al. 2017b

<sup>14</sup> Danish Refugee Council 2017

<sup>15</sup> For example: UNHCR 2017: *UNHCR Recommendations for Greece in 2017*.

on my study.<sup>16</sup> In addition to this, I found that the responsibility and accountability of international organisations have been touched upon multiple times. Verdirame's research on how the UN carry out their operations with potentially putting human rights at risk is one example of this.<sup>17</sup>

There have been previous studies that touch upon all the topics that are included in this paper. I have aimed to use as versatile literature as possible, using both governmental and non-governmental as well as academic and non-academic material and sources. This supports the somewhat vivid nature of the Greek hotspots, as well as the responsibility of international organisations.

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<sup>16</sup> Pijnenburg 2018.

<sup>17</sup> Verdirame 2011.

## 2. The EU and the European migrant crisis

It can be difficult to understand the Greek hotspots and the ECtHR cases that are related to the if one doesn't understand what they emerged from. I will therefore start with presenting the European migrant crisis in the following chapter. I will commence with an overview of the crisis starting in 2015 and gradually moving to a more focused part, namely the implementation of the Greek hotspots.

In the recent past, Europe has experienced the heaviest migration flow since the Second World War. The peak occurred in 2015, with an astonishing 1.25 million registrations for first-time asylum applicants in the EU alone.<sup>18</sup> During the years 2015 and 2016, more than 2.3 million illegal EU border-crossings were detected, according to Frontex data collection.<sup>19</sup> The majority of the people reached Europe by crossing the Mediterranean, usually reaching the shores of Italy or Greece. Crossing these seas is nothing but dangerous especially when the vessels are inadequate and operated by smugglers.<sup>20</sup> The majority then further moved into Europe, this developed an uncontrolled influx. Many Schengen-countries decided to reintroduce the border control within the EU.<sup>21</sup>

Desperately finding ways of getting control of the situation, in May 2015, the European Commission presented the "Proposal for a Council Decision establishing measures in the area of international protection for the benefit of Italy and Greece".<sup>22</sup> The proposal introduced the EU relocation scheme and proposed a solution to relocate 40,000 asylum seekers from Italy and Greece to other EU member states.<sup>23</sup> Subsequently, followed by the joint meeting of Foreign and Interior Ministers resulted in a *Ten point action plan on migration*<sup>24</sup> in April 2015, the European Commission issued the European Agenda on Migration in May the same year. The EU and the member states felt immense pressure to secure the ongoing and ever so instable migrant situation. "We need to restore confidence in our ability to bring together European and national efforts to address migration, to meet our international and ethical obligations and to work together in an effective way, in accordance

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<sup>18</sup> European Parliament News 2017

<sup>19</sup> European Border and Coast Guard Agency: Migratory Map. Detections of illegal border-crossings are updated monthly in a downloadable Excel-sheet. Please note that an individual can cross the border more than once. In other words, the number of individuals crossing is lower.

<sup>20</sup> UNHCR 2015

<sup>21</sup> European Stability Initiative 2017, pp. 16

<sup>22</sup> Cf. European Commission 2015c

<sup>23</sup> *Ibid*, pp. 5.

<sup>24</sup> European Commission Press Release 2015.

with the principles of solidarity and shared responsibility.”<sup>25</sup> The agenda called on the EU as a whole to work for immediate action: saving lives at sea, targeting criminal smugglers, relocation and resettlement of migrants within the EU, working with partner countries to tackle migration upstream and using EU’s tools to aid countries such as Greece and Italy on the frontline.<sup>26</sup>

The European Agenda on Migration additionally presented the brief debut of the hotspot approach, which has become vital and game changing for EU migration and asylum processes.<sup>27</sup> The approach was drafted to be a support system and assistance especially for Greece and Italy, the frontline Member States of the European migrant crisis. The European Commission assessed the mechanism of the hotspots in both countries. The operation entailed close cooperation with various EU agencies. The reception centres were set up in hotspots and are still active within the system and mechanism of identification, registration and collecting fingerprints of the irregular migrants.<sup>28</sup> The assistance of this procedure of screening the irregular migrants was planned to not only speed up the process of allocation of the individuals but was planned also to control and thus calm down the dramatic migrant flow from overseas (more on the hotspot approach below).<sup>29</sup>

In July 2015, the governments of the member states could not agree on the relocation scheme proposed and decided voluntarily to allocate 32,256 persons. 7,744 individuals remained unallocated amongst the member states.<sup>30</sup> Regardless of the relocation scheme and humanitarian aid systems, the number of arrivals (not to mention deaths) did not abate<sup>31</sup>, the EU was in despair. Measures had to be taken, but the EU found itself challenged to an

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<sup>25</sup> European Commission 2015a, p. 2.

<sup>26</sup> Ibid, pp. 3-6.

<sup>27</sup> Ibid, p. 6. “First, the Commission will set up a new 'Hotspot' approach, where 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.”

<sup>28</sup> Cf. European Commission 2017, page 4.

<sup>29</sup> European Commission 2015b

<sup>30</sup> Council of the European Union 2015, pp. 3.

<sup>31</sup> SOURCE

impossible extent.<sup>32</sup> In September 2015, two Council Decisions were issued, summing up to 160,000 relocations within the member states.<sup>33</sup> The Council Decisions and the relocations embedded in them needed new schemes and new structures.<sup>34</sup>

## 2.1 The role of the EU and the member states

The refugee crisis with the peak 2015 led to multiple policies and at times radical schemes. The EU soon realised that the migrant crisis was not going to be temporary.<sup>35</sup> The situation led me to the vital question: who is responsible in a situation like this? Enabling the research on the responsibility I will start with presenting how the EU and the member states were reacting at the time. I will in the following subchapters present the actions and the role of the EU and the member states within the whole EU migrant crisis. The reactions and actions then further led to the Greek hotspots.

When the migrant crisis occurred, the EU member states, and the EU altogether were unsure what to expect. The role of the member states remains until this day somewhat unclear. Logically enough, the focus often lies on Greece and Italy, when discussing the Hotspot Approach. This is due to the fact, that these two countries have been affected the most by the migrant crisis in Europe. The difficulty appears though when discussing the role and responsibilities of the member states. The EU asylum policy is argued to be too ambitious, but also to be inadequate at times. The complexity lies in the ambiguousness. “EU asylum policy is characterized by a contradiction between the commitments to providing protection and to controlling migration into the EU”.<sup>36</sup> The role of the EU has been questionable from the start. How can one solve a problem that seems to be larger than life? How can the EU respond to the European migrant crisis? The Schengen principle in combination with the Dublin Principle gives the European migration regime a somewhat unstable and imbalanced

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<sup>32</sup> “Due to the ongoing instability and conflicts in the immediate neighbourhood of Italy and Greece, and the repercussions in migratory flows on other Member States, it is very likely that a significant and increased pressure will continue to be put on their migration and asylum systems, with a significant proportion of the migrants who may be in need of international protection. This demonstrates the critical need to show solidarity towards Italy and Greece and to complement the actions taken so far to support them with provisional measures in the area of asylum and migration.” Official Journal of the European Union 2015b: Council Decision (EU) 2015/1601, pp. 81-82.

<sup>33</sup> Official Journal of the European Union 2015a: Council Decision 2015/1523 and Official Journal of the European Union 2015b: Council Decision (EU) 2015/1601.

<sup>34</sup> See Chapter 2.4 and 2.5.

<sup>35</sup> Afouxenidis – Petrou – Kandyliis – Tramountanis – Giannaki 2017, p. 14.

<sup>36</sup> Karamanidou – Schuster 2012, pp. 171.

ground.<sup>37</sup> This tricky aspect isn't made easier when one looks back to the previous question of how the EU could handle such a migrant crisis with grace. The supranational union, the EU, was bound to bring about a change regarding their migration and asylum policies, but also on a deeper structural level. "The aim of the EU's asylum policy is to offer appropriate status to any third country national requiring international protection in one of the Member States and ensure compliance with the principle of non-refoulement. To this end, the Union is striving to develop a Common European Asylum System."<sup>38</sup> EU has strived to develop a functioning system. In the upcoming chapters we will look further into the solution that the EU found.

## 2.2 The migrant crisis in Greece

I have limited my field of research of this thesis to the Greek hotspots. Prior to introducing the Hotspot approach, I will present the migrant crisis and how it played out in Greece.

Greece was already struggling before the European migrant crisis became reality. As the Greek Ombudsman clearly in 2017 stated: "Greece was found in the center of both the crises that are testing Europe's cohesion, as an economic and cultural entity. After eight consecutive years of recession, the shrinking of incomes as well as citizens' rights, the crisis, from economic-fiscal, has evolved into a broader social one, with features of a now humanitarian crisis."<sup>39</sup> The EU Member States drafted a two-year plan in September 2015 to ease the pressure due to the Refugee crisis that Greece and Italy had experienced the strongest. The Council Decisions 2015/1523<sup>40</sup> and 2015/1601<sup>41</sup>, also known as Relocation Decisions, entailed an emergency relocation mechanism to relocate 160,000 asylum seekers. Greece had to then accommodate to the decisions. "The Greek state, within conditions of severe economic hardship and social disorganisation, was required to develop a policy of reception and identification of asylum seekers, which I ought to have fulfilled years before. The urgent foundation of structures and procedures, under the pressure and coercion of the EU, has resulted in a reception policy focusing on hotspots."<sup>42</sup> Greece was put in a tough

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<sup>37</sup> cf. Pastore - Henry 2016, pp. 50-51.

<sup>38</sup> European Parliament 2018, p. 3.

<sup>39</sup> The Greek Ombudsman 2017, p. 8.

<sup>40</sup> Official Journal of the European Union 2015a: Council Decision 2015/1523

<sup>41</sup> Official Journal of the European Union 2015b: Council Decision (EU) 2015/1601

<sup>42</sup> Kourachanis 2018, p. 1165.

spot. The fact that Greece is geographically situated on the edge of the EU with Asia and Africa on the other side of the Aegean Sea, became suddenly extremely central. This sea way was the main path of the migrant flow during the European migrant crisis. Greece ended up in a sort of state of emergency and it was or still is difficult to recover.<sup>43</sup>

Greece went from first being a country that served as a stop on the journey to suddenly being responsible for strict controls and enforcing new policies within the EU asylum system.<sup>44</sup> Transitions and fast changes are not easy on a state. Greece was also criticised on being slow on adapting to the crisis. The lack of a consistent plan was evident.<sup>45</sup> In addition to this the EU was also in transition trying to respond to the migration flow. “The European Union is standing at the most critical crossroads on its path towards integration.”<sup>46</sup>

### 2.3 The Hotspot approach and the legal framework

I have now opened the situation that the EU and Greece found itself in prior to the Hotspot approach. I will in the following introduce the Hotspot approach to the reader. The crisis that the EU found itself formed the likewise evasive system. In addition to the Hotspot approach short introductions of the different actors and schemes will be included. This is to form the ensemble before entering deeper into the topic.

The call for aid on securing the external border of the EU was stated in the European Agenda on Migration in May 2015.<sup>47</sup> The European Commission developed the hotspot approach as a response to the call. The hotspot approach was presented by the European Commission in September 2015 under the name “The Hotspot approach to managing exceptional migratory flows”.<sup>48</sup> The Hotspot approach was implemented with the aim to serve emergency relocation mechanisms to 160 000 people, who needed international protection. The relocation mechanism, among the EU member states, was meant to act as the principle of

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<sup>43</sup> Cf. The Greek Ombudsman, pp. 6-8.

<sup>44</sup> Cf. Afouxenidis – Petrou – Kandylis – Tramountanis – Giannaki 2017, p. 8: “The Greek state’s orientation to the crisis has also shifted over recent months from assuming the role of transit nation, to an approach where strict controls have gradually been introduced and enforced. The latter is also part of the overall EU approach to immigration but we feel that it is also a strategic decision undertaken by the government.”.

<sup>45</sup> The Greek Ombudsman 2017, p. 7: “They were late in grasping the magnitude of the issue, and when they actually did, they reacted in a piecemeal manner, instead of acting in the context of a coherent plan”.

<sup>46</sup> The Greek Ombudsman 2017, p. 7.

<sup>47</sup> European Commission 2015a, pp. 3, 6, 10, 11, and 17.

<sup>48</sup> European Commission 2015b.

solidarity and fair sharing of responsibility.<sup>49</sup> A hotspot area is defined by the European Parliament and by the Council of the EU 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”.<sup>50</sup> Furthermore, the Hotspot approach is explained as a mechanism where the European Asylum Support Office (further on called EASO)<sup>51</sup>, the European Border and Coast Guard Agency (further on called Frontex)<sup>52</sup>, European Police Office (EUROPOL)<sup>53</sup> and Eurojust<sup>54</sup> collaborate with the national authorities of the EU Member States, foremost Italy and Greece, who were facing disproportionate migratory flows. The mechanism was planned to help the officials in the individual instances with their work and in this way enable quicker processing of the irregular migrants.

The process within the hotspot entails identifying, registering, debriefing and fingerprinting each individual migrant in the first entry country. The idea of the hotspot approach is to ensure that every irregular migrant is further channelled to one of these three pipelines: asylum, return or relocation.<sup>55</sup> Within the hotspots the suitable agencies are planned to map out the individual migrants and their needs. Thus, by means of the processing the migrants who are not in need of protection will be identified. Frontex will then help Greece and Italy with the coordination of returning these individuals. The EU strives also to dismantle smuggling and trafficking networks. Europol and Eurojust will be present at the hotspots for this purpose. However, not solely for this purpose.<sup>56</sup>

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<sup>49</sup> European Parliament 2018, p. 5. See Article 80 of TFEU

<sup>50</sup> Official Journal of the European Union 2016: Regulation (EU) 2016/1624

<sup>51</sup> Official Journal of the European Union 2010: EASO is an EU agency that acts the main support and expertise on asylum within the union. It was established to help member states fulfil their obligations, both on European and international level, to protect the individuals who are in need. The agency is set up by Regulation (EU) 439/2010.

<sup>52</sup> European Union, official website: Frontex, “Frontex helps EU countries and Schengen associated countries manage their external borders. It also to helps to harmonise border controls across the EU. The agency facilitates cooperation between border authorities in each EU country, providing technical support and expertise.”

<sup>53</sup> European Union, official website: Europol, “The European Police Office (Europol) is the EU’s law enforcement agency, whose remit is to help make Europe safer by assisting law enforcement authorities in EU member countries.”

<sup>54</sup> According to the official policy of the hotspot approach, Eurojust is present at the hotspots. However, I did not see Eurojust on the Lepida hotspot. My personal experience of the time spent in the Greek archipelago at that time, showed to me, that all hotspots were unique. The actors and organisations varied, and the roles could also differ.

<sup>55</sup> European Commission 2015b

<sup>56</sup> European Commission 2015b



Among the main functions of the hotspot approach, one is to identify the wishes of the migrants within the EU. Within the hotspot the migrants must explicitly express their wish to apply for international protection. Once they have expressed this wish, the staff of the hotspot shall guide them into the asylum procedure. This is the core function of the hotspot approach. The hotspot approach moreover performs as the guardian for the right to asylum (Article 18, EU Charter of Fundamental Rights) and for the protection from collective expulsion and refoulement (Article 19, EU Charter of Fundamental Rights, Article 78 of the Treaty on the Functioning of the of the European Union, Article 4 of Protocol No. 4 to the ECHR).<sup>57</sup>

The Hotspot approach is implemented in practice with small disparities from one and other. Still the hotspots mostly function in the same way. What is characterising for all of them are the diverse actors that function within the system, as well as the various policies that have enabled the birth of the hotspots. I will introduce you to the different actors and key policies within the hotspot ecosystem. This enables the reader to get the full picture of the reality.

### *The Common European Asylum System*

The Tampere European Council of 1999 agreed on the establishment of a Common European Asylum System (further on called CEAS). CEAS is a collective of EU laws that was finalised in 2005. The establishment works on the premises that asylum will be granted to people fleeing persecution or serious harm in their country of origin. These individuals need international protection in form of asylum. CEAS is meant to ensure that every EU member state protects the rights of asylum seekers and refugees. The 1951 Geneva Convention on the protection of refugees<sup>58</sup> presents asylum for the first time in history as not only a

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<sup>57</sup> European Union Agency for Fundamental Rights 2019, pp. 34.

EU Charter of Fundamental Rights, Article 18 Right to asylum: The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter referred to as 'the Treaties').

EU Charter of Fundamental Rights, Article 19 Protection in the event of removal, expulsion or extradition: 1. Collective expulsions are prohibited.

2. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

Treaty on Functioning of the European Union, Article 78 (1): 1. The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.

ECHR, Article 4 of Protocol No. 4 Prohibition of collective expulsion of aliens: Collective expulsion of aliens is prohibited.

<sup>58</sup> UNHCR 1951: Convention and Protocol Relating to the Status of Refugees, Text of the 1951 Convention Relating to the Status of Refugees, introductory note by the Office of the United Nations High Commissioner

fundamental right, but also an international obligation to be granted to an individual. The EU being an area that not only enables free movement, but moreover lacking substantive border control, it lays the foundation of the Member States being obliged to follow the same migration policies and migration law. The system that resulted from this was the CEAS, that was revised again in 2016.<sup>59</sup> CEAS has been criticised by scholars for ‘externalisation’ of migration control. “A key effect to CEAS is to ‘externalize’ migration control through immigration detention.”<sup>60</sup>

### *EU Immigration Policy*

The EU Immigration Policy relies fundamentally on the legal basis of the Articles 79 and 80 of the Treaty on the Functioning of the European Union (TFEU).<sup>61</sup> The treaty is planned

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for Refugees (UNHCR), page 3: “Developments in international human rights law also reinforce the principle that the Convention be applied without discrimination as to sex, age, disability, sexuality, or other prohibited grounds of discrimination. The Convention further stipulates that, subject to specific exceptions, refugees should not be penalized for their illegal entry or stay. This recognizes that the seeking of asylum can require refugees to breach immigration rules.”

<sup>59</sup> European Commission 2016: In this communication, the Commission presents options for a fair and sustainable system for allocating asylum applicants among Member States, a further harmonisation of asylum procedures and standards, and a strengthening of the mandate of the European Asylum Support Office (EASO).

<sup>60</sup> cf. Silverman 2018, pp. 3.

<sup>61</sup> Official Journal of the European Union 2012: TFEU Art. 79: “1. The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings. 2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures in the following areas:

- (a) the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunification;
- (b) the definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States;
- (c) illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation;
- (d) combating trafficking in persons, in particular women and children.

3. The Union may conclude agreements with third countries for the readmission to their countries of origin or provenance of third-country nationals who do not or who no longer fulfil the conditions for entry, presence or residence in the territory of one of the Member States.

EN 26.10.2012 Official Journal of the European Union C 326/77

4. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish measures to provide incentives and support for the action of Member States with a view to promoting the integration of third-country nationals residing legally in their territories, excluding any harmonisation of the laws and regulations of the Member States.

5. This Article shall not affect the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed.”

TFEU Art. 80 “The policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle.”

to serve different purposes and is thus divided into four main competences: regular immigration, integration, combating irregular immigration and readmission agreements.<sup>62</sup>

The EU Immigration Policy on the competence for combating irregular immigration reads: “the European Union is required to prevent and reduce irregular immigration, in particular by means of an effective return policy, in a manner consistent with fundamental rights.”<sup>63</sup>

The effective return policy has been more difficult to implement without breaching human rights. The competence of readmission agreements entail that the EU “is competent to conclude agreements with third countries for the readmission to their country of origin or provenance of third-country nationals who do not or no longer fulfil the conditions for entry into, or presence or residence in a Member State.”<sup>64</sup>

### *The European Agenda on Migration*

The migration crisis in 2015 forced the EU to create a renewed agenda for migration, resulting in the European Commission presenting ‘A European Agenda on Migration’<sup>65</sup> in May 2015. The agenda proposed all in all four policy areas:

“Reducing incentives for irregular immigration; Border management – saving lives and securing external border; Developing a stronger common asylum policy; and (e)stablishing a new policy on regular immigration, modernising and revising the ‘blue card’ system, setting fresh priorities for integration policies, and optimising the benefits of migration policy for the individuals concerned and for countries of origin.”<sup>66</sup>

The Agenda presented a plan of ‘Immediate action’<sup>67</sup> with the action points of: 1) saving lives at sea, 2) targeting criminal smuggling networks, 3) responding to high-volumes of arrivals within the EU: Relocation, 4) a common approach to granting protection to displaced persons in need of protection: Resettlement, 5) working in partnership with third countries to tackle migration upstream, 6) using the EU’s tolls to help frontline Member States.<sup>68</sup>

The fifth and sixth immediate action points were set out to be the foundation of the EU-Turkey settlement.<sup>69</sup>

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<sup>62</sup> European Parliament 2019a.

<sup>63</sup> Ibid.

<sup>64</sup> Ibid.

<sup>65</sup> European Commission 2015a: ‘A European Agenda on Migration’.

<sup>66</sup> European Parliament 2019a.

<sup>67</sup> European Commission 2015a, p. 3.

<sup>68</sup> Ibid. page 3-6.

<sup>69</sup> See subchapter 2.4 EU-Turkey Statement

### *The Dublin Regulation*

The Dublin Regulation (Regulation 604/2013) is part of the CEAS and the common asylum system. The Dublin III Regulation defines which EU Member State has the obligation to process and evaluate the asylum claim for migrants arriving in Europe.<sup>70</sup> 1 January 2014 the Regulation entered into force and defines in practice which State has the obligation to evaluate the asylum request of the migrants arriving in the EU. Every individual entering the EU is fingerprinted in their first country of entry, in this way they are also registered. The data bank will thus easily show in which country every individual first entered. The Dublin Regulation stipulates that the asylum application shall be handled in the country that the migrant has entered first. The member States can in this way choose to return asylum seekers to their country of first entry, if they wish to.

The Regulation's aim is also to provide the asylum seeker a fair examination in one Member State. The (irregular) migrant has the indisputable right to a personal interview and children shall not be separated from their family members at any time. The Regulation also stipulates the fact that detention of migrants should solely be used as a last resort where other measures have been proven to not be effective.<sup>71</sup>

### *Family Reunification*

The Directive on the right to family reunification<sup>72</sup> lays legal grounds for the process of reuniting family members to those who already reside legally in an EU Member State. The Family Reunification Directive solely applies to legally residing third-country nationals<sup>73</sup> who are requesting to be reunited with family members, who also are third-country nationals.

### *The European Asylum Support Office*

One of the main agencies to the CEAS is the European Asylum Support Office (EASO). The EU 2004 Hague Programme furthermore proposed the European Asylum Support Office (EASO) within the CEAS. EASO was set up on 1 February 2011 as an EU agency to enable

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<sup>70</sup> Official Journal of the European Union 2013: 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)

<sup>71</sup> cf. UNHCR - ECRE: The Dublin Regulation

<sup>72</sup> Official Journal of the European Union 2003: EU Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification

<sup>73</sup> 'Third-country national' meaning any person who is not a citizen of the Union

the cooperation of the EU member states and their asylum-related matters in practice<sup>74</sup>. EASO's role was vital in 2015 when the EU implemented the new Hotspot approach.

#### *European Border and Coast Guard Agency*

Frontex was prior known as the *European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union*, as from October 2016 known as *European Border and Coast Guard Agency*.<sup>75</sup> The national authorities of the individual EU Member States are responsible for the border management. The national authorities shall then constitute the Agency within their work of field. The cooperation was according to the regulation called the European integrated border management.<sup>76</sup>

I have now presented the actors and policies within the hotspot scheme. The different components have led to the hotspots in Greece. One policy has not been presented in this list by choice. This is the EU-Turkey Statement. The statement will be presented in the next subchapter.

When discussing the Hotspot approach the question of detention is often brought up, when discussing the hotspot approach. According to the European Parliament, detention should only be utilised “in very clearly defined exceptional circumstances and that there should be a right of appeal against it before a court”.<sup>77</sup> However the Hotspot approach entails the possibility of detention as long as it is within reason. “In addition, the Greek State should ensure the reference in law, and full application in practice, of Article 31 of the 1951 Convention Relating to the Status of Refugees and strictly limit the use of restriction of liberty for new arrivals for the absolute minimum time necessary for identification and registration, with the exception of children who should never be detained.”<sup>78</sup> What is then the maximum time that they can be detained? Greek law states that 25 days is the maximum

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<sup>74</sup> Official Journal of the European Union 2010: Regulation (EU) No 439/2010 of the European Parliament and the of the Council of 19 May 2010 establishing a European Asylum Support Office

<sup>75</sup> Official Journal of the European Union 2016: Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard, p. 2

<sup>76</sup> Cf. Ibid. p. 11-12

<sup>77</sup> European Parliament 2018, p. 8.

<sup>78</sup> UNHCR 2017

time of detention.<sup>79</sup> However, the reality does not always align with the law. We will get back to this later.<sup>80</sup>

## 2.4 EU-Turkey Statement

When discussing the Hotspot approach in Greece, one can impossibly leave out the EU-Turkey Statement. I will present the EU-Turkey Statement to the reader in the following chapter. An understanding of the EU-Turkey Statement in addition to the Hotspot approach is vital, when diving further into the hotspots in Greece.

Subsequently to the ongoing migrant crisis at the Aegean Sea and in Greece, the EU head officials started meeting to address the migration crisis with the thought on stabilising the situation externally from the EU. On 29 November 2015, the EU and Turkey published the Joint Action Plan as a result of the international summit.<sup>81</sup> The statement presented action points on how to achieve the goal of ending the irregular migration from Turkey to the EU. The concern of individuals putting their lives at risk and smugglers and how they are exploiting the migrants and their business model, were one of the main reasons for the production of the action points.<sup>82</sup> After the third meeting since November 2015, the Council of the European Union published an updated EU-Turkey statement by way of a press release on 18 March 2016. The EU-Turkey statement aimed “to end the irregular migration from Turkey to the EU”.<sup>83</sup> Turkey accepted this statement in exchange for the EU providing them billions of euros in financial support for projects to support and protect refugees in Turkey. Additionally, the EU promised to revive the discussion of Turkey’s accession to the EU and the possible implementation of visa-free travelling for Turkish citizens in the EU.<sup>84</sup>

The statement brought a large change to the hotspots. Hotspots could suddenly be regarded as “closed detention centres”.<sup>85</sup> The irregular migrants arriving to the Aegean islands after 20 March 2016, were detained in the hotspot area. The individuals who would not apply for

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<sup>79</sup> Greece 2016, Hotspots are according to Greek law designed and designated for a maximum of 25-day detention (Law 4375/2016).

<sup>80</sup> See Chapter 4 and especially subchapter 4.4.

<sup>81</sup> Council of the European Union 2015

<sup>82</sup> Ibid.

<sup>83</sup> Council of the European Union 2016: EU-Turkey Statement, 18 March 2016

<sup>84</sup> Council of the European Union 2015, Action point 2, 5 and 6.

<sup>85</sup> Greek Refugee Council: Reception and Identification Procedure, Greece, The European Policy Framework: ‘hotspots’

asylum within the borders of Greece, or whose asylum application can be considered as laying on insufficient grounds, is inadmissible under the directive of asylum and thus should, according to EU-Turkey Statement, be returned to Turkey. The complexity however lies in the fact that the EU has the non-refoulement principle. All irregular migrants are to be protected by the non-refoulement, not mentioning that all rights of these individuals are to be respected. The principle of non-refoulement should guarantee that no individual shall be forcibly returned to a country where they face persecution.<sup>86</sup> All costs of the return operations of the irregular migrants to Turkey was planned to be covered by the EU.<sup>87</sup>

The detention of migrants was followed by extreme criticism due to the limitations of logistics that the islands and hotspots could provide. The practice has been largely left behind and replaced with a systematic geographical restriction. This restriction implies in practice that the irregular migrants are not allowed to leave the island but are allowed to move freely outside the hotspot on the island.<sup>88</sup>

The Progress report on the European Agenda on Migration states the fact that the Eastern Mediterranean route, meaning the route from Turkey to Greece, has remained calmer in comparison to the period before the implementation of the EU-Turkey Statement.<sup>89</sup> Even though the EU has been criticised for the EU-Turkey Statement, the EU remains content with the deal outwards.<sup>90</sup>

The Statement was a proof of the EU and its member states trying to geographically extrude the migrant control from the EU area. All migrants arriving in Greece, should be sent back to Turkey. The Statement also entails an exchange-deal, for every Syrian that the EU sends back to Turkey, a Syrian migrant in Turkey will be relocated within the EU.<sup>91</sup>

The aftermath of the Statement has shown that none of the legal measures were followed according to EU law – such as an approval from the European Parliament. This results in the Statement classifying as ‘soft law’ and thus not qualified as a legally binding provision. However, the practice of the Hotspot approach as well as the EU-Turkey Statement were implemented as ‘hard law’, binding legislative measures. The usage of informal statements

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<sup>86</sup> Weissbrodt – Hortreiter 1999, p. 2.

<sup>87</sup> Council of the European Union 2015, Action Point 1.

<sup>88</sup> Greek Refugee Council: Reception and Identification Procedure, Greece, The European Policy Framework: ‘hotspots’ as well as the Greek Refugee Council: Freedom of movement

<sup>89</sup> European Commission 2017, pp. 1.

<sup>90</sup> European Commission 2017, pp. 6.

<sup>91</sup> Kourachanis 2018, p. 1155.

and agreements not only gambles with the most precious power that the EU thrives on, the power of democracy, but also puts the jurisdiction of a supranational power in a very bad light. The fact that the European Commission thinks highly of the EU-Turkey Statement and praises it for returns of individuals that have been “successful” is not only concerning, but furthermore appalling.<sup>92</sup>

The EU-Turkey Statement has been criticised and condemned as a basis for EU’s denial of protection to Syrian refugees. The grounds are admissible, and the examination of the legal grounds are classified as insufficient.<sup>93</sup> Not only is this worrying but the practice of the processing of asylum application also shows that the statement violates the applicant’s legal and full right to asylum.<sup>94</sup>

## 2.5 Hotspots in Greece

The Hotspot approach resulted in physical hotspots. In the section below, I will introduce the hotspots in Greece and go more into detail on how they work in practice. I will furthermore attend to the actors within the hotspot areas and try to give the reader the full picture of the operation and activities.

The EU and Greece implemented the hotspots to ensure identification and registration of the irregular migrants arriving to the Greek islands. The hotspots official name according to Greek law was initially First Reception Centres (FRS), now they are called Reception and Identification Centres (RIS).<sup>95</sup> We will however stick to the appellation “hotspot”. There are five hotspots in total in Greece. Each hotspot is located on an Aegean island: The Moria on Lesbos, Vial on Chios, Vathy on Samos, Lepida on Leros and Pili on Kos. Lesbos, Chios, Samos and Leros were all operational by March 2016.<sup>96</sup> The total capacity that the hotspots hold in total is of 6,338 places. The hotspots were however overflowing with 15,201 residents in May 2018.<sup>97</sup>

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<sup>92</sup> Cf. Ziebritzki 2017.

<sup>93</sup> The Greens / EFA 2018, p 6.

<sup>94</sup> UNHCR 2016, pp. 3-6.

<sup>95</sup> Greece 2016, Law 4375/2016.

<sup>96</sup> Danish Refugee Council 2017, p. 11.

<sup>97</sup> European Parliamentary Research Service 2018, p. 3.



As mentioned above, the Greek authority in charge of the management of the hotspot (officially called the Reception and Identification Service (further on called RIS)).<sup>98</sup> RIS is according to the Greek law responsible for all the procedures of registration, identification and data verification within the hotspots. RIS is furthermore responsible for the medical screening, identification of vulnerable persons, the provision of information and the establishment (and more).<sup>99</sup> The difficulty of the RIS-structure is that only a few of the RIS staff member have permanent contracts. This leads to lack of continuity, where it is needed the most.<sup>100</sup> Even though RIS is responsible for the hotspots and to make sure that the hotspot areas are lawful, the task can be challenging because RIS does in fact not provide the majority of these services in the hotspots.<sup>101</sup> The RIS has, according to Greek law, the right to detain an individual for three days, which can be extended up to 25 days, and is supposed to avoid detention of minors.<sup>102</sup>

Irregular migrants arriving to Greece by crossing the Aegean Sea have been through a lot. Identifying vulnerable individuals within this group is more than a challenge.<sup>103</sup> However, this is a large part of RIS' work.

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<sup>98</sup> Greece, Law 4375/2016, On the organization and operation of the Asylum Service, the Appeals Authority, the Reception and Identification Service, the establishment of the General Secretariat for Reception, the transposition into Greek legislation of the provisions of Directive 2013/32/EC “on common procedures for granting and withdrawing the status of international protection (recast)(L 180/29.6.2013), provisions on the employment of beneficiaries of international protection and other provisions, Article 8 (1) and (2).

<sup>99</sup> Greece, Law 4375/2016, Article 8 (2).

Greece, Law 4375/2016, Article 9 (1): Reception and identification procedures shall include: a) the registration of their personal data and the taking and registering of fingerprints for those who have reached the age of 14, b) the verification of their identity and nationality, c) their medical screening and the provision of any necessary care and psycho-social support, d) informing them about their rights and obligations, in particular the procedure for international protection or the procedure for entering a voluntary return program, e) attention to those belonging to vulnerable groups, in order to guide them to the appropriate, in each case, procedure and to provide them with specialized care and protection, f) referring those who wish to submit an application for international protection to start the procedure for such an application, g) referring those who do not submit an application for international protection or whose application is rejected while they remain in the RIC to the competent authorities for readmission, removal or return procedures.

<sup>100</sup> European Union Agency for Fundamental Rights 2019, p. 27.

<sup>101</sup> cf. Ibid, p. 27. According to the Figure 4 on page 27 of the FRA Opinion, these are the structures of the hotspots: The Hellenic Police provides the safety services. The Hellenic Army provides food, blankets, clothes, infrastructure (including repairs). The UNHCR provides cash assistance to the residents of the hotspots. KEELPNO provides healthcare and social services. “Other” operators provide education and other services.

<sup>102</sup> Greece: Greek Law No. 4375 of 2016, Article 14 (2) and 46 (10) (b).

<sup>103</sup> Greece: Law 4375 of 2016, Article 14, paragraph 8: “As vulnerable groups shall be considered for the purposes of this law: a) Unaccompanied minors, b) Persons who have a disability or suffering from an incurable or serious illness, c) The elderly, d) Women in pregnancy or having recently given birth, e) Single parents with minor children, f) Victims of torture, rape or other serious forms of psychological, physical or sexual violence or exploitation, persons with a post-traumatic disorder, in particularly survivors and relatives of victims of ship-wrecks, g) Victims of trafficking in human beings.”. Note that the Greek law does not include LGBTI individuals in the vulnerability categories. cf. Refugees International 2017.

All hotspots in Greece possess three mutual elements. Namely, of being actual physical sites, having the same working method and using a filtering mechanism to group and categorise the irregular migrants.<sup>104</sup> The Greek army is responsible for the maintenance of security within the hotspot areas.<sup>105</sup> The hotspots and their function have been enabled by the vital help and support of the EASO and Frontex, and the deployment of twelve EU-vessels in naval operations on top of that.<sup>106</sup> All five hotspots work in practice in slightly different ways. This can lead to assured vagueness in the assessment of the legality of them.<sup>107</sup>

The hotspots work as an evidence of collaboration. Generally, the Greek Police, Frontex, UNHCR, IOM, Asylum Service, EASO, RIS and various NGOs work together on the ground. The Greek Police guards the external area of the hotspot. The Greek Police and Frontex both work with identifying and verifying the nationalities of irregular migrants. UNHCR and/or the International Organisation for Migration (IOM) provide the irregular migrants with information. The Greek Asylum Service is present at the hotspot to assist the migrants seeking international protection. EASO are rather vital in the asylum procedure within the hotspot. They handle the first instance personal interviews; take part of the vulnerability assessment procedure and they give an estimation of the asylum applications. Medical and psychological care has been arranged by NGOs under authorisation of RIS until mid-2017. Ever since, the Centre for Disease Control and Prevention, an entity under the Ministry of Health and Social Solidarity, has taken over.<sup>108</sup>

Even though the hotspot approach is presented in the European Agenda on Migration as short-term crisis response<sup>109</sup>, it seems likely that the EU institutions have prepared themselves to include the approach for the long run. The fact that the hotspot approach is included in the Frontex regulation could signify this.<sup>110</sup> The existence and functions of these hotspots do not convince all scholars. Registration, identification and debriefing doesn't scare the irregular migrants away as much as the fact that they can be detained. "Detention does not deter asylum seekers who fear for their lives, it only re-routes them to more dangerous and fraught paths."<sup>111</sup> The Greek hotspots have had difficulties with people gone

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<sup>104</sup> Danish Refugee Council 2017, p. 9.

<sup>105</sup> Kourachanis 2018, p. 1154.

<sup>106</sup> European Commission 2017, p. 4.

<sup>107</sup> Greek Refugee Council: Reception and Identification Procedure, Greece, The European Policy Framework: 'hotspots'

<sup>108</sup> See European Commission 2015b.

<sup>109</sup> European Commission 2015a, p. 6

<sup>110</sup> cf. Official Journal of the European Union both 2015a and 2015b.

<sup>111</sup> Silverman 2018, p. 4.

missing and smuggling themselves not only from Turkey to Greece, but also from Greece into other EU-countries. Greek hotspots have also been criticised for the processes within it being too tedious. “Unclear and lengthy asylum procedures: The majority were frustrated with what they consider a lack of sufficient information on asylum procedures and the legal framework. A source of anxiety is the lack of clarity on procedures or feedback on the status of their asylum claim, particularly on the islands. This has severe implications on psycho-social wellbeing, irrespective of age and gender.”<sup>112</sup>

Not only UNHCR has expressed the discontent with the hotspot scheme that the EU and the member states have produced. Kourachanis expresses his disbelief in this migrant relief management. The worry that the hotspots violate human rights can be affirmed. “The policy of the EU and the Greek state in refugee management over the past 3 years is not a policy that respects fundamental human rights. Living conditions in the hotspots, which are a central supranational and national policy, violate respect for human rights and democracy. Ensuring adequate living conditions for third-country national and avoiding the risk of their marginalisation within fenced accommodation facilities are the significant challenges that the Greek state currently faces.”<sup>113</sup>

The frustration that the UNHCR and scholars like Kourachanis is presenting is only one example of the Hotspot approach and the Greek hotspots not being suitable for the situation that Greece found itself in. One can ask if there was any alternative to this approach though. Four years later, the hotspots still serve this purpose, and in addition contain the migrants to the individual island, thus preventing from gaining access to the mainland.<sup>114</sup> The migrants are prohibited from leaving the island, unless they are provided exemptions or are granted asylum. “It is obvious that hotspots are being used as detention and foreclosure facilities. At the same time, they are also being used as a deterrent against migration flows to central and northern European countries. Hotspots, therefore, act as a double preventive border.”<sup>115</sup> This particular *containment policy* was not included in the hotspot approach but has had an immense effect on the asylum system in Greece, not to mention within the EU. The islands that hold these hotspots are neither built nor structured to provide for such migration. Consequently, making the policy an issue of not only the EU, Greece, but also of the

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<sup>112</sup> UNHCR 2018, p. 8.

<sup>113</sup> Kourachanis 2018, p. 1166.

<sup>114</sup> Danish Refugee Council 2017, p. 7.

<sup>115</sup> Kourachanis 2018, p. 1155.

communities of these Aegean islands.<sup>116</sup> The overcrowding of the hotspots has led to lack of sanitary facilities, medicine and adequate health care, food and proper shelter.<sup>117</sup>

Even though the ‘hotspot approach’ has received attention within refugee law and policymaking, it remains unclear what the approach specifically entails. If the approach per se is seen as indistinct, the hotspot will be undefined.<sup>118</sup>

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<sup>116</sup> Refugees International 2017, pp. 5-6.

<sup>117</sup> UN Human Rights Council 2017, p. 3.

<sup>118</sup> cf. Papoutsi et al. 2018, p. 2200.

### 3. The EU and the protection of human rights

I strive to analyse the hotspots and the question of EU's possible accountability towards human rights violations. Therefore, I will in the following present the structure of the EU's human rights protection. This will set a foundation for me to explore the field. In the following chapter, I will explain the basics of how the EU protects human rights. I will review the EU and the relationship it has with the ECHR. I will further discuss the EU member states and the ECHR. I will additionally handle the doctrine of equivalent protection within this chapter.

The relationship between the European Union and the protection of human rights can hardly be explained in a simple way. Referring to the EU's policies of human rights as somewhat paradoxical, is not uncommon.<sup>119</sup> The original Treaties<sup>120</sup> did not touch on human rights. Despite this fact, one can argue that human rights have been part of the EEC/EU project from the very beginning. This is because the EEC was founded to ensure peace in Europe.<sup>121</sup>

The founding legal basis of the human rights protection of the European Union can be found in the Treaty on European Union (further on called TEU)<sup>122</sup>. Article 2 of the TEU states that human rights do belong to the fundamental values of the Union.<sup>123</sup> Furthermore, the Article 6(1) of the TEU warrants the EU to respect human rights and fundamental freedoms.<sup>124</sup> Additionally, the Article 6 (2) urges the EU to accede to the ECHR<sup>125</sup> (more information regarding that in the chapter 3.2 Accession of the EU to the ECHR). Article 21 of the TEU

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<sup>119</sup> cf. Alston 1999, p. 6.

<sup>120</sup> Treaty establishing the European Coal and Steel Community (1951), Treaty establishing the European Economic Community (1957), Treaty establishing the European Atomic Energy Community (1957).

<sup>121</sup> Douglas-Scott – Hatzis 2017, p. 1.

<sup>122</sup> Treaty on the European Union, also called the Maastricht Treaty, was signed in 1992 and entered into force 1993. The treaty was drafted in preparation for the European Monetary Union. The treaty also gives the EU more elements of a political union. More on the treaty can be found: [[https://europa.eu/european-union/law/treaties\\_en](https://europa.eu/european-union/law/treaties_en)] (5.2.2020)

<sup>123</sup> Article 2 of TEU "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, nondiscrimination, tolerance, justice, solidarity and equality between women and men prevail." cf. Borchardt (2010), pp. 19.

<sup>124</sup> Article 6 of TEU: "1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.

<sup>125</sup> Article 6 of TEU 2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law."

refers to the obligation of “the universality and indivisibility of the human rights” regarding all conduct and action of the EU, within and outside the borders of the union itself.<sup>126</sup>

The Strategic Framework and Action Plan on Human Rights and Democracy established EU human rights policy.<sup>127</sup> The framework was escorted by an action plan to ensure the enforcement.<sup>128</sup> The Framework refers to human rights as one of the top priorities of the EU.<sup>129</sup>

Even though the EU states to prioritise human rights protection and promotion, there are also other international organisations that strive to do the same. In the following subchapter we will delve into the Council of Europe’s convention, ECHR, and the relationship that it has to the EU.

### 3.1 The EU and the ECHR

In this thesis, I am using the ECHR as my legal basis and its case law as my example to assess the accountability of the EU within human rights violations. Therefore, I will present the ECHR and the relationship between it and the EU and its member states. I will commence in this chapter with portraying the relationship between the actors and further move on to the ECHR and the case law in the next chapter.

One can, on the one hand argue that the EEC/EC did not see human rights as the elementary pillar of their function. On the other hand, human rights can be seen as the very motive for the formation of the EEC/EC (see above 3. European Union and human rights protection). Either way, the stronger the EC/EU became, the more responsibility it had to take. This

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<sup>126</sup> Article 21 of TEU “The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.” Furthermore the Article 21 (2) of the TEU states: “2. The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to: (...) (b) consolidate and support democracy, the rule of law, human rights and the principles of international law”

<sup>127</sup> Council of The European Union 2012, p. 1: “The EU is aware of these challenges and determined to strengthen its efforts to ensure that human rights are realised for all. The EU will continue to throw its full weight behind advocates of liberty, democracy and human rights throughout the world.”

<sup>128</sup> Council of the European Union 2012, EU ACTION PLAN ON HUMAN RIGHTS AND DEMOCRACY is included in the document, with a clear view and action points. This states the importance and value of human rights within the EU.

<sup>129</sup> Ibid.

progress has also applied to human right protection. Consequentially, the ECHR and the EU have become more intertwined with time.<sup>130</sup>

The CJEU's role is to ensure that every EU member state and institution interprets and applies EU law correctly. The ECtHR, for its part, protects human rights within the scope of the ECHR. The parties of the ECHR are mostly EU member states. This fact makes the relationship between the EU and the ECHR special, but also somewhat complex. At what point does the EU law end and the human rights scheme of the ECHR start?<sup>131</sup> What is the position of an EU member state within the ECHR? Transferring sovereign power to an international organisation will and has not been prevented by the ECHR. The responsibility to act according to the Convention will however remain.<sup>132</sup>

Even though the EU and the ECHR are more intertwined, the EU has refrained from becoming a party to the ECHR. Because the EU is not party to the ECHR, the EU institutions may infringe ECHR rights. "The question therefore arises whether these institutions must comply with the Convention when they act. A related question is whether member states are responsible under the Convention for the effect on private persons of their national legislative or other public acts that are a consequence of EU membership."<sup>133</sup> These questions lead us naturally to the well-known, possible accession of the EU to the ECHR.

### 3.2 The Accession of the EU to the ECHR

The EU has experienced challenges with its versatile legal space striving to protect human rights. Thus, has the possible accession of the EU to the ECHR been discussed since the late 1970s. Under Article 6(2) of the Treaty of Lisbon the accession became a legal obligation.<sup>134</sup> An informal working group was initiated to develop an accession agreement and thus enable the accession as such. The final agreement was reached in April 2013 and thereafter submitted to the CJEU.<sup>135</sup> The CJEU did not see the agreement adaptable with the Treaties

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<sup>130</sup> cf. Greer 2008, pp. 47-48. "(...) the EU began to require respect to human rights as a condition of non-EU states entering into formal trading and other relationships with it. As a result, it became increasingly difficult for the EU to justify not having a developed human rights policy for its own internal affairs." Greer 2008, p. 49.

<sup>131</sup> Hert – Korenica 2012, p. 875.

<sup>132</sup> Harris – O'Boyle – Warbrick 2014: p. 32.

<sup>133</sup> Harris – O'Boyle – Warbrick 2014: pp. 31-32.

<sup>134</sup> European Parliament 2019b.

<sup>135</sup> Council of Europe 2013.

*Opinion 2/13*.<sup>136</sup> Many aspects of the agreement would have been needed to be revised according to the CJEU. If the EU were to pursue an accession, further changes would be mandatory. “Should accession become a reality, the question will be whether it would lead to a new dynamic in the relationship between the two European courts.”<sup>137</sup>

The EU is still to this day obligated to accede to the ECHR. Scholars like Greer have been supportive of the accession. Greer believed that the accession would have already taken place.<sup>138</sup> Not all scholars agree with supporting the accession like Greer. One can ask if the accession is worth advocating for. Scholars like Steve Peers does not believe it is<sup>139</sup>. He is a strong believer of the fact that the standard of human rights protection would be reduced as a result. The accession would, according to Peers, block the authority that the ECtHR has in human rights issues. “So, it has unfortunately become necessary to oppose the EU’s accession, instead of supporting it.”<sup>140</sup>

Due to the accession remaining unclear and unforeseeable, one can ask what the relation of the EU to the ECHR is. In the case of this thesis, I will have to work with the tools, that have been given to me. The fact that the accession is not yet completed and perhaps never will be leads me to the next subchapter, namely the doctrine of equivalent protection.

### 3.3 The doctrine of equivalent protection

I will in the following swiftly introduce the reader to the doctrine of equivalent protection. This knowledge enables the reader to advance the understanding of the human rights protection within the EU with the ECHR as a component.

As I have already presented in this chapter, the relationship of the EU and the ECHR can be described as somewhat complex. The affair between the CJEU and the ECtHR is signified by the fact that the EU is not a party to the ECHR. In practice, this entails that the CJEU does not adhere to the ECtHR because it is not legally forced to. Then again, the ECtHR cannot call upon the CJEU either. This has led to the abovementioned suggestion of the EU’s

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<sup>136</sup> Court of Justice of the European Union: *Opinion 2/12 Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*

<sup>137</sup> Lock 2017, pp. 241.

<sup>138</sup> Greer 2006, pp. 326: “The accession of the EU to the Convention poses no significant problems and will probably take place by the end of the decade when a few technical difficulties have been solved.”

<sup>139</sup> See Peers 2016.

<sup>140</sup> Peers 2016, p. 222.



accession to the ECHR.<sup>141</sup> The two human rights regimes, the one of the EU and the other one of the Council of Europe, that exist parallel to one another, do differ. The difference can be spotted in the two courts, the CJEU and the ECtHR, and their divergent ambitions.<sup>142</sup> The CJEU's goal is to protect the autonomy of the legal order, in other words to guard the law of the EU. The ECtHR works as the guardian of human rights, as presented in the ECHR, in the countries who are parties to the convention.<sup>143</sup>

The CJEU and the ECtHR wish to co-exist. Thus, both actors should avoid a blockage of the authority of one another. This has resulted in the ECtHR avoiding cases that would require judicial review from the CJEU. This is perhaps because the judicial review could lead to the CJEU stating the cases inadmissible. In other words, the CJEU has had the chance to block the ECtHR's authority in some cases. As a result, the ECtHR adopted the doctrine of equivalent protection in 2005. In practice the doctrine entails the ECtHR acknowledging "that the EU human rights regime is equivalently protective as that of the Council of Europe."<sup>144</sup> This decision allows the ECtHR not to take on cases that involve the EU. "As long as the EU human rights regime is equivalently protective with that of the Council of Europe there is no need for a Strasbourg review".<sup>145</sup> The doctrine "is an instrument created to maintain a peaceful relationship between the EU human rights regime and that of the Council of Europe."<sup>146</sup>

Even though most ECtHR's cases are brought to a state party, the cases are more than often linked to an international organisation and their actions. Two cases have led to the ECtHR's own doctrine of equivalent protection: *Bosphorus v. Ireland* and *Matthews v. UK*.<sup>147</sup> In the *Matthews v. UK* case, the ECtHR dealt with the right to vote. The EU citizens on Gibraltar were unable to vote in the European Parliament elections. The case showed that member states to the ECHR could be liable for breaches to the convention, even when the power of the individual state has been shifted to an international organisation, in this case the EU.<sup>148</sup>

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<sup>141</sup> Hert- Korenica 2012, pp. 874.

<sup>142</sup> Hert – Korenica 2012, pp. 874-875.

<sup>143</sup> Cf. Hert – Korenica 2012, p. 875, Shelton 2003, p. 95.

<sup>144</sup> Hert – Korenica 2012, p. 875.

<sup>145</sup> Ibid.

<sup>146</sup> Ibid, p. 889.

<sup>147</sup> European Court of Human Rights: *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, no. 45036/98, Reports of Judgments and Decisions 2005-VI.

European Court of Human Rights: *Matthews v. The United Kingdom*, no. 24833/94, Reports of Judgments and Decisions 1999-I.

<sup>148</sup> cf. Verdirame 2011, p. 366.

The EU and the Council of Europe can be accused of using the doctrine of equivalent protection as a cover up for human rights obligations that should be directed towards the EU, and perhaps even vice versa. Verdirame's thoughts on the UN can also be applied to the current situation that the EU finds itself in. "(I)nadequacies in the legal enforcement of and compliance with human rights produce both a 'liberty deficit' and an 'accountability deficit'. The doctrine of equivalent protection (...) is a welcome attempt to address these two deficits judicially. However, it is not enough. Political and administrative solutions must also be found."<sup>149</sup>

The doctrine of equivalent protection lays the foundation for judicial control over acts of international organisations.<sup>150</sup> The difficulty however lies within the protection itself. It has always been incomplete. "Judicial scrutiny on the basis of equivalent protection is normally *mediated* rather than *direct*: what comes under examination is the act of the state transferring powers to the international organisation that caused the breach."<sup>151</sup> The question in this thesis is how this judicial scrutiny under the light of the doctrine of equivalent protection plays out in practice. What does this mean for Greece, the Greek hotspots and the human rights violations, that have possibly been committed. The Greek hotspots and the possible wrongdoings are not a result of a state transferring the powers to the EU. I would suggest that the reality resembles more the EU giving the powers to a member state. The question that arises is if the doctrine of equivalent protection is utilized in the judgement of the ECtHR in the cases that relate to the Greek hotspots. Henceforth, I also wonder how it is utilized and how the ECtHR makes the utilization clear. I will resume to this in chapter 4.

### 3.4 Chapter conclusion

In this chapter I have briefly introduced the reader to the human rights protection of the EU. I have further dealt with the relationship of the EU and the ECHR and in addition to that the relationship of the EU member states and the ECHR. This has led me to the accession of the EU to the ECHR, that is still pending. When discussing the EU and the ECHR, one cannot leave out the doctrine of equivalent protection. The doctrine still dictates much of the action in this field. In the next chapter we will see if and how the doctrine of equivalent protection

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<sup>149</sup> Verdirame 2011, p. 2.

<sup>150</sup> Verdirame 2011, p. 359.

<sup>151</sup> Verdirame 2011, p. 359.

has been used in the case of J.R. and others v. Greece from the ECtHR. The J.R. and others v. Greece case is used in this research to portray the reality that we live in.

#### 4. The ECHR and the ECtHR

The tentative argument of this thesis is based on an examination of the liability of human rights violations in the EU. For this research I use an ECtHR case that emerged from a hotspot in Greece as an example to portray the reality. I will therefore present the ECHR in the following chapter. I will further on present the ECtHR's case *J.R. and others v. Greece*.<sup>152</sup> Finally, I will dive deeper in the ECHR's article 5, Right to liberty and security<sup>153</sup>, and refer to additional analyses of the situation regarding the hotspots and human rights violations.

The Council of Europe (CoE) drafted the European Convention on Human Rights (ECHR). The ECHR was partly founded as “a response to current and past events in Europe” but further also to define the obligation entailed in the membership of the Council of Europe. The ECHR was “a reaction to the serious human rights violations that Europe had witnessed during the Second World War. It was believed that the ECHR would serve as an alarm that would bring such large-scale violations of human rights to the attention of other West European states in times for action to be taken to suppress them.”<sup>154</sup> The ECHR came into force on 3 September 1953. It was based on two individual bodies – the Commission and the Court. However, in 1998 the European Court of Human Rights (ECtHR) replaced the two bodies.<sup>155</sup> The ECtHR has received a great deal of criticism, due to “inconsistency in the case law”, that is triggered by the ECtHR's disproportionate workload.<sup>156</sup> The 47 member countries of the CoE have signed up to the ECHR.<sup>157</sup> In other words, approximately 830 million people can bring a case to the ECtHR. 17,000 judgements have been implemented. The ECHR includes right to life, freedom of speech, freedom of assembly, liberty, equality,

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<sup>152</sup> European Court of Human Rights: *J.R. and others v. Greece*, no. 22696/16.

<sup>153</sup> Council of Europe: ECHR, Article 5: Right to liberty and security

<sup>154</sup> Harris – O'Boyle – Warrick 2014: p. 3.

<sup>155</sup> cf. Grabenwarter 2014: p. V (Preface).

<sup>156</sup> Ibid.

<sup>157</sup> The 47 member countries of the Council of Europe are: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Monaco, Montenegro, Netherlands, North Macedonia, Norway, Poland, Portugal, Republic of Moldova, Romania, Russian Federation, San Marino, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, United Kingdom.

right to a fair trial, prohibition of slavery and human trafficking and freedom of religion, only to mention a few.<sup>158</sup> The ECHR protects most political and civil rights.<sup>159</sup>

The ECHR provides for state and individual applications and can thus be stated to have a strong enforcement mechanism.<sup>160</sup> Article 33 and 34 of the ECHR state that any party and any person or individual may bring a case to the ECtHR, if a violation of the ECHR is to be suspected.<sup>161</sup> As mentioned before, the fact that an individual can bring a case to the ECtHR makes the court more approachable in comparison to the CJEU.<sup>162</sup>

#### 4.1 The ECtHR and the hotspots in Greece

There are many cases of the ECtHR that are directly linked to the hotspots in Greece, *J.R. and other v. Greece*, *O.S.A. and others v. Greece* and *Kaak and others v. Greece*, to mention only a few.<sup>163</sup> It is also worth mentioning that all three cases mentioned above emerge from the Vial hotspot on Chios. The cases are also linked to each other through the judgements of the ECtHR. The judgement of the *O.S.A. and others v. Greece* referred even directly to the case of *J.R. and others v. Greece*.<sup>164</sup> The judgement of *Allaa Kaak and others v. Greece* did not refer directly to the *J.R. and others v. Greece* case, but did it indirectly.<sup>165</sup> Unlike the *J.R. and others v. Greece* case, the two other cases resulted in a violation of Article 5 § 4 of

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<sup>158</sup> The facts are found on the Council of Europe's website. [<https://www.coe.int/en/web/impact-convention-human-rights/how-it-works>] (17.12.2019)

<sup>159</sup> Some exceptions are to be found: due to the existence of the International Covenant on Civil and Political Rights (ICCPR) the ECHR could leave out rights of minority groups for example. Harris – O'Boyle – Warrick 2014: pp. 5-6.

<sup>160</sup> Harris – O'Boyle – Warrick 2014: pp. 6.

<sup>161</sup> Article 33 of the ECHR "Inter-State cases - Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the Protocols there to by another High Contracting Party." Article 34 of the ECHR "Individual applications - The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."

<sup>162</sup> The approachability is vital when researching the cases that have emerged from the hotspots in Greece. The cases comprehend the at times miserable destinies of irregular migrants. The fact that ECtHR attends to cases of individuals gives this topic and the research flesh to their bones.

<sup>163</sup> European Court of Human Rights: *J.R. and others v. Greece*, no. 22696/16. *O.S.A. and others v. Greece*, no. 39065/16. *Kaak and others v. Greece*, no. 34215/16. There are more cases related to the Greek hotspots that have been applied to the ECtHR. European Court of Human Rights: *European Court of Human Rights: J.B. v. Greece*, no. 54796/16. *European Court of Human Rights: Kaberi v. Greece*, no. 19557/17. *European Court of Human Rights: Ahmadi and others v. Greece*, no. 39065/16.

<sup>164</sup> ECtHR 2019a: p.1.

<sup>165</sup> ECtHR 2019b: p.1.

the ECHR. The Article 5 § 4 (right to a speedy decision on the lawfulness of detention) wasn't even touched upon in the *J.R. and others v. Greece case*.

I will concentrate on the *J.R. and others v. Greece case*. I will use this case as an example through the analysis on the EU responsibility within human rights violations. I have chosen this path because *J.R. and others v. Greece* was the first of its kind and has thus laid the groundwork for the other ECtHR cases.

#### 4.2 *J.R. and others v. Greece*

Below, I will present the ECtHR case and the judgement briefly. This provides the reader with background information that is needed to understand the analysis later.

The *J.R. and others v. Greece case* concerned the conditions in which the three applicants faced where held in and the circumstances of their detention. On 21 March 2016, the applicants, three Afghan nationals, arrived at the Greek island of Chios. Chios had already at the time a hotspot in action and this is where they were placed after being detained. The applicants stayed at the Vial hotspot centre until September 2016 (one of them), respectively November 2016 (two of them). During this time, all three applicants were in the asylum process. Because the EU-Turkey Statement came into force on 20 March 2016, the hotspot centres had to facilitate a large number of residents. According to the applicants, this large amount resulted in poor living conditions.<sup>166</sup> “(T)here was insufficient food, a lack of hygiene, the water supply was often cut off, and medical care and legal assistance were scarce.”<sup>167</sup>

The applicants claimed that Greece had violated the following articles of the ECHR: Article 3 of the ECHR, prohibition of inhuman or degrading treatment. This is due to the conditions of their detention in the hotspot centre. Article 5 § 1, right to liberty or security, due to the conditions and length of the detention. Article 5 § 2, right to be informed promptly of the reasons for arrest, due to the fact that the applicants had not received any information in their mother tongue or in any other language to why they were detained. Article 34 of the ECHR,

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<sup>166</sup> cf. Council of Europe, European Court of Human Rights 2018, p. 1.

<sup>167</sup> Council of Europe, European Court of Human Rights 2018, p. 2.

right to individual application, because the police questioned and summoned one of the applicants about the application to the ECtHR.<sup>168</sup>

The ECtHR found that Greece had violated solely Article 5 § 2. Even though it is likely that the applicants knew they entered Greece unlawfully, their situation regarding the EU-Turkey Statement was most likely unfamiliar to them. The statement came into force only a day before their arrest. In other words, even if they had received an information leaflet in their own mother tongue, it most likely would not have contained enough or even accurate information regarding their situation or eventualities.<sup>169</sup> The ECtHR did not find that the detention in the Vial hotspot, lasting one month, could be considered disproportionate. The ECtHR stated that the detention had not been unlawful and that it did not classify as inhuman or degrading treatment.<sup>170</sup> The ECtHR points out that the main point of the hotspot is to enable the registration, identification and further administrative actions, leading later perhaps to an asylum process if requested by the irregular migrant.<sup>171</sup>

#### 4.3 ECHR Article 5 Right to liberty and security

The *J.R. and other v. Greece case* resulted in a violation of ECHR's Article 5 (2) "Everyone who is arrested shall be informed promptly, in a language, which he understands, of the reasons for his arrest and of any charge against him".<sup>172</sup> Greece had violated the applicant's rights. I will below explain Article 5 (2) to give the reader a better view of what right that was breached at the Greek hotspot of Chios.

The right to liberty of person is secured by article 5 of the ECHR, article 6 of the Charter of Fundamental Rights of the European Union and article 9 of the International Covenant on Civil and Political Rights (ICCPR). The right to liberty is not absolute. It is however seen as elementary within international law. In the case of detaining an individual, the detention

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<sup>168</sup> Council of Europe, European Court of Human Rights 2018, p. 2.

<sup>169</sup> Council of Europe, European Court of Human Rights 2018, p. 3.

<sup>170</sup> ECtHR 2019a: pp 1. "As in the case of *J.R. and Others v. Greece* (no. 22696/16), the Court held that the applicants' detention had nevertheless been lawful and that the threshold of seriousness for it to be characterised as inhuman or degrading treatment had not been attained."

ECtHR 2019b: pp 1. "The Court also held that the conditions of detention in the Souda camp did not amount to inhuman or degrading treatment. The Court reiterated its previous finding that a period of one month's detention in the Vial camp should not be considered excessive, given the time needed to comply with the relevant administrative formalities. In addition, the length of the applicants' detention once they had expressed their wish to apply for asylum had been relatively short."

<sup>171</sup> Pijenburg 2018: p. 1.

<sup>172</sup> European Court of Human Rights: *J.R. and others v. Greece*, no. 22696/16.

needs to be founded on a valid legal foundation. The detention should be prescribed by domestic law. Detention of migrants is to be regarded as a last resort.<sup>173</sup> It should furthermore be apprehensible for why the detention is taking place. “Article 5 § 2 contains the elementary safeguard that any person arrested should know why he is being deprived of his liberty and is an integral part of the scheme of protection afforded by Article 5”<sup>174</sup>. “Arrested persons must be told, in simple, non-technical language that they can understand, the essential legal and factual grounds for the arrest, so as to be able, if they see fit, to apply to a court to challenge its lawfulness in accordance with Article 5 § 4”<sup>175</sup>. It is the duty of the detaining state to inform the detainee of the situation.<sup>176</sup> According to the Council of Europe there is also little to no time to spare to fix this error: “The constraints of time imposed by the notion of promptness will be satisfied where the arrested person is informed of the reasons for his arrest within a few hours”.<sup>177</sup> From my personal experience I can inform that irregular migrants who arrived to Leros during the early summer and spring of 2016 did most definitely not receive information that promptly.

#### 4.4 J.R. and others v. Greece: the aftermath

I have now presented the case of J.R. and others v. Greece and the judgement of it. I will dive into the critique that has come off as a result of the judgement, but also critique and analysis on the correlation between the human rights violations and protection, based on the ECHR, and the hotspots prior to the judgement. This subchapter will in other words lead the reader into the analysis of the thesis.

As mentioned in the previous subchapter, the ECtHR found a violation of Article 5 (2) of the ECHR. My personal experience from Leros, including the information that I have gathered for this research, has given my insights within this field. One of them being, that there is urgent need of a better way of informing the irregular migrants of the situation they have found themselves in when entering the hotspots. UNHCR acknowledge the “(l)ack of information and awareness on national services, asylum procedures, and available complaint

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<sup>173</sup> cf. Majcher 2018.

<sup>174</sup> Council of Europe 2004, p. 29.

<sup>175</sup> Ibid, p. 30.

<sup>176</sup> Ibid, p. 30. “It is plain from the wording of Article 5 § 2 that the duty on States is to furnish specific information to the individual or his representative”

<sup>177</sup> Council of Europe 2019, p. 30.



and reporting mechanisms” and furthermore the “(i)nsufficient interpretation” as the most prominent concerns of asylum-seekers and refugees across Greece.<sup>178</sup> Specifically the lack of interpretation and up-to-date information links directly to *J.R. and others v. Greece*<sup>179</sup>. The UNHCR further recommends Greece and all the institutions and actors involved to “improve information provision” and to guarantee, “strengthened interpretation services”.<sup>180</sup> This should be a given. When implementing a new system, all parties should be informed. In the case of irregular migrants, it can be difficult to inform them prior to the arrival due to obvious reasons. However, there are other ways of minimising the misunderstandings. One way would have been to prepare Greece and Italy by providing them with leaflets before the hotspot approach became effective. Why had the EU not prepared itself for this? This is only one question that arises to me when researching this topic.

The UNHCR is not the only one to bring up the difficulty of delivering information to the irregular migrants. “It should be noted that in every detention site, the detainees were deprived of basic interpretation services. The lack of providing adequate and consistent information to the detainees, in a language they understand, on the legal basis, development of the detention process and their rights is one of the biggest problems in each detention facility. At the same time, it is a basic infringement of the fundamental rights of the detainees and a factor of legal uncertainty, which causes a chain reaction both for them and the detention services.”<sup>181</sup> The Greek ombudsman expressed his hard critique on the hotspots in a letter written in 2017. He highlights how the miscommunication between the actors within the hotspot and the irregular migrants causes infringements of basic rights.<sup>182</sup> The huge challenge with the Greek hotspots was that the circumstances or the politics that the European migrant crisis had created were everchanging. The aftermath of this ECtHR case could imply that the situation was uncontrollable at the time. This would explain why the EU had not been able to prepare itself nor its member states, including Greece.

The judgement received a lot of critique from scholars as well. Various scholars expressed their disappointment in both the scheme of the Greek hotspots and how they function, but also in the judgement that the *J.R. and others v. Greece* case. Pijnenburg puts words to the disappointment I experienced when reading the ECtHR’s judgement. The judgement does

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<sup>178</sup> UNHCR 2018, p. 6

<sup>179</sup> ECtHR: *J.R. and others v. Greece*

<sup>180</sup> UNHCR 2018, p. 7.

<sup>181</sup> The Greek Ombudsman 2017, p. 58.

<sup>182</sup> Cf. The Greek Ombudsman 2017, pp. 57-58

not supply us with a take on the legitimacy of the hotspots in Greece per se. “In fact, the particular circumstances of this case are such that it tells us very little about the compliance of the hotspots with the Convention.”<sup>183</sup> The judgement does not touch upon the legitimacy or the jurisdiction behind the Greek hotspots. The ECtHR’s judgement refers to the fact that Greece was during a situation of emergency. Can we assume that the ECtHR is protecting Greece due to the exceptional circumstances the state found itself in?<sup>184</sup> The interesting question that Pijnenburg brings up is if the ECtHR would be as forgiving regarding the EU-Turkey Statement and Greece’s position. How long can exceptional circumstances last?<sup>185</sup> Another point worth mentioning is that the judgement reveals that the ECtHR indeed sees that the EU-Turkey Statement was not concluded by the EU, but rather by the EU member states and Turkey.<sup>186</sup> “The judgement can be read as endorsing the Statement insofar as detaining migrants in order to identify and register them as part of the implementation of the EU-Turkey Statement is in line with the Article 5(1) (para. 112).”<sup>187</sup>

The case law of the ECHR, *J.R. and other v. Greece*, in other words the judgement of the ECtHR in the case, does not agree with the fact that article 5 (with all paragraphs included) is violated through the actions of the hotspot approach in Greece. However, scholars like Majcher beg to differ.<sup>188</sup> When mentioning the right to liberty in the context of detaining irregular migrant at hotspots, one cannot mention the freedom of movement. Freedom of movement is guaranteed under art 2 of Protocol 4 to the ECHR.<sup>189</sup> Paragraph 1 of article 2 reads: “Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.” Majcher argues that the large majority of the hotspot’s residents should be “considered *prima facie* in need of international protection and, consequently, lawfully present in the territory of these countries for purposes of the right to freedom of movement.”<sup>190</sup>

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<sup>183</sup> Pijnenburg 2018: p. 2.

<sup>184</sup> See the case of *J.R. and others v. Greece*. Council of Europe, European Court of Human Rights 2018, “The Court noted that the facts in question occurred at the time of an exceptional and sharp increase in migratory flows in Greece, which had created organisational, logistical and structural difficulties.”

<sup>185</sup> Pijnenburg 2018: p. 3.

<sup>186</sup> *Ibid.*

<sup>187</sup> *Ibid.*

<sup>188</sup> Majcher 2018.

<sup>189</sup> Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, as amended by Protocol No. 11.

Freedom of movement is also guaranteed under article 12 of the ICCPR and article 26 of the Geneva Refugee Convention.

<sup>190</sup> Majcher 2018.

“The deprivation of personal liberty is the most severe restriction, affecting the core of the freedom of the individual. Thus, despite the fact that administrative detention is defined as a last resort, the actual implementation and excessive use of this measure raises the legitimate question if it actually aims at deterring the migration wave into Europe.”<sup>191</sup> All irregular migrants arriving to the Aegean islands in Greece are subject to “restriction of liberty” or “restriction of freedom” according to article 14 of the April 2016 Law 4375/2016.<sup>192</sup> However as we saw in the judgements of the ECtHR, the detentions do not qualify as unlawful.<sup>193</sup>

So as mentioned above, is the ECtHR trying to be gentle towards Greece? Is it legitimate to give mercy towards a state? And if it is so, how far should it go? The intriguing aspect of this case is that the legal foundation can be identified as ad hoc. The spontaneity of the Hotspot approach and the EU-Turkey Statement makes the case unique. The ad hocism does however not give me ease. I cannot stop thinking if there is more than just mercy towards Greece behind the mellow and soft judgement. Can the judgement be so gentle due to a power play? Does the EU have the overhand of the Council of Europe and the ECtHR? What would happen if the ECtHR were to question openly the EU-Turkey Statement or the hotspots in Greece? Would it play out as a crisis? Noting, that the ECtHR is referring to the forthcoming accession and that they therefor cannot criticise the EU and its actions. One should not be oblivious to the political interests in cases like the J.R. and others v. Greece.<sup>194</sup> If you ask me, the power play does indeed exist. The truth is that situation got out of hand. The fact that the European migrant crisis was uncontrollable is evident to every EU citizen. However, how far can uncontrollable situations explain actions? Or perhaps even worse, how much can be forgiven in an uncontrollable situation? Was Greece (and Italy) the victims or should EU be victimized?

“Greece has a responsibility to protect the human rights of women, men and children arriving on the islands. That can only be achieved by ending the current containment policy and transferring asylum seekers to the mainland, so that they can be provided with adequate accommodation, services to meet their needs, and access to fair and efficient asylum procedures.”<sup>195</sup> Even though the 19 NGOs perhaps were right in the Joint Letter to Prime

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<sup>191</sup> The Greek Ombudsman 2017, p. 57.

<sup>192</sup> Greece 2016, article 14 paragraph 2.

<sup>193</sup> See judgement of European Court of Human Rights: J.R. and others v. Greece, no. 22696/16.

<sup>194</sup> Cf. Pijnenburg 2018, p. 4.

<sup>195</sup> ActionAid et. al 2017, p. 3.

Minister Tsipras, Greece could and should perhaps amend the ways of how they are handling within the hotspot scheme. I want to argue though, that it seems unfair to blame one member state, Greece, alone for this complex dispute. Counter argument to that, could be are not we beyond fairness. The reality in the hotspots is perceived as far from all humanity and decency.<sup>196</sup> To counter the feeling of unfairness, I will research how the EU as an international organisation could be seen as at least partially responsible for the all the liability that lies within the Greek hotspots.

The situation that we now find ourselves in, has led me to question the jurisdiction of the ECtHR as well as the doctrine of equivalent protection. The case, J.R. and others v. Greece, and my experience on the hotspot of Leros, have resulted in a personal mistrust of the human rights protection within the EU. Is the human rights protection fully absolute? Can it even be fully absolute? The combination of the reality of the Greek hotspots with the lack of protection of human rights within the EU and its member states leads me to seek alternative methods to reach not only the protection of human rights within the EU, but also guaranteeing the possibility of holding the EU accountable, responsible or liable for potential human rights violations. Whether the Greek hotspots in fact do violate human rights or not is one question to answer. The other more relevant question for this thesis is the liability of the EU. If the Greek hotspots are implemented according to the hotspot approach and consequently put human rights at risk or even worse result in breaches of human rights, then what are the consequences? Can anyone be held accountable? Is anyone responsible for possible human rights violations? These questions are difficult to answer. I aim to find answers to these questions by exploring alternatives. If a member state of the EU cannot be blamed for putting human rights at risk within the Greek hotspots, then perhaps the EU can be held accountable? I will in the next chapter review the structure of accountability and responsibility of the EU. I will therefore go into alternative structures in the following chapter.

#### 4.5 Chapter conclusion

I have now presented the ECHR, the legal instrument of the thesis. I have also introduced the reader to the case that I use throughout this analysis, namely the J.R. and others v. Greece

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<sup>196</sup> Silverman 2018, p. 4.

of the ECtHR. I have further now researched and presented the case from different perspectives, both the facts and the judgement as well as critique from scholars and actors from the field that has arisen from the judgement.

Like stated earlier, the challenge with the case of the European migrant crisis and the consequences of it is that the EU holds such a vital position in human rights protection globally. The EU has set standards for human rights protection since its commencement. The Council of Europe and the EU practice an act of respect towards each other called the doctrine of equivalent protection.<sup>197</sup> The case of *J.R. and other v. Greece* and its judgement shows how soft the ECtHR is towards an EU member state.<sup>198</sup> The responsibility has to be taken by someone. The author and creator of the Hotspot approach was the European Commission.<sup>199</sup> Hence, I will in the following chapter probe different theories to find the possible liability of the EU as an international organisation within this topic.

Before going further with this research, I must bring up the difficulty of the EU policies that lie behind the Greek hotspots. To give an example, the EU-Turkey Statement was implemented without sight of proper jurisdiction. The European Parliament never had the chance to amend or even to have a single say in this matter. The EU leaders decided upon the lines and structure of the Statement on their own. In other words, and in all fairness: the statement is not legally binding and will not pass as an official EU agreement. Even the General Court of the European Union decided upon the exclusion of its jurisdiction in practice.<sup>200</sup> Hence, perhaps it is wrong to strive for responsibility of the EU within this matter. Regardless of this issue, I will move forward with the research. I would at the same time like to argue that the vague nature of the hotspots is precisely why this topic should be studied.

The hotspots are demanding because they have never been implemented before.<sup>201</sup> After experiencing a Greek hotspot myself and researching the policies and the legal structure as

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<sup>197</sup> See Chapter 3.3

<sup>198</sup> European Court of Human Rights: *J.R. and others v. Greece*, no. 22696/16.

<sup>199</sup> European Commission 2015b.

<sup>200</sup> The Greens / EFA 2018, p. 12

<sup>201</sup> The Greek Ombudsman 2017, pp. 11-12. "Both Greece, in particular, and Europe, in general, set the benchmarks on the standards for managing third-country population flows. The politics and practices adopted and implemented may form and influence, to a significant degree, the measure and degree of legal protection and humanitarian response and treatment of the populations fleeing from areas of natural disasters, humanitarian risks and war across the world. The challenge for Greece, as well as the other EU Member States and EU institutions is still that these policies and practices are planned and implemented without any compromise to the respect for human dignity, the rule of law and the mandates of international, EU and national legal culture."

well as the crisis that the EU found itself in, I cannot help to ask myself: Is the case of the ECtHR is telling the whole truth? I am referring to the fact that the judgement was too mellow regarding the circumstances. Greece can perhaps not be wholeheartedly accused for the possible violations of human rights that have occurred at the hotspots. Who else is left then? Who is responsible? Where is the EU? We know that the EU is not a party to the ECHR, hence the “on-going” accession and the doctrine of equivalent protection. The accession and the doctrine are perhaps not enough. Therefore, I will try to ignite the liability of the EU in the Greek hotspots in other ways.

## 5. Alternative liability schemes

In the previous chapters I have presented the situation of the Greek hotspots and the judicial framework. I have chosen to use an ECtHR case as a sample of the liability structure within the human rights protection of the ECHR. I have through this example, the case of *J.R. and other v. Greece*<sup>202</sup>, shown that Greece is held liable for the violation, not mentioning or calling upon the EU. The analysis of the judgement and the critique both call upon the responsibility of the EU. The research has shown that the EU cannot be held liable through either the ECHR for the actions that could set human rights into risk or that could even breach human rights. The doctrine of equivalent protection does not make a difference towards the liability either. We must therefore find an alternative. If the ECHR fails to protect the human rights as they should, how would an alternative to this convention look like? Is there even an alternative to talk about? Can the EU be held accountable after all? I will try to answer these questions by diving deeper into alternative liability schemes.

Scholars have concentrated extensively on trying to define the legal personality of international organisations through their omits and rights. This phenomenon has not supported the definition of the responsibility of the international organisations. The responsibility seems to remain somewhat evasive.<sup>203</sup> Bearing this in mind, I will in the following chapter present various responsibility and liability schemes that could perhaps be applied in the case of the EU. These schemes are based on accountability and/ or responsibility structures of international organisations. I will use the case of *J.R. and other v. Greece*<sup>204</sup> as a sample, meaning the Greek hotspots, comprised the Hotspot approach and the EU-Turkey Statement, to see if the schemes are plausible.

### 5.1 Accountability of International Organisations

Accountability is a broad term that is used so frequently within the field of public administration and government that one tends to forget the nonexistence of a translation to another European language.<sup>205</sup> Thus, I will define it within the concept of this thesis.

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<sup>202</sup> European Court of Human Rights: *J.R. and others v. Greece*, no. 22696/16.

<sup>203</sup> Cf. Verdirame 2011, p. 55.

<sup>204</sup> European Court of Human Rights: *J.R. and others v. Greece*, no. 22696/16.

<sup>205</sup> Harlow 2002, p. 23.

According to the International Law Association (ILA), the accountability of an IO relates to its power and authority. If the IO has power, accountability is an unavoidable consequence. Accountability can be divided into different forms: legal, political, financial or administrative. The form of the accountability depends on the circumstances in which the IO finds itself. ILA regards the combination of the four forms the best position to assess accountability.<sup>206</sup>

In addition to the forms, ILA asserts three levels of accountability. The first level identifies as the international organisation being “being subject to, or should exercise, forms of internal and external scrutiny and monitoring, irrespective of potential and subsequent liability and/or responsibility.” Second level is the “tortious liability for injurious consequences arising out of acts or omissions not involving a breach of any rule of international and/or institutional law”. The third, and most important, level described as “responsibility arising out of acts or omissions which do constitute a breach of a rule of international and/or institutional law”.<sup>207</sup>

In the case of the hotspots in Greece, the accountability of the EU could be based on one of the three levels of accountability. This depends on whether the breaches of human rights within the hotspots are recognised or not. When using the *J.R. and others v. Greece* as a sample of the violation, I will apply the third level of accountability. The problem of the adaption of the accountability lies in the subject of the violation of Art. 5 (2) of the ECHR<sup>208</sup>. The judgement states that Greece violated the rights of the applicant. How can the accountability of the EU be recognised within the judgement of this case? Or perhaps the more vital question, can it be recognised at all?

It can be difficult to answer this question. I will step back and look at the structure that Greece was given through the EU policies. The Hotspot approach and the EU-Turkey Statement were published by the EU.<sup>209</sup> Basilien-Gainche condemns the EU-Turkey Statement for creating two unacceptable scenarios. First, sending migrants back to unsafe situations without examining their asylum case properly, this resulting in breaches of the right to asylum, principle of *non-refoulement* and prohibition of collective expulsion. Second, “the encampment of more and more refugees on Italian and Greek soil” whilst other

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<sup>206</sup> International Law Association 2004, p. 5.

<sup>207</sup> International Law Association 2004, p. 5.

<sup>208</sup> See Chapter 4.3 and 4.4

<sup>209</sup> Hotspot approach: European Commission 2015b.

EU-Turkey Statement: Council of the European Union 2015 as well as Council of the European Union 2016.



member states close their borders and Italy and Greece don't succeed in returning the conceived amount of refugees by the EU.<sup>210</sup> The EU-Turkey Statement can be criticised of being “the exemplification of an industrialised and institutionalised selection of refugees”.<sup>211</sup> The hotspot approach for that matter was not meant to be a long-term solution. By neglecting the fundamental rights of the residents, meaning the irregular migrants within the hotspots, “(t)he ‘Hotspots’ express no less than the cold fact of the European States’ selfishness”.<sup>212</sup>

Basilien-Gainche's view on the situation would result that the third level of accountability would be applied for the EU as an international organisation in this case. EU member states are forced to disrespect fundamental values and legal responsibility to follow the frame of the Hotspot approach and the EU-Turkey deal. The question remains: can the EU member states blame the EU for pushing them to this corner? This question arises because the heads of the EU member states have for a fact been the creative force of the EU-Turkey Statement and the Hotspot approach. We find ourselves constantly repeating the same question: who is responsible for this mess? Is it possible to blame the EU as an international organisation?

How does the EU fit within this matter? The tentative argument of this thesis is that the EU should take responsibility or even accountability for (a part of) the violations of human rights at the hotspots in Greece. We must identify the different factors that could topple or enable this argument. As we can see in the section above on accountability, the difficulties arise already at the definition of the terms. This in combination with the fact that EU is regarded an exception within international organisations, makes the analysis rather challenging to carry out. The accountability of international organisations defined by the International Law Association in 2004 is not applicable to this case according to me.<sup>213</sup> We will thus continue probing other liability schemes.

## 5.2 Responsibility without accountability?

After defining the accountability in the previous subchapter, we will resume on researching the liability through responsibility and accountability. The interesting part of the responsibility of the European Union is that the responsibility can be claimed to be assumed

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<sup>210</sup> Basilien-Gainche 2017 in Migration on the Move, pp. 171.

<sup>211</sup> Ibid.

<sup>212</sup> Ibid.

<sup>213</sup> International Law Association 2004

without accountability. How can this work? “That decision of who to blame is important because it determines who is held to account for the outcome. Democratic accountability requires that voters use elections to punish incumbent governments for bad outcomes. Yet a political system where the responsibility for significant policy areas is shared across multiple institutions and levels of government weakens this sanctioning mechanism, and raises the question of how voters can hold the relevant political actors to account.”<sup>214</sup> Even though Hobolt and Tilley formed their statement in regards to the EU economic crisis in 2012, the thought behind the form and structure of accountability as such, can be used within the tentative argument of this thesis.

Can we hold the EU accountable for the consequences that the EU-member states have had to deal with due to the Hotspot approach and the EU-Turkey Statement? Additionally, even if we hold them accountable what does this mean substantially. “When people hold the EU responsible for poor performance, but cannot hold it accountable for that performance, they become less trusting of its institutions as a whole.”<sup>215</sup> This can be applied exactly to the situation of the EU within the Greek hotspots. The trust towards the EU can fall. The fact that the EU cannot be accused for human rights breaches under the ECHR, is problematic. The problematic aspect is indeed the piercing urge to gain mistrust towards the institution, meaning the EU not to mention as a human rights defender. I cannot resist asking myself, if the EU is doing itself a disservice by not taking more responsibility when breaches of human rights emerge whether by actions carried out by the member states or by the EU itself. Is the EU blamed too often or not enough?

Hobolt and Tilley discuss further the accountability within a multi-level system. The question of the accountability deficit of the EU can be solved according to them. “(T)he process of democratic accountability in a multilevel system is a two-step process. First, voters need to be able to assign responsibility to the right level of government. Second, they need to be able to identify someone to punish (or reward) for performance. Hence, citizens need to understand where power lies, which is a challenge in a complex multilevel system of governance, and they need to be able to sanction powerful actors, which is even more difficult in the EU. To make the EU accountable we thus need to improve both institutional and government clarity. We argue that this will be difficult, however, and even if successful it may prove fruitless if performance continues to be judged by voters at the national rather

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<sup>214</sup> Hobolt – Tilley 2014, p. 140.

<sup>215</sup> Hobolt – Tilley 2014, p. 147.

than European level.”<sup>216</sup> When reading the solution that Hobolt and Tilley suggests, I gather that they are noticing that the EU’s accountability or responsibility deficit lies upon a faulty structure. The lack of clarity of the EU is perhaps the villain of it all. I have noticed when researching this topic that transparency within the EU is much needed. It is arguable though that even if transparency is needed, would it make a difference in the case of J.R. and others v. Greece? I would argue that it is too little too late for structural changes within the EU and the Greek hotspots.

In this subchapter I have brought to light the accountability deficit of the EU. The research that I’m trying to advance is difficult to advance due to the lack of clarity within the supranational organisations itself. I will, however, try out another liability scheme in the next subchapter.

### 5.3 Draft articles on the responsibility of international organisations

There are difficulties regarding responsibility of international organisations. This is due to the challenge of recognising the international legal obligations of international organisations. International organisations are liable to the treaties to which they are parties to, but it remains unclear if the liability reaches beyond.<sup>217</sup> It gets even trickier when you look further into this. International organisations commonly act through a member state or actors of the member state. This leads to a challenge in the identification of the acts that can be attributed to the international organisation. The Greek hotspots and their jurisdiction suffer this problem exactly. Where does the main responsibility lie? Is it in the state, meaning in this case Greece? Or is it in the EU? It is difficult to identify the EU as an actor since the hotspot approach is utilized and realized by individual EU member states. Thus, the individual member states, in this case Greece, can be blamed for wrongdoings instead of the international organisation, meaning the EU. However, the policies that lie behind the Greek hotspots are moulded and published by the EU. Hence, the hunt for the suitable liability scheme continues.

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<sup>216</sup> Hobolt – Tilley 2014, p. 148.

<sup>217</sup> Klabbers 2013, p. 77.

I will in the following try out the *Draft articles on the responsibility of international organizations* (further called DARIO (plural))<sup>218</sup> as a legal instrument for implementation. I will before that introduce the reader to the DARIO.

With the International Law Commission (ILC) adapting articles on responsibility of States for internationally wrongful acts<sup>219</sup> in 2001, there was still room to grow and space for specification within the field of international organisations as legal persons. Hence, the DARIO were shaped. The DARIO aim to define and cover the responsibility of international organisations.<sup>220</sup> The ILC does state the difficulty of codifying this responsibility. International organisation can vary considerably, making the codification and sometimes even the application of the DARIO complicated.<sup>221</sup> This fact does however not invalidate the articles. The DARIO have been used in similar ways to challenge the existing (or rather non-existing) responsibility schemes of international organisations. Verdirame uses the DARIO in his research on how the UN could or should take greater responsibility when their operations lead to human rights violations.<sup>222</sup>

I will now proceed with applying the DARIO to the Greek hotspots and the possible responsibility of the EU. I will apply the EU as an international organisation according to DARIO Article 2.<sup>223</sup> If we wish to identify Greece within this equation it could be an “agent of an international organization” means an official or other person or entity, other than an organ, who is charged by the organization with carrying out, or helping to carry out, one of its functions, and thus through whom the organization acts”<sup>224</sup>. The difficulty arises when one tries to identify the actual human rights violations within the DARIO. The DARIO is based on “the international responsibility of an international organization for an internationally wrongful act” as it states in article 1 (1). More relevant definition of the scope is article 1 (2): “The present draft articles also apply to the international responsibility of a State for an internationally wrongful act in connection with the conduct of an international organization”.<sup>225</sup> The case of *J.R. and others v. Greece* suits quite well under this definition,

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<sup>218</sup> International Law Commission - United Nations 2011a. Further on cited as DARIO 2011.

<sup>219</sup> International Law Commission 2001, para.76.

<sup>220</sup> International Law Commission - United Nations 2011b, pp 46.

<sup>221</sup> International Law Commission - United Nations 2011b, pp 47.

<sup>222</sup> Verdirame 2011, see i.e. Chapter 3 International Institutional Responsibility.

<sup>223</sup> DARIO 2011: Article 2 Use of terms defines an international organization as an organisation with “its own international legal personality” that is founded based on a treaty or equivalent instrument that applies to international law. In other words, the EU does fit this definition without doubt. See DARIO Art. 2 (a) for more.

<sup>224</sup> DARIO 2011: Article 2 Use of terms (d).

<sup>225</sup> DARIO 2011: Article 1 Scope of the present draft articles.

when looking closer at Greece and the EU in the case of possible human rights violations within the Greek hotspots. The EU-Turkey Statement and the Hotspot approach were both framed under the executive order of the EU and different institutions of the EU. The internationally wrongful act still remains undefined.

An Internationally wrongful act – what defines it? Can the violation of the ECHR Art. 5 (2) qualify as an internationally wrongful act?<sup>226</sup> “There is a breach of an international obligation by an international organization when an act of that international organization is not in conformity with what is required of it by that obligation, regardless of the origin or character of the obligation concerned.”<sup>227</sup> The internationally wrongful act goes hand in hand with the responsibility of the international organisation.<sup>228</sup> It is recognised when it “(a) is attributable to that organization under international law; and (b) constitutes a breach of an international obligation of that organization.”<sup>229</sup> Due to the fact that the EU is not party to the ECHR, we have to halt. The breach of ECHR Article 5 (2) is in that way not attributable to the EU. In other words, one can perhaps not blame the EU for the violation. The violation could be thought to lead to Greece solely and not to touch the responsibility of the EU. The potential breaches of human rights that the Greek hotspots and that the Hotspot approach have caused can be attributable to Greece as a state. There is the everlasting complexity with the EU. “International organisations generally engaged with the work of trends have emerged. First, the EU sought to distinguish itself from other international organisations, often calling for the adoption of special rules.”<sup>230</sup> The DARIO can be regarded as not applicable on incidents that comprehend international wrongful acts dealing with the EU.

We can however see alternative ways to approach this matter. As mentioned earlier, the doctrine of equivalent protection ensures that the EU human rights regime protects the human rights in an equivalent way to what the ECHR does<sup>231</sup>. I wonder, if the doctrine of equivalent protection can work in the other way as well. Shouldn't the protection of human rights lead to the responsibility to protect them? Meaning, that the violation of Art 5 (2) of the ECHR could be identified as an internationally wrongful act and hence enable the

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<sup>226</sup> European Database of Asylum Law 2018, see *Outcome and Observations/Comments*

<sup>227</sup> DARIO 2011: Article 10, Draft Articles on Responsibility of International Organisations.

<sup>228</sup> DARIO 2011: Part Two, The internationally wrongful act of an international organization, Chapter I: General principles, Article 3: Responsibility of an international organization for its internationally wrongful acts.

<sup>229</sup> DARIO 2011: Article 4 Elements of an internationally wrongful act of an international organization.

<sup>230</sup> Verdirame 2011, p. 93

<sup>231</sup> cf. Hert – Korenica 2012, p. 875. Please also see Chapter 3.4

DARIO to work in this study. The J.R. and others v. Greece case led to a violation of solely one article of the ECHR. Is the violation serious enough to claim the responsibility of the EU? The foundation that I use for this study is perhaps too vague to identify the violation of the human right as a direct international wrongful act committed by the EU.

Derivative responsibility in the context of the Draft articles on the Responsibility of International Organisations (DARIO) can refer to two different scenarios.<sup>232</sup> The first eventuality of derivative responsibility is based on Chapter IV in the DARIO. International responsibility of an IO being evoked by an act of a state or another IO.<sup>233</sup> The second possibility is the state's responsibility in connection with an IO's conduct.<sup>234</sup> In this thesis I am trying to arouse the thought of the EU taking (more or some) responsibility for the breaches of human rights evoked within the hotspot approach and the EU-Turkey Statement. This leaves me concentrating on the derivative responsibility of an IO, in this case of the EU, in connection with an act of a state. I want to suggest that Greece did not have another choice than to violate the ECHR or other human right conventions when implementing the hotspots. The violation of article 5(2) is to be applied in the derivative responsibility of the Chapter IV of the DARIO. "Responsibility of an international organization in connection with the act of a State"<sup>235</sup>, Greece has applied the Hotspot approach, created by the EU, thus leading us to this alignment. The Greek hotspots and their implementation could be regarded as applicable for the scenario of article 16 of DARIO, "Coercion of a State or another international organization".<sup>236</sup> Were the Hotspot approach and the EU-Turkey Statement too ambitious from the very beginning?

The question remains: can the human rights violation that has emerged at a Greek hotspot be allocated under the international institutional responsibility of the EU? The DARIO notices both force majeure and necessity.<sup>237</sup> Whether we can apply the DARIO to the ECtHR case or not, we can nonetheless argue that the European migrant crisis was beyond anyone's

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<sup>232</sup> Verdirame 2011, pp. 127-128.

<sup>233</sup> DARIO 2011, Responsibility of an international organisation in connection with the act of a State or another international organization, Article 14-19.

<sup>234</sup> DARIO 2011, Responsibility of a State in the commission of an internationally wrongful act by an international organization, Article 58-63.

<sup>235</sup> DARIO 2011: Chapter IV "Responsibility of an international organization in connection with the act of a State or another international organization"

<sup>236</sup> DARIO 2011: Article 16, "Coercion of a State or another international organization

An international organization which coerces a State or another international organization to commit an act is internationally responsible for that act if: (a) the act would, but for the coercion, be an internationally wrongful act of the coerced State or international organization; and (b) the coercing international organization does so with knowledge of the circumstances of the act."

<sup>237</sup> DARIO 2011: Article 23 Force majeure and Article 25 Necessity

control. Article 23 of the DARIO covers the event an international wrongful act occurring due to a case of a *force majeure*.<sup>238</sup> If the European migrant crisis is regarded as a *force majeure* then the breaches of human rights could be argued as proportional. The article 23 of DARIO states that the force majeure clause does not apply if “the organization has assumed the risk of that situation occurring”.<sup>239</sup> I wonder, how could the EU institutions and the EU member states that assembled the Hotspot approach and the EU-Turkey Statement not have thought of the possibility that the application of these could lead to violations of human rights? The Greek Ombudsman has little to no empathy towards the decisionmakers: “The shortcomings, deficiencies and the impression of an administration striving to meet demands that appear to constantly overwhelm it, in each one of the areas which this report examines, have a common background; the fact that key national and European stakeholders fell short of realising in good time and interpreting in accurate political terms the situation unfolding in the field during the past two years, as well as before that.”<sup>240</sup>

One could argue that the EU and its member states were doing the best they could. There was perhaps a necessity to act as they did. According to article 25 of the DARIO paragraph 1 (b) necessity cannot be invoked unless the act “does not seriously impair an essential interest of the State or States towards which the international obligation exists, or of the international community as a whole”.<sup>241</sup> The EU exists to protect human rights. However the paragraph 1 (a) of the DARIO states necessity cannot be invoked unless the act “is the only means for the organization to safeguard against a grave and imminent peril an essential interest of its member States or of the international community as a whole, when the organization has, in accordance with international law, the function to protect the interest in question”.<sup>242</sup> The European migrant crisis was certainly aggravating for the EU. One can of course argue that the hotspot approach and the EU-Turkey Statement were put together because there was a severe necessity to find a solution. However, the paragraph 1 (b) explains that necessity shall not be invoked unless the act “does not seriously impair an essential interest of the State or States towards which the international obligation exists, or

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<sup>238</sup> DARIO 2011: Article 23, “1. The wrongfulness of an act of an international organization not in conformity with an international obligation of that organization is precluded if the act is due to force majeure, that is, the occurrence of an irresistible force or of an unforeseen event, beyond the control of the organization, making it materially impossible in the circumstances to perform the obligation.”

<sup>239</sup> DARIO 2011: Article 23 Force majeure, Paragraph (2) (b)

<sup>240</sup> The Greek Ombudsman 2017, p. 10.

<sup>241</sup> DARIO 2011: Article 25 Necessity

<sup>242</sup> Ibid.

of the international community as a whole”.<sup>243</sup> We are back to the same question as before: Can the EU or even a member state be punished for trying to safeguard the human rights and rights of migrants? Are the consequences of the safeguarding so severe?

Even though the humanitarian response to the migrant crisis in Greece has been outstanding historically, one can still find countless flaws. The short-sighted EU migration policies and total deficit of will from other the member states, besides Greece and Italy, to take responsibility within the migrant crisis, not to even mention the EU institutions dodging the matter, have all in all led to insufficient progress.<sup>244</sup> Years later, the lack of management and organization within the hotspots in Greece is not justified.<sup>245</sup> Greece, the EU member states and the EU as a whole are being accused of not taking sufficient actions to settle the still ongoing difficulties in the hotspots and in the asylum processes within the EU. This can clearly be identified as an aftermath of the overwhelming migrant crisis with its peak regarding the migrant flow in 2015, but also regarding the peak of difficulties in bureaucracy and placement of the migrants in 2016.<sup>246</sup> This is answering the question if the force majeure or necessity articles of the DARIO can be implemented in the case of the Greek hotspots. Personally, I do not see how the Greek hotspots can work beyond the severe migrant crisis that the EU and all the individuals involved (bearing in mind all the ones, who didn't now survive), suffered. I do not see how the Greek hotspots should be operational anymore. Necessity and force majeure could be invoked before, but not anymore.

#### 5.4 Human rights obligations

Through the course of this thesis, it has become clear, that there is an imbalance, between what the ECtHR and scholars<sup>247</sup>, see as enough human rights protection when dealing with the Greek hotspots and the living conditions of the irregular migrants. The EU protects human rights in theory through their own fundamental rights and through other various treaties on human rights protection. I would like to believe that the human rights indeed are

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<sup>243</sup> Ibid.

<sup>244</sup> ActionAid et al. 2017a, p. 2.

<sup>245</sup> cf. ActionAid et al. 2017a, p. 2. “With all this in mind, the Greek state’s initial, understandable lack of preparedness for 2015’s unprecedented migration flows is no longer a reasonable justification for the gaps in asylum and reception procedures we witness today in Greece, an EU member state.”

<sup>246</sup> ActionAid et al. 2017a, p. 2.

<sup>247</sup> See Kourachanis 2018, Silverman 2018, Pijnenburg 2018 and Majcher 2018 – just to mention a few.



protected within the EU not only in theory but also in practice. Additionally, I would like the EU to be held accountable for possible breaches of human rights. This has however been more difficult to implement than I could have imagined. Since the ECtHR cannot hold the EU accountable for possible breaches of human rights, I have tried to find an alternative way.<sup>248</sup> The accountability and responsibility of the EU have also been difficult to invoke through the legal instruments that I have chosen in this thesis.<sup>249</sup> The last section of this research will illustrate the human rights obligations that the EU has, or ideally could have. This will conclude the hunt for an alternative liability scheme.

As presented before the doctrine of equivalent protection exists within the structure of the ECHR and the EU. The doctrine should give the member states motivation to guard international organisations and their actions in a more profound way.<sup>250</sup> I want to question this motivation though. In the case of the hotspots in Greece the motivation seems to be lacking. One could argue that the doctrine is only a mask for the ever so evident interconnectivity between member states and international organisations. Why is this connection however often forgotten in reality? Alternatively, is it solely a bluff to get away with actions that breach human rights? Can one restructure the system and implement the doctrine of equivalent protection in a more serious matter? In the case of the European Union and Greece, what would this demand from the aforementioned? Can we already demand this change? Is this plausible when reviewing the case of hotspots in Greece and the breaches of human rights?<sup>251</sup>

The problem lies within the system that we have built around international organisations. “What the law in its present state does not provide is a general obligation, incumbent on the UN or other international organisations, not to violate rules of international human rights whenever such violations could cause one or more member states to incur responsibility on a derivative basis and/or under the doctrine of equivalent protection (the two bases are not coextensive).”<sup>252</sup> If Greece would decide to question the policies that has lead them to the implementation of hotspots, Greece would find itself in an extremely complicated situation. The question remains: is it even possible to hold the EU partially accountable for the

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<sup>248</sup> Partially due to the on-going implementation of the accession of the EU to the ECHR. See chapter 3 for more on the relationship between the EU and the ECHR.

<sup>249</sup> See the subchapters 5.1, 5.2 and 5.3.

<sup>250</sup> Verdirame 2011, p.86. According to Verdirame the doctrine of equivalent protection indeed gives the member states more motivation.

<sup>251</sup> cf. Verdirame 2011, p. 86.

<sup>252</sup> Verdirame 2011, p. 87.

violation of Article 5(2) of the ECHR? How would Greece approach this matter? Can another country approach this matter? In other words, can an EU member state hold the EU accountable? Alternatively, can an EU member state question the liability of the EU?

I want resume to the doctrine of equivalent protection and to the accession of the EU to the ECHR. When researching I stumbled upon the problematic aspect of divergent human rights obligations between the EU and the EU member states. Would it be preferable for the whole EU ecosystem if the EU would have the same obligations as its member states? Would it be desirable to be able to call on the responsibility of the EU within hotspots in Greece? Verdirame surges in the argument why it would not be preferable to form a system where international organisations would follow and comply with treaty standards of their member states. This is because the human rights obligations can vary quite a lot between the individual member states. Despite the complexity of the scenario, Verdirame argues that it is not impossible to implement. Verdirame uses the UN as his example. He states that the UN would always have to stick to the highest standards of human rights rather than with the member state with the lowest standard.<sup>253</sup> The interesting aspect that Verdirame brings up is that the human rights obligation between the international organisation and its member states could work as a concept if it is realised by custom.<sup>254</sup> One can ask though, is custom enough? Customary law requires a certain amount of time until it is acceptable. In the case of the hotspots in Greece, I would like to argue that we do not have the time. Meaning, the human rights obligation of the EU cannot be balanced with the of the member state, Greece.

I have tried to implement alternative liability schemes to see if the EU could be held liable for the violation that emerged in the judgement of the ECtHR case.<sup>255</sup> It seems however, that I have not found a path. The EU is a complex legal person to approach. The EU remains an exception amongst other international organisations, due to its supranational nature. This study would have resulted in distinctively different findings if the EU was party to the ECHR. “The EU has maintained that the internal rules of the organisation of an international obligation in the case of ‘mixed agreements’, that is treaties to which both the EU and its member states are parties.”<sup>256</sup> In the case of this study, we can state that due to the fact that the EU has not acceded to the ECHR, we cannot apply this.

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<sup>253</sup> cf. Verdirame 2011, p. 87-88.

<sup>254</sup> cf. Verdirame 2011, p. 89.

<sup>255</sup> European Court of Human Rights: J.R. and others v. Greece, no. 22696/16.

<sup>256</sup> Verdirame 2011, p. 98

Through this research I have come across an often-occurring argument against the quality of human rights protection within the EU. Actors within the field of human rights protection, such as the Greek ombudsman, accuse the EU and Greece of making the situation political. “The issue for Greece, as well as for Europe, was and still is primarily political. The articulation of such a cohesive political context, the timely preparation of a strategic plan and the selection of effective and flexible implementing tools would multiply the operational capabilities of the administration.”<sup>257</sup> The argument can be used to question why the EU couldn’t keep politics out of the scheme of hotspots. The answer is easy. The EU cannot work without support of other member states. Thus, making the processes and the policies highly intertwined with the national political aspirations.

### 5.5 Chapter conclusion

In the previous chapter, I have tried to allocate the accountability of the EU within the hotspots of Greece. I stated that the accountability of international organisations defined by the International Law Association is not applicable to this case. I further on researched in the reality of the EU practicing within the field of human rights protection without taking accountability for its responsibilities. I moved on to probing the implementation of the DARIO in this case. Difficulties occurred when applying the DARIO to the situation of the hotspots in Greece. One challenge is to prove and identify an internationally wrongful act within the Greek hotspots. Furthermore, the Hotspot approach and its legal framework can be tough to specify. Institutional responsibility is still classified as vague, especially when comparing to state responsibility.<sup>258</sup> If the goal is to be able to count on institutional accountability within international law, we still have a long way to go. The DARIO is a huge step towards the correct direction, but still leaves us somewhat in the dark regarding clarity within institutional responsibility and accountability.<sup>259</sup>

Within the context of respecting human rights at the Greek hotspots, one must also remember the soft or even “invisible” human rights breaches. These breaches are namely the asylum procedures and the unclarity that they entail.

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<sup>257</sup> The Greek Ombudsman 2017, p. 11.

<sup>258</sup> cf. Verdirame 2011, p. 142.

<sup>259</sup> Verdirame 2011, p. 143.

After studying the human rights obligations of the EU, one can state that the EU should do a better job securing human rights. “Despite shortcomings, the European Union remained a leading actor in promoting human rights globally.”<sup>260</sup> This is exactly why the EU also must show an example by implementing a link to accountability. At the end of the day, the EU is perhaps not explicitly breaching their international legal obligations. However, one should not forget the importance of setting an example. With risk of turning too political, we have to bear in mind the direction the world is going towards. If the world is growing towards more connectivity, one also must lay the ground rules for this. The suffering that the asylum seekers are put through doesn’t come alone. In other words, I personally do believe that a tremendous amount of suffering is experienced throughout the whole process of seeking asylum. The Hotspot approach does not lighten the burden for anyone, whether I am referring to the EU or Greece, or the migrants.

The hotspot approach is complex within the structure of the responsibility. Even though, the EU, mainly the Commission, created the approach and the framework can be claimed to be democratically passed, the main responsibility lies on Italy and Greece alone. The support through EU institutions and actors and the financial support of other EU-member states cannot and will not relieve the responsibility of Italy and Greece.<sup>261</sup> Greece is condemned of human rights violations at a hotspot on the island of Chios. Scholars may argue that this peanuts in comparison to the fact behind the EU migrant policies. The EU is accused Basilien-Gainche of dodging new citizens: “(T)he Hotspots approach entails a genuine cold fact: the European Union and more precisely its Member States has provided a sparse reception to refugees in order to establish a global rejection of migrants, even though the legal obligations that the international, European, and national laws impose on them are thus violated (in particular the right to life and the right to asylum).”<sup>262</sup> A member state of an international organization can find itself in a situation of being held responsible for a wrongful act that is not attributable to the state (solely). As Verdirame also states, one cannot only derive the human rights obligations from member states to international organisations.<sup>263</sup>

It can also be stated after this chapter and the analysis of the accountability of the EU within human rights protection, that the EU perhaps is not the liable legal person from the very

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<sup>260</sup> Human Rights Watch 2019

<sup>261</sup> Basilien-Gainche 2017 in Migration on the Move, p. 164.

<sup>262</sup> Ibid, p. 152.

<sup>263</sup> Verdirame 2011, p. 86.

beginning. “Nevertheless, according to the authentic interpretation of the legal substance of this statement by the General Court of the EU, and regardless whether it is a political text with binding legal consequences, its content, and most importantly its commitments, cannot be attributed to the European Council or any other Union body, but solely to the leaders of the Member States.”<sup>264</sup> This statement argues totally against my tentative argument: that the EU should take responsibility as an institution, rather than merely blaming the individual politicians. Many scholars and actors within this field chooses to refer to the leaders of the European Union, rather than to the EU itself. Why is this? Perhaps international law is not ready for the EU to take such responsibility?

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<sup>264</sup> The Greek Ombudsman 2017, p. 7-8.

## 6. Conclusion

In this thesis I have given the reader a brief overview of the European migrant crisis. The crisis generated in the hotspots in both Greece and Italy. I have limited this study to the Greek hotspots. I have exhaustively researched the system and scheme behind hotspots in Greece. The EU-Turkey Statement as well as the hotspot approach of the EU have been presented and analysed. I have studied the human rights protection of the EU and the relationship of the EU and the ECHR, as well as both in the light of an ECtHR case.<sup>265</sup> The case of *J.R. and others v. Greece* and the judgement have been studied from various viewpoints. The judgement raised questions and criticism from scholars on the legal role of the EU within the Greek hotspots. This has further led me to view the possible accountability of the EU within human rights violations that have emerged from the Greek hotspots. Not only the accountability, but also the responsibility and the human rights obligations of the EU have been studied.

The purpose of this thesis was to study the Greek hotspots and what has resulted of them as well as to examine the possible responsibility of the EU within the them. I have throughout this thesis presented both the schemes behind the hotspots, that enable them, as well as criticism of them. When studying the combination of the EU and the ECHR, one must become acquainted with their extraordinary relationship. To study the EU through the ECHR is highly interesting due to the pending accession.<sup>266</sup> Even though the EU perhaps morally should take more responsibility on protecting human rights especially moving towards an accession to the ECHR, my study shows that one must be lenient when it comes to policymaking. The difficulty lies within the structure. Even if the human rights violations are identified on the ground of the ECHR, there are factors to be considered that can bring us closer to the possible accountability and/or responsibility of the EU within the hotspots of Greece. These are for example the doctrine of equivalent protection and derivative responsibility. Furthermore, within these factors, the different actors and objects must be identified and appointed. The EU is a multi-level system and the proper dichotomy is, and will perhaps remain, undefined. The human rights protection from the ECHR's point of view is to be guarded by the doctrine of equivalent protection within the EU. However, as I have

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<sup>265</sup> European Court of Human Rights: *J.R. and others v. Greece*, no. 22696/16.

<sup>266</sup> See Chapter 3.2: The Accession of the EU to the ECHR

proven in my analysis, the doctrine of equivalent protection does not bring us closer to the liability or accountability of the EU within the Greek hotspots.

Can the EU be held accountable for possible human rights violations that have occurred at a Greek hotspot? And how can it be held liable? In this thesis I have shown that the EU cannot be held accountable for the human rights violations that the ECtHR holds Greece accountable for in the case of *J.R. and others v. Greece*.<sup>267</sup> I have tried to demonstrate the possible accountability of the EU through the accountability of international organisations, draft articles on the responsibility of international organisations and then through the human rights obligations of the EU.<sup>268</sup> All the aforementioned theories cannot be implemented to the situation that the EU finds itself in.

One can state that the sample that I have used to find the possible accountability was too weak. The ground that this research is based on, *J.R. and others v. Greece*, is too hollow to prove a point. This also led to the fact that the implementation of different legal theories on responsibility of the EU, or of an international organisation were complicated to carry out. I want to argue that the judgement of *J.R. and others v. Greece* did not result in violations strong enough to find the accountability in the EU. Perhaps the accountability of the EU can be assessed through another case. The thesis is based on an ECtHR case that is one in a series of many. The ECtHR cases related to Greek hotspots are many: *Kaberi v. Greece* (no. 19667/17), *J.B. v. Greece* (no. 54796/16), *Ahmadi and others v. Greece* (no. 39065/16) and *Allaa Kaak and others v. Greece* (no. 34215/16). These cases should be analysed and investigated to receive a more comprehensive picture regarding the relationship between Greece, the ECHR and the EU. I want to propose the chance of finding the EU responsible of human rights violations in one of these cases. The options for further research are in other words vast. Further studies could give a clearer picture of the human rights protection of the EU or within the EU. They could perhaps additionally open the opportunity for Greece to question the schemes of the hotspots. Can Greece question the policies of the EU and how would that work out? In the case of this thesis, the questions proposed will have to serve as food for thought. These questions will have to be answered in another paper.

Clearly, there is an imbalance between scholars and the ECHR. The view on unlawfulness according to various scholars regarding the hotspots in the light of the ECHR, or even in the

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<sup>267</sup> Ibid.

<sup>268</sup> See Chapter 5: Alternative liability schemes

light of human rights in general and unlawfulness according to the ECtHR are dissimilar. How can we fix this imbalance? Is there even a need to fill the gap? In this thesis, I have strived for a solution to patch the hole that the imbalance has created. Unfortunately, there is no simple solution.

Even if one perhaps could argue that the EU should take responsibility within this matter, it seems rather complicated to enable the legal framework for this. The complexity lies in the EU policies that are behind the Greek hotspots. The EU-Turkey Statement and the hotspot approach are both experimental in their nature. One can ask now four years after the implementation of the hotspots: Is the EU taking more responsibility regarding the issue of migration? Whilst trying to implement the EU-Turkey Statement to the fullest, the EU has assembled an *EU Facility for Refugees in Turkey* project.<sup>269</sup> Other projects and partnerships to be mentioned is the cooperation with the African Union and its Member States and the restoration of the *North Africa Window of the EU Trust Fund*.<sup>270</sup> These pre-emptive programs can give us hope for future EU migration policies. The problem is however that the reactions are too slow. I want to argue that it is too little too late. I decided to concentrate on the liability of the EU within the scope of the Greek hotspots in this thesis. “Although Greece continued to host large number of asylum seekers, it failed to protect their rights.”<sup>271</sup> Further research could answer whether the liability of Greece could be invoked in a stronger way.

To conclude, during this thesis I have encountered various challenges. First and foremost, the legal ground of the hotspots is arguable. After that, I come across the difficulty of recognising the pattern of the EU’s human rights regime. Apparently, the regime is not structured, but more so evasive. Trying to frame the system, I approach the ECHR as my legal basis for the argument, only to face even more layers within international law that are indecisive. The explicit topic of this research is affected by several factors and is hardly stagnated. The ambiguous relationship of the EU and the ECHR makes the legal base of the

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<sup>269</sup> cf. European Commission 2020, more on the EU Facility for Refugees in Turkey is to be found in the European Commission Fact Sheet.

<sup>270</sup> European Commission Press Release 2017.

<sup>271</sup> Human Rights Watch 2019: “Overall numbers of arrivals increased compared to the same period in 2017. Deficiencies in the reception and asylum system escalated with severe overcrowding, unsanitary, unhygienic conditions, and lack of sufficient specialized care, including medical care, trauma counseling, and psychological support. Physical and gender-based violence were common in asylum camps, and NGOs reported deteriorating mental health conditions among asylum seekers. Most accompanied children continued to be placed in camps with adults, in so-called protective police custody or detention or risked homelessness, with no authorities failing to resolve a shortage of juvenile shelters or foster care.”



analysis rather ambitious. The fact that the EU faced the migrant crisis, peaking in 2015, but that only Italy and Greece implemented hotspots at the time makes the narrative and the fact checking quite challenging. All the factors above must be taken into consideration. This is without mentioning that Greece had experienced an economic crisis prior to the migrant crisis. As I have proven in my text, many components within the structure of this thesis are evasive. This in addition to the fact that Greece has both the Hotspots approach as well as the EU-Turkey Statement to follow, result in a complicated situation both practically but also in theory. Greece is in a complex situation at the outset. By adding the question of how the EU can take responsibility, or even accountability, makes the subject demanding.

In the end of 2017, the then European Commission President Jean-Claude Juncker stated his concern for the EU losing its momentum in the making of new asylum laws and systems. “Even if we are now moving away from crisis mode, it is evident that migration will remain a challenge for a generation of Europeans. Europe urgently needs to equip itself with future-proof means of managing migration responsibly and fairly. We have made solid progress in the past three years but now is the time to turn proposals into law, and law into practice.”<sup>272</sup> The problem lies perhaps within the migration politics. The EU as an institution is until this date divided and totally detached from the reality that the Greek islands, the hotspots with all the residents and actors, not to mention other asylum seekers face. It would be highly naïve to think that the future would not entail further migrant flows. With the European Commission even stating it in their press release, one must take these matters seriously.<sup>273</sup> The question remains if one can at this point, so early and close to the implementation of the approach, analyse the measures of the system as such. One can only wait for more qualitative studies to be published to know the true effect the migrant crisis and the EU-Turkey Statement, combined with the Hotspot approach has had on all the actors and individuals involved.<sup>274</sup>

“(S)urvival in these sites is undoubtedly a testament to the resilience of the migrants. However, the hotspots have become sites of mental, emotional, and psychological devastation.”<sup>275</sup>

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<sup>272</sup> European Commission Press Release 2017.

<sup>273</sup> European Commission Press Release, “Whilst the coordinated work was able to stabilise a highly volatile situation – with irregular arrivals to the EU dropping by 63% in 2017 – the trend for the years to come and factors such as climate change, the security situation and demography in the EU and its neighbourhood, point to migration remaining a challenge for decades.”

<sup>274</sup> Cf. Takou 2017.

<sup>275</sup> Silverman 2018, p. 4.

The complexity of the situation that the EU and Greece find themselves in, results in a tragedy in which the irregular migrants suffer. The question remains to be answered: Who is responsible?