

«X and X v Belgium»: the need for EU legislation on humanitarian visa

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This article examines the recent judgment of the Court of Justice of the European Union in the case of X and X v. Belgium (C-638/16 PPU). The issue at stake concerns an application for a visa with limited territorial validity (LTV) requested by a Syrian family at the Belgian embassy in Beirut in order to apply for asylum in Belgium. The article discusses the different interpretations given by the Advocate General and the Court of Justice and agrees with the AG that the EU Charter of Fundamental Rights leaves a limited margin of discretion to Member States and imposes a positive obligation to issue a LTV Visa in cases like X and X. It also concludes that the judgment in question clearly shows the need for the EU to adopt legislation regulating the issuance of humanitarian visas under the Visa Code.

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I. Introduction

¹ With the war in Syria still raging, and the turbulence in other parts of the world persisting or flaring up, it would not be wise to consider the «refugee crisis» to be a thing of the past. The declining number of applicants for international protection that Europe has received over the last couple of months masks the fact that the number of people in need of international protection is still growing – but they are unable to reach the territories of the European countries to lodge their asylum claim. Access to European territories is prevented through measures such as the contested EU-Turkey deal¹ and the EU's endorsement of a similar deal between Italy and Libya, both cleverly concocted in such a way as to circumvent the scrutiny of the Court of Justice of the European Union². While other avenues are looked into in order to have the illegitimacy of such measures declared by an international or national court of law, their execution in practice currently leads to literary millions of people being unable to flee persecution and inhuman treatment. It is in this context that the case of X and X needs to be analyzed. This article endeavors to do exactly that.

¹ Press release (144/16), EU-Turkey statement, 18 March 2016.

² Order of the general Court (First Chamber, Extended Composition) T-192/16 of 28 February 2017 (NF versus European); Order of the general Court (First Chamber, Extended Composition) T-193/16 of 28 February 2017 (NG versus European Council); Order of the general Court (First Chamber, Extended Composition) T-257/16 of 28 February 2017 (NM versus European Council); See for a case commentary M. Zoeteweyj, *Der EU-Türkei Deal: ceci n'est pas un acte juridique européen*, *Asyl*, 2/2017 (forthcoming). Note that an appeal is currently pending before the Court of Justice: see C-208/17 P, C-209/17 P and C-210/17 P (P, NF, NG and NM versus European Council).

² In a nutshell, the case of X and X concerns a Christian Syrian family that sought to flee the city of Aleppo that was, at the time of their application, still under ISIS occupation. Since all other routes of escape were closed, they planned to directly travel to Belgium on a visa with limited territorial validity to apply for international protection on arrival in Belgium. When their visa application was rejected by the Belgian authorities X and X appealed against the decision, which led to the Belgian court of appeal sending a request for a preliminary ruling to the Court of Justice of the European Union (CJEU). The CJEU was asked to interpret various provisions of the EU Visa Code in order to determine whether an application for a visa with limited territorial validity such as the one made by X and X falls within the scope of the Code, and as a result thereof within the scope of application of the Charter of Fundamental Rights of the European Union (the Charter). Notwithstanding the affirmative Opinion of Advocate General Mengozzi in this case, the Court came to the conclusion that the Visa Code (and therefore the Charter) does not apply to such applications.

³ The decision of the Court and the discussion surrounding the case reveals the need for EU legislation that provides people in clear need of international protection with a legal pathway to Europe. Though binding instruments of EU law allow Member States to issue visa with limited territorial validity on humanitarian grounds, the concept of humanitarian grounds is not further defined in EU law. -Additionally, the relevant legal instruments are drafted in such a way that uncertainty remains with regard to the oblige-

tory nature of the provisions governing the issuance of a visa on humanitarian grounds.

- 4 This article examines the Court's ruling in X and X against the background of the lack of EU legislation governing the issuance of visas on humanitarian grounds. It does so by first analyzing and commenting on the Court's decision in X and X, and the issues that arise from the conclusion of the CJEU that national (Belgian) law is applicable to their visa application. Following this analysis is an overview of the EU and international legal framework for the international protection of people that flee persecution and inhuman treatment. This overview leads to the conclusion that summarizes the findings of the authors and argues that there is a need for legislation governing the issuance of visas on humanitarian grounds in a distinctive and unambiguous way, a need that is evidenced by the outcome of the case of X and X, and that the EU would do well if steps were taken to make the necessary amendments to the applicable legislation, as suggested by NGOs, academics and the European Parliament.

II. X and X v. Belgium: out of sight, out of mind?

- 5 The following paragraphs analyze the events and legal arguments leading up to the decision of the CJEU in the case of X and X v. Belgium³, and the consequences of this decision for the applicants. A more detailed clarification of the provisions of the EU Visa Code will follow in the third part of this contribution.

³ Judgment of the Court (Grand Chamber) C-638/16 of 7 March 2017 (X and X versus Belgium).

1. Facts of the case

- 6 On 12 October 2016, a Syrian family of 5 (two parents and three small children) living in Aleppo applied for a visa with limited territorial validity ex Article 25(1) of the EU Visa Code at the Belgian embassy in Beirut (Lebanon). On their application form, X and X stated that the aim of their trip was to apply for asylum once in Belgium. Shortly after their return to Aleppo, where they would wait for the decision on the visa-application, the Syrian border with Lebanon was closed for an undetermined period of time. On 18 October 2016, the Belgian Aliens' Office (the «Office») refused the visa application based on Article 32(1)(b) of the Visa Code, based on the presumption that the family clearly had the intention to stay on Belgium's territory after the expiry of the visa they applied for. The Office's subsequent assessment of the visa application under Belgian law led to a rejection of the application, as the Office argued that Belgian law does not allow diplomatic posts to accept applications for international protection from third country nationals, and that further neither Belgian law nor applicable international refugee or human rights law imposes an obligation on the Belgian authorities to admit foreigners on Belgian territory, even if these foreigners live in catastrophic circumstances.
- 7 In appeal, X and X argue that Member State authorities are obliged to take Articles 4 and 18 of the Charter of Fundamental Rights of the European Union («the Charter») into account when assessing visa applications made under the EU Visa Code, and that this should result in a positive decision on their application for a visa with limited territorial validity

under Article 25 of the Visa Code. The court of appeal, taking for granted that Article 25 indeed applies to applications such as the one made by X and X, refers questions regarding the margin of discretion left to the Member States in their decision based on Article 25(1) of the Visa Code, taking into account the article's reference to international obligations and in the light of the Charter, to the Court of Justice of the European Union for a preliminary ruling.

- 8 Before the Court, the Belgian government – supported by the European Commission and several governments of other Member States of the European Union – argued in addition to the Belgian migration authorities' arguments that the Visa Code does not apply at all to visa applications such as the one made by X and X, as they should be regarded as an application for a visa that would allow a stay of more than three months. Such visa fall outside the scope of the Visa Code, thereby also excluding an application of the Charter according to Article 51 of the Charter, and should therefore be dealt with under national law.

2. AG Mengozzi's Opinion

- 9 In his Opinion⁴, Advocate General Mengozzi first deals with the arguments made by the Belgian government and the Commission, as the success of these arguments would lead to a lack of jurisdiction on the side of the Court. The AG argues primarily that nothing in the Visa Code justifies a conclusion that the applicant's intention to seek international protection once on the territory of a Member State

changes the nature or the subject of his or her application for a visa with limited territorial validity (LTV), or transform this application into an application for an authorization of a stay of longer than three months. The AG interprets Article 25(1) of the Visa Code as allowing Member States' authorities to issue an LTV, even if they have serious doubts as to whether the applicant will leave the territory after the expiry of the visa or if other reasons to refuse a visa as listed under Article 32 exist. The AG underpins this argument further by reasoning that the applicants' extended stay in Belgium would anyway be based on their status as applicants for international protection in accordance with Article 9(1) of Directive 2013/32, and no longer on the Visa Code. Therefore, the AG argues that the applicants' intentions to stay longer than three months could at the very most be regarded as a reason to refuse a visa under Article 32 of the Visa Code, but could certainly not be a reason for the non-application of the Code. This is, according to the AG, also evident from the fact that during the whole of the application and appeals procedure the Belgian authorities assessed X and X's application under the Visa Code – and that the reason for the refusal of the LTV was based on Article 32(1)(b) of the same Code.

- 10 The AG also disagrees with the argument brought forward by the Belgian government that it is not possible to apply for a visa with limited territorial application by pointing out that the standard application form annexed to the Code refers to «Schengen visa» without making any distinction between the types of visa that can be applied for, and that in any case the fact that the applicants applied for a

⁴ Opinion of AG Mengozzi in: Judgment of the Court (Grand Chamber) C-638/16 of the 7 March 2017 (X and X versus Belgium).

visa that is regulated in the Visa Code automatically guarantees the application of this Code – and through Article 51 of the Charter also the provisions of the Charter of Fundamental Rights of the EU.

- ¹¹ Therefore, the AG is of the opinion that, when Member States' authorities assess applications for LTV under Article 25(1) of the Visa Code, the margin of discretion that this Article leaves to the authorities is not only limited by international obligations, but also by Article 4 of the Charter, which, interpreted in the light of the case law of the Court itself⁵ and in the light of the ECtHR's understanding of Article 3 ECHR⁶ should be interpreted to mean that Member States are under a positive obligation to take reasonable measures to prevent the materialization of a risk of torture or inhuman or degrading treatment of which they know or of which they should have known. Thus, Member States' authorities must inform themselves through official EU sources and reports published by NGOs working in the field of the situation in the country of origin of an applicant for visa under the Visa Code before deciding to apply one of the reasons for refusal of a visa lis-

ted under Article 32(1) of the Code.

3. Ruling of the Court

- ¹² The Court, in its ruling of 7 March 2017, disagreed with the argument of the Belgian government that it lacked jurisdiction to look into the referred question, as the Court found that it was not obvious from the circumstances of the case that EU law was not applicable. The Court is therefore competent to look into the substantive issue referred to it, namely the question of the applicability of the Visa Code to visa-applications that would allow the holder of the visa to enter the territory of a Member State in order to lodge an asylum claim, within the period of validity of the original visa.
- ¹³ Basing itself on Article 62 (2)(a) and (b)(ii) of the EC Treaty on which the Visa Code was based, which (unlike Article 79 (2) (a) TFEU which has since replaced the EC Treaty) limits the competence of the Council to adopting measures regarding the issuance of visas for intended stays of no more than three months, and Articles 1 and 2(2)(a) of the Visa Code which define the scope of the Code as the issuance of visas for intended stays on the territory of the Member States not exceeding 90 days in any 180 day period, the Court concludes that, since the objective of the applicants in the main proceedings is to apply for international protection upon arrival in that Member State and therefore ultimately to stay in that Member State for more than 90 days, the visa application falls outside the scope of the Visa Code described above. As a result, the application does not fall within the scope of the Charter, either. The Court is thus excused from looking into the interpretation of Article 25(1) of the

⁵ Judgment of the Court (Grand Chamber) [C-84/12](#) of 19 December 2013 (Koushkaki versus Germany); Judgment of the Court (Grand Chamber) Joined Cases [C-404/15](#) and [C-659/15](#) of 5 April 2016 (Aranyosi and Căldăraru versus Generalstaatsanwaltschaft Bremen); Judgment of the Court (Grand Chamber) [C-182/15](#) of 6 September 2016 (Petruhhin).

⁶ Judgment of the Court of Human Rights (First Section) [No. 22535/93](#) of the 28 March 2000 (Mahmut Kaya versus Turkey); Judgment of the Court of Human Rights (First Section) [No. 39630/09](#) of the 13 December 2012 (El-Masri versus The Former Yugoslav Republic of Macedonia); Judgment of the Court of Human Rights (First Section) [No. 44883/09](#) of the 23 February 2016 (Nasr & Ghali versus Italy, Application, judgment).

Visa Code, and the margin of discretion left to the Member States in refusing to issue a visa to applicants that would – because of the refusal – be left bereft of the chance to apply for international protection, and therefore continue to be trapped in an inhumane situation.

- ¹⁴ Towards the end of the ruling, the Court adds that sanctioning the use of the provisions of the Visa Code for applications for visas that would allow the visa-holder to apply for international protection in the Member State of their choice would undermine the Dublin system. With this remark, inserted as if it were an afterthought, the Court seems to reveal the true motivation behind the ruling in X and X: to save an already failing system as illustrated in the previous section (2).

4. X and X: practical implications of the ruling

- ¹⁵ Apart from the implications for similar cases and the issue of humanitarian visas under EU law in general, a subject that is discussed in more detail further on in this contribution, the immediate consequence of the Court's ruling in the case of X and X is that their visa application has to be assessed under Belgian law. Belgian law does not provide prospective applicants for international protection with the opportunity to apply for international protection from abroad. An application has to be made either from within Belgium or at the Belgian border⁷. X and X could therefore not apply for asylum at the Belgian representations in a third

country. It is exactly for this reason that they applied for a visa to be allowed entry into Belgium, in order to file their asylum claim at the offices of the Immigration Office in Brussels. They could have applied for a touristic Schengen visa, but instead they choose to be honest and specified their intention of applying for international protection as the reason for their visa application.

- ¹⁶ According to a study carried out by the European Migration Network (EMN) in 2012, Belgium was one of the EU Member States have had schemes for issuing national humanitarian visas. This study showed that, at least in December 2009, the Belgian authorities delivered humanitarian visas to prominent persons, such as foreign opposition leaders, or persons on behalf of which the Belgian authorities had been contacted by the UNHCR⁸. The same European Migration Network reported in 2017 with regard to 2016 that the Belgian authorities had continued making use of the possibility to issue humanitarian visas, and that in that year almost 1000 humanitarian visa were issued, mainly to Syrians who had made their application through the embassy in Lebanon. However, these visas were issued in order to implement a humanitarian resettlement scheme and involved persons that were already recognized as refugees before being issued with a humanitarian visa⁹. This type of humanitar-

⁷ Office of the commissioner general for refugees and stateless persons, *Asylum in Belgium – Information brochure for asylumseekers regarding the asylum procedure and reception provided in Belgium*, 2014.

⁸ BE EMN NCP (December 2009), [EU and non-EU harmonised protection statuses in Belgium](#), Belgian National Contact Point to the European Migration Network, p. 19, 25 and 40.

⁹ This is not the case in all EU Member States, but the criteria that a person has to have been recognized as refugee before he/she can be issued with a humanitarian visa does apply in Belgium; See EMN, [Resettlement and Humanitarian Admission Programmes in Europe – what works?](#), November 2016, p. 5.

ian visa therefore does not offer persons that wish to file an application for asylum in Belgium with a legal pathway to do so. Resettlement through humanitarian visas is therefore often less contentious than the admittance of persons that wish to apply for international protection with a humanitarian visa. In the particular case of X and X, the above leads to the conclusion that, considering that their status has not yet been determined, they would not be eligible for a humanitarian visa under Belgian law.

III. Access to international protection under international and European law

¹⁷ In the light of X and X's case the questions that arise naturally are: how does the EU law respond to people in need of international protection? Does the EU provide people that want to flee persecution and inhumane treatment with opportunities to claim international protection in the EU from abroad, or does a person have to be on EU territory in order to claim asylum? With the coming into force of the Lisbon Treaty in 2009, a vital question that needs to be added is: how is Article 18 of the Charter, which guarantees the right to asylum, substantiated in secondary EU law, and does it find application in practice or does the right to asylum only exist on paper? The below paragraphs analyse the current framework on access to international protection under EU law, to find answer the above questions.

1. The Geneva Convention and the ECHR: non-refoulement of refugees

¹⁸ To place the discussion of the EU law on international protection in the appropri-

ate frame, a very brief introduction to the applicable norms of international law should be given. It is commonly known that the Convention Relating to the Status of Refugees, signed in 1951 in Geneva and therefore often referred to as the «Geneva (Refugee) Convention», forms the backbone of the framework of asylum and refugee law at the international level. Central provisions of the Convention for the purpose of this article are Articles 1A(2) of the Refugee Convention, defining which persons are refugees¹⁰, and Article 33(1) of the Convention which provides that no contracting state shall expel or return («refouler») a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. Articles 2-34 define the benefits (access to education, labor, health care, etc.) associated to the status of refugee. These secondary rights fall outside the scope of this article.

¹⁹ With regard to the European region, the ECHR is applicable to all actions of the states that are party to the Convention, including those with regard to foreigners within their jurisdiction. Though the Convention does not specifically regulate international protection or foreigners' access to a State's territory, the ECHR is interpreted to provide for limitations on the right of states to turn foreigners away

¹⁰ According to this Article, a refugee is any person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.

from their borders. If turning away a foreigner would lead to putting this person at risk of torture or inhuman or degrading treatment or punishment, this is prohibited by Article 3 of the ECHR, which explicitly prohibits torture or inhuman or degrading treatment or punishment¹¹. Interpreted in this way, Article 3 of the ECHR is an expression of the non-refoulement principle of Article 33(1) of the Refugee Convention.

²⁰ Much has already been said and written with regard to the principle of non-refoulement, and the possibility or obligation to apply this principle extraterritorially¹². Based on the interpretation of the principle of non-refoulement in standing case-law on the application of the principle as present in the Refugee Convention and the ECHR but also in other instruments of international law, experts in the field of refugee law advocate the view that States party cannot fulfil their

obligations adhering to a strict territorial application of the principle, and that States should always consider the human rights implications of their actions and decisions even if the impact would not take place on their territory. However, despite this discourse, it is impossible to deny that the debate on extraterritorial application of the principle of non-refoulement is ongoing. The case of X and X fuelled this discussion, which as a result of the decision of the Court in this case flared up once more.

2. EU asylum law

²¹ Though the EU is neither party to the Geneva Convention nor (yet) to the ECHR, all of its Member States are. The obligations under the two legal instruments are implemented in EU law by a number of EU legal acts, of which only those that are relevant for the topic at hand are mentioned here.

²² Under the Procedures Directive asylum seekers may apply for international protection within the territory of a Member States and at its borders, transit zones and territorial waters¹³, whereas the determination of the State responsible to process an asylum claim is set out in Article 7 to 11 of Regulation 604/2011 (better known as the «Dublin» Regulation). In practice, the criterion that applies in the majority of cases is Art. 13¹⁴, establishing that the country responsible for examining an asylum application will be the first Member State where the asylum applicant has irregularly entered into the

¹¹ See for milestone rulings of the ECtHR in this regard: Judgment of the European Court of Human Rights No. 14038/88 of the 7 July 1989 (Soering versus the UK), para. 91; Judgment of the European Court of Human Rights No. 15576/89 of the 30 October 1991 (Cruz Varas and Others v. Sweden), paras. 69-70; Judgment of the European Court of Human Rights Nos. 13164/87, 13447/87, 13448/87 of the 20 March 1991 (Vilvarajah and Others versus United Kingdom), para. 103; Judgment of the European Court of Human Rights No. 22414/93 of the 15 November 1996 (Chahal versus United Kingdom), paras. 73-74.

¹² G. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, 3rd edn, Oxford University Press, 2007, p. 201–267; W. Kälin, *Commentary on Article 33, Paragraph 1*, in A. Zimmerman (ed.), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary*, Oxford University Press, 2011, p. 1327 – 1396; Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalization of Migration Control*, Cambridge Studies in International and Comparative Law, Cambridge University Press, 2011, p. 100 ff.

¹³ Moreno Lax, *External Dimension*, Peers, S., et al, *EU Immigration and Asylum Law*, p. 220.

¹⁴ Garlick, M., *Solidarity under Strain: solidarity and fair sharing of responsibility in law and practice for the international protection of refugees in the European Union*, 2016, p. 161.

EU. This system both places an unfair burden on frontline States and makes Dublin a coercive system, that does not take individual preferences and choices into account, apart from a few exceptional cases. Apart from that, the whole system is, despite the high costs incurred through the application thereof¹⁵, highly inefficient, as the number of asylum seekers actually transferred with Dublin procedures is much smaller than the number of applications for international protection lodged and assessed in another Member State than the one that would be responsible for their application according to the Dublin rules¹⁶. Potential sending Member States either do not want to take the trouble to start a transfer procedure, or requested Member States find a reason to deny responsibility for the applicant. One could argue that this system, which clearly does not serve the objectives with which it was adopted in the first place, leads to an unnecessary constraint of the rights of the affected applicants for international protection. This conclusion is also reached by various authorities, including legal scholars¹⁷, the European Commission¹⁸, NGOs¹⁹

and other experts²⁰.

- ²³ It is however not only the Dublin system that limits access to international protection. The system has been supplemented by so-called non-entrées measures²¹ that are part of the EU external policy. These measures were introduced as part of a policy that aimed at strengthening external borders as well as at facilitating the access to international protection²². However, the EU has limited itself to focusing only on the first objective; the deal with Turkey is only the last episode of a long sequence of measures (such as re-admission agreements, the increasingly prohibitory and exclusionary role of Frontex, carrier sanctions, stricter visa policies) that were introduced to strengthen the external borders²³. By contrast, much weak efforts have been made with regard to the development of legal pathways to access international protection under EU law, and no steps are taken to activate legislation that has already been adopted such as the Temporary Protec-

to be applied in full.».

- ¹⁵ On the costs of the Dublin system see European Council on Refugees and Exiles, «[Dublin II Regulation: Lives on hold](#)» - European Comparative Report, February 2013, p. 20, cit.
- ¹⁶ See EMN, [The Dublin system in 2016 Key figures from selected European countries](#).
- ¹⁷ Guild, Costello, Garlick and Moreno-Lax, Enhancing the Common European Asylum System and Alternatives to Dublin, CEPS Papers in Liberty and Security in Europe No 83/September 2015.
- ¹⁸ Proposal for a Regulation of the European Parliament and of the Council ([COM \(2015\)240 final](#)): «Though the recent legal improvements date only from 2014, the mechanism for allocating responsibilities to examine asylum applications (the «Dublin system») is not working as it should. In 2014, five Member States dealt with 72% of all asylum applications EU-wide. The EU can provide further assistance, but the rules need

- ¹⁹ European Council on Refugees and Exiles, «[Dublin II Regulation: Lives on hold](#)» - European Comparative Report, February 2013, cit.
- ²⁰ UN Human Rights Council, Report of the Special Rapporteur on the human rights of migrants: Banking on mobility over a generation: follow-up to the regional study on the management of the external borders of the European Union and its impact on the human rights of migrants ([A/HRC/29/36](#)) of the 8 May 2015, par. 66: «in the long term, the European Union needs to take stock of the durable failure of the Dublin logic and develop options for solidarity among its member States and greater freedom of movement of migrants in Europe».
- ²¹ Hathaway, J.C., *The Emerging Politics of Non-Entrée, Refugees*, 40, 1992.
- ²² The Stockholm Programme – An Open and Secure Europe Serving and Protecting the Citizens, ([17024/09](#)) of the 2 December 2009.
- ²³ See amongst others Den Heijer, M, *Europe and Extraterritorial Asylum*, Hart, 2012.

tion Directive²⁴. Arguably, the only relevant initiatives in the field of access to international protection are recent ad hoc actions on resettlement²⁵. A Regulation for a more permanent European Union Resettlement Framework has been proposed by the Commission in July 2016 by the Commission and is currently debated by EU Parliament. However, the EU Parliament Rapporteur on this proposal and several NGOs have already expressed their concerns that the humanitarian rationale has almost been replaced by security concerns²⁶. The proposed Regulation can therefore not be expected to create alternative pathways to international protection under EU law.

²⁴ The lack of pathways to access international protection under EU law increases the importance of the visa policy of the EU and its Member States. A generous visa policy for prospective applicants for international protection would facilitate the access to international protection of especially the vulnerable people in need of protection that do not have the physical, mental, financial or other means to make the journey to the territories of the Member States. A restrictive visa policy

²⁴ Council Directive (20 01/55/EC of 20 July 2001) on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving such Persons and Bearing the Consequences Thereof of the 7 August 2001; See recently Ineli-Ciger, M., Time to Activate the Temporary Protection Directive, *European Journal of Migration and Law*, 2016, 18, 1, 2016, 1-33.

²⁵ Conclusions of the Representatives of the Governments of the Member States meeting within the Council (1130/15): on resettling through multilateral and national schemes 20 000 persons in clear need of international protection of the 22 July 2015.

²⁶ European Council on Refugees and Exiles (Policy Note 1): Untying the EU Resettlement Framework in December 2016.

on the other hand would make it impossible for these people to access international protection in the view of the lack of other, more tailored, pathways to international protection.

3. Humanitarian visa policies: EU and Member States practices

²⁵ In general, visas are among the most efficient and primary instruments to implement and outsource border controls²⁷. In the context of the European Union, they have also added a vital dimension to the external policy of the EU, with visa liberalization or facilitation being used as incentives for third countries to cooperate with the European Union in its migration management²⁸. This has as its effect that third countries bordering the European Union amend their immigration laws reflecting EU norms, thus functioning as a buffer for the European Union, as occurred in Balkans countries in the course of the last decade²⁹. The EU visa policy is therefore an essential instrument in the EU migration management toolkit.

²⁶ Though the regulation of the movement of third country nationals did not belong to the competences of the EU initially, the EU acquired competence in this field

²⁷ See Meloni, A., EU Visa and Border Control Policies: What roles for Security and Reciprocity? In Big, D. et al, *Foreigners, Refugees or Minorities: Rethinking people in the context of Border Controls and Visas*, Ashgate, 2013, at 151 ff., dealing with visa as a remote form of control.

²⁸ Thym, D., Towards International Migration Governance? The European Contribution, in *The EU and Global Social Governance*, at p. 296.

²⁹ See for instance Agreement between the European Community and the Republic of Serbia on the facilitation of the issuance of visas, 18.9.2007 entered into force on 1.7.2008, *OJ L 334, 19.12.2007*; See on the negative effects for asylum seekers *Chachipe Rights & Justice*, Selective freedoms. The Visa liberalisation and restrictions on the right to travel in the Balkan, 2012.

through the Treaty of Amsterdam. The legislative measures taken in this regard are, among others, the Visa Code Regulation³⁰, which establishes the procedures and conditions for Member State authorities issuing visas for short stays in and transit through the territories of Member States, and a separate Regulation listing the non-EU countries whose nationals are required to hold a visa to enter the EU³¹. Needless to say that included in this list are the countries that are the main sources or transit countries of refugees³². This makes it increasingly difficult for potential refugees to obtain a visa sanctioning their regular entry into the country where they wish to make their application for international protection³³.

²⁷ This does not need to be like this per se. Visas policies can also be implemented to the benefit of protection seekers. Such a visa policy could, for example ease, suspend or lift visas obligations for nationals of countries from which high number of recognized refugees originate. This might be a temporary or permanent measure to allow people in need of protection to safely and legally reach the EU. Alternatively, protected entry mechanisms could

³⁰ Regulation of the European Parliament and of the Council (No 810/2009) of 13 July 2009: establishing a Community Code on Visas (Visa Code).

³¹ Council Regulation (EC) (No. 539/2001) of 15 March 2001, amended by Regulation (EU) of the European Parliament and of the Council (No. 1289/2013) of 11 December 2013; See also Meloni, A., in Hailbronner, K., Thym, D., *EU Immigration and Asylum Law*, 2016. A Commentary, Beck, 2nd edition, 2016.

³² Cf Regulation No. 539/2001, Annex I.

³³ Numbers of irregular entries of asylum seekers among Member States are extremely high. As Noll puts it: «There were 1,321,560 asylum claims during the year [2015], according to the International Organization for Migration. Frontex says at least 800,000 of these claims consisted of irregular entries», 2016.

be put in place, and visas could be provided to people who have obtained international protection from a Member State while still in a third country, or to people who wish to travel to a Member State in order to submit a claim for international protection on arrival³⁴. It is unclear to what extent EU law in its present form allows or even compels Member State to issue visas to people who are clearly in need of international protection and who request to be admitted to the territory of a Member State in order to lodge an application for international protection. The before mentioned Visa Code provides in Article 25 that Member States shall issue humanitarian visas to applicants that do not fulfil certain entry conditions laid down in the Visa Code and the Schengen Borders Code, if this is necessary on humanitarian grounds, for reasons of national interest or because of international obligations. The visa that the Member State should issue in case it decides to apply Article 25 of the Visa Code is a so-called Visa with Limited Territorial Validity (LTV), which grants the holder of the visa the right to stay exclusively in the issuing Member State. However, neither the Visa Code nor any other instrument of European Union law provides guidance on how this Article should be applied in practice. The Article should have gained importance, especially after the coming into force of the Lisbon Treaty in December 2009 – a few months after the entry into force of the Visa Code, which was adopted in July of the same year – , by way of which also the Charter

³⁴ See for this account Moreno Lax, V., *Europe in Crisis: Facilitating Access to Protection, (Discharging) Offshore Processing and Mapping Alternatives for the Way Forward*, Red Cross, EU Office, 2016, distinguishing between collective and individual solutions, 2016, at 34 ff.

of Fundamental Rights of the European Union has gained binding force on an equal footing with the Treaty on European Union and the Treaty on the Functioning of the European Union. This Charter provides, among other fundamental rights, for the prohibition of torture and inhuman or degrading treatment or punishment in Article 4, and for the right to asylum in its Article 18. Considering the change in the legal landscape thus brought about by the coming into force of the Lisbon Treaty, it is surprising that the issue of humanitarian visas on the EU level did not gain momentum before.

²⁸ Meanwhile, several Member States have gained experience with the implementation of humanitarian visa schemes, as already mentioned briefly under the discussion of Belgian law above. Comparative studies by legal scholars, EU institutions and NGO have documented positive outcomes³⁵. Evidently, the degree of the protection offered under the schemes varies considerably from one State to another and a wide spectrum of inclusive/protective variables may be identified. To begin with, the 2014 report for the EU LIBE Committee recognizes three different approaches among Member States implementing some kind of humanitarian visa scheme; there are those that issue LTV on humanitarian grounds, in accordance with Article 25(1) of the Visa Code, but there are others that issue

type C or type D visas on similar grounds³⁶. For instance, visas on humanitarian or asylum/humanitarian grounds may have an explicit basis in the law (which is the case in the Netherlands, Spain and Switzerland), or work as a de facto or informal procedure, with States allowing third country nationals to apply for a touristic visa and then submit an international protection request once entered the territory of the State³⁷. Further, differences also exist as to the place from which these pathways may be accessed by protection seekers, as some States restricts the possibility to apply for a protected entry procedure in embassies or consular representations in third countries, whereas others also include countries of origin³⁸. It is also important to examine and compare the extent to which the State from which a humanitarian visa is requested takes over responsibility for the safety of the applicant during the assessment procedure of the application, because whereas some States do offer protection during the assessment procedures, others do not. Finally, some of the states mentioned here have decided to suspend or put a cap on the

³⁵ Noll, G. et al, 2003, [Study on the feasibility of processing asylum claims outside the EU](#), The Danish Centre for Human Rights, European Commission, Jensen, U., Humanitarian Visas: option or obligation?; Study for the LIBE Committee, 2014, Hein, C., de Donato, M., [Exploring avenues for protected entry in Europe](#); Report from the Consiglio Italiano per i rifugiati (CIR), 2012.

³⁶ Jensen, 2014, p. 42. It is worth remembering that the Common Code on Visas (CCV) provides for two general categories of visas, namely type «C», which are uniform EU visas released for short term stays and valid throughout the Schengen area. By contrast, type «D», are national visas valid for longer periods within the State of issuance and with restrictions to travel other Schengen States. The CCV provides also a further visa establishing in Art. 25 that States may issue visas on humanitarian grounds with territorial limited validity (LTV), i.e. providing the beneficiary only the right to stay in the country issuing the visa. This is the type of visa that Syrian applicants requested at Belgium embassy in the case at stake in X and X.

³⁷ This is the case of LTV in Italy and short/long term visa issued in France, see Jensen, 2012, respectively at 44 and 45.

³⁸ Noll, G, et al, 2003, cit., at 216.

humanitarian visa procedure, as it resulted in the arrival of more applicants for international protection than their domestic asylum system – and their domestic politics - was able to handle³⁹.

²⁹ This short overview of Member State laws and practices with regard to humanitarian visas clearly shows that there is no consistency among the Member States in this respect. This results in a situation in which persons in need of international protection might feel that they participate in a lottery when they choose for the legal pathway to access international protection in Europe – and that this, in its turn, inspires many of them to attempt a risky journey to the borders of Europe rather than putting their hopes on an equally risky walk on the legal pathway. The existing wide divergences among Member States laws and practices in regard of humanitarian visas has a number of negative consequences in terms of different waiting times, uncertain outcome of the application depending on the Member State processing the request, possibilities of protection while the examination is conducted, etc. In addition, the exercise of broad discretionary powers by consular or other responsible authorities seems a common trend and this

³⁹ This is the case for Switzerland and Austria, for example. For Switzerland see Thränhardt: Kann Deutschland vom neuen Schweizer Asylverfahren lernen?, *ZAR* 2016, p. 331, where he mentions that numbers have dropped considerably from 4.722 in 2014 to 1.721 in 2015. Later in 2016 the issuance of humanitarian visa to Syrians was suspended by the Swiss authorities, see [Asylum checks tightened on injured Syrians and Iraqis](#); Austria decided in 2003 to reserve humanitarian visa only for family members of recognized refugees; proposals are presently in the pipeline to abolish humanitarian D-type visa completely, See [Austria: Proposals to restrict humanitarian visas and family reunification](#).

puts at risk basic principles of EU administrative law, such as fairness, good administration, legal certainty or legitimate expectations. The overview should therefore also serve as an argument for the EU policy makers and legislators to kick off a genuine discussion about the introduction of a clear legislative framework on humanitarian visas in EU law, in order to harmonize or even uniformise Member State practices in this respect.

4. Towards an EU humanitarian visa scheme?

³⁰ In this regard, it is worth noting that in 2014 the EU Commission adopted a proposal to reform the Visa Code, albeit that the proposed reform was limited to financial, technical and logistic aspects⁴⁰. By contrast, in its 2016 report on that proposal the European Parliament seized the opportunity to stress the protective function of visas, in line with its previous positions on the need to create legal pathways to the EU⁴¹. To this end the EP proposed a number of amendments of the proposed recast Visa Code with the view to develop the humanitarian potential of the Visa Code⁴².

⁴⁰ Proposal for a Regulation of the European Parliament and of the Council ([COM \(2014\) 164 final](#)) on the 1 April 2014.

⁴¹ European Parliament resolution ([2015/2095](#)) of the 12 April 2016: on the situation in the Mediterranean and the need for a holistic EU approach to migration. Besides non-binding resolutions adopted in the context of the Mediterranean tragedies, it is worth also remembering that the European Parliament has recently adopted a draft report on the proposal of the EU Commission on a Union resettlement framework, with a view of bolstering the humanitarian rationale of resettlement, which is at present time shadowed and undermined by the ambiguous proposal of the EU Commission.

⁴² Proposal for a Regulation of the European Parliament and of the Council ([COM\(2016\)0468](#)) on the 13 July 2016: on the proposal for a regulation

³¹ Most importantly, the European Parliament's report sets out that «the issuing of a visa to a person seeking protection constitutes a means of allowing such person to access the territory of the Member States in a safe manner» (Amendment 7). The EP therefore includes in its amendments a provision enabling third country nationals to apply for humanitarian visas at consulates or embassies of one of the Member States. In case of a positive assessment of their visa application, asylum-seekers would have the possibility to safely travel to the Member State concerned and lodge an application for international protection (Amendment 95). If adopted, this amendment would introduce a humanitarian visa linked to an asylum application, providing for the first time for a protected entry procedure based on individual demands under EU law⁴³. In line with this amendment, the European Parliament also proposed to exempt beneficiaries of humanitarian visas from the ordinary shortstay visas validity by stating that Member States «shall grant an exemption from the standard 90 days' validity in any 180 days» and issue visas for a period of 12 months, which would also be renewable (Amendment 96). Further, the EP makes reference to the case law of the ECtHR⁴⁴ emphasizing that Member States have «certain obligations even outside the[ir] territory when they exercise jurisdiction»

of the European Parliament and of the Council establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014.

⁴³ Resettlement is namely a rather collective instrument managed by almost entirely by UNHCR, rarely offers the possibility to individuals to spontaneously submit an application (self referrals).

⁴⁴ The European Parliament: makes reference to the Judgment of the European Court of Human Rights No. 27765/09 (Hirsi Jamaa and Others versus Italy, Application) on the 23 February 2012.

(Amendment 7) and lists expressly a number of international obligations that bind Member States activity.

³² The EP's position would clearly take the EU one step closer to a humane asylum system, as it would fill a crucial gap in the field of EU asylum law, and it would contribute to address the above-mentioned issues of national divergences on humanitarian visas. Yet, it has to be underlined that since March 2016 the legislative process regarding the proposal to amend the Visa Code seems to have stalled. It is to be hoped that the case of X and X, which once again brought this lacuna in the EU's visa and asylum law to the footlight, will spur the EU legislator to take up this issue once more.

IV. Reflections on the need for a more humane EU asylum system

³³ Without simply claiming that the Court should have ruled for the applicants' right to a humanitarian visa under EU law, the Court's ruling in X and X is disheartening for a number of reasons.

³⁴ First of all, the Court's finding that the intend of the applicants to apply for international protection on arrival in Belgium modifies the nature of their application for a short-stay visa into an application for a visa sanctioning a stay for more than ninety days within a 180-day period is perplexing. Especially when one considers that Article 32(1)(b) of the Visa Code unambiguously provides that Member States' authorities are to refuse a visa if there are reasonable doubts as to the applicant's intention to leave the territory of the Member States before the expiry of the visa applied for, one would expect more of an explanation from the Court to

underpin its decision for the non-applicability of the Visa Code to X and X's visa-application, and its blunt finding that such a ruling does not run contrary to Article 32 of the Visa Code. Claiming that a certain finding, which seemingly runs contrary to an explicit provision of EU law, actually does not run contrary to this provision is, on its own, not convincing. In the context of the case of X and X, it only serves to strengthen the impression that the Court is eager to reach a certain conclusion without being able to base this conclusion firmly on EU law.

³⁵ The Court's focus on the intent of the applicants is furthermore problematic as it seems to communicate to applicants that it does not pay off to be honest to the authorities with regard to the reason behind their application. If X and X would have been dishonest about their intentions, if they would have stated that the aim of their visit to Belgium was purely touristic, the authorities would have, in this particular context, still have ample reason to doubt the intention of the applicants to leave the territory of the Member State before the expiry of the visa. However, they would not have had any other choice but to reject this application based on Article 32 of the Visa Code, in which case the Court, if asked for a preliminary ruling, would have had to rule for the applicability of the Visa Code and the Charter of Fundamental Rights.

³⁶ It is the Court's obvious wish to steer clear from the Charter where the stickingpoint of this judgment actually lies. As mentioned before, it was not until the entry into force of the Lisbon Treaty in 2009 that the Charter was given binding

force on an equal footing with the Treaties. The Visa Code was adopted a few months before the entry into force of the Lisbon Treaty. However, the Charter binds the EU institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States (in all their emanations) when they are implementing Union law – irrespective of the date of entry into force of the particular instrument of EU law⁴⁵. It is therefore beyond doubt that, when Member States apply the Visa Code, or national law that falls within the scope of Union law⁴⁶, Member States authorities are bound by the provisions of the Charter. The real question in cases such as X and X is, according to the authors, therefore not whether their visa-application falls within the scope of the Visa Code – as AG Mengozzi and the above arguments clearly speak for the applicability of the Visa Code, even if it only were as a legal base for a refusal of the visa – , but the remaining margin of discretion under Article 25(1) of the Visa Code now that the Charter has gained binding legal force. That this is a hot potato is understandable to all that are acquainted with asylum law and policy making⁴⁷, and the Court's denial of its ju-

⁴⁵ Article 51 of the [Charter of Fundamental Rights of the EU](#).

⁴⁶ See the ruling of the Court of Justice of the European Union on the scope of Article 51 of the Charter in *Fransson*: Order of the Court (Grand Chamber) [C-617/10](#), (*Åklagaren versus Hans Åkerberg Fransson*) of the 7 May 2013.

⁴⁷ The defendants in the case of X and X argued that a decision of the Court in X and X that would have compelled Member State authorities to issue persons applying for a humanitarian visa to enter the EU in order to lodge an asylum claim with such a visa would open the floodgates, and that it would lead to a failing of the Dublin system and therewith also to a failing of the entire CEAS. However, one does wonder how many applicants would fulfil the same conditions as X and X did in

risdiction therefore seems to be a maneuver to postpone the challenge of having to interpret Article 25(1) of the Visa Code in the present environment.

- ³⁷ It is however possible that, even if the Court would have bitten the bullet and if it had ruled for the applicability of the Charter, this would not have resulted in an interpretation of Article 25(1) of the Visa Code that would oblige Member State authorities to issue applicants for a humanitarian visa with such a leave to enter the EU. Considering the willingness of the Court to turn a blind eye on the Member States using the framework of the EU to concoct agreements with third countries practically outsourcing the responsibility for people in need of international protection⁴⁸, it is regrettably even probable that the Court would have based a decision against an obligation to issue humanitarian visas on a restrictive interpretation of Article 3 ECHR and the principle of non-refoulement it contains, which boils down to «out of sight, out of mind». Such an interpretation would mean that the Court subscribes to the notion that the EU is not responsible for

this case. One has to recall that X and X are a family with three small children, that they are Orthodox Christians who live in a city that is occupied by ISIS, and that they have managed to lodge an application for a humanitarian visa at a Member State embassy in another country than their country of origin/domicile. The particularities of X and X's situation may lead to the conclusion that, even if the Court would have ruled for an obligation to issue a humanitarian visa to applicants such as X and X, such a ruling would not have opened a floodgate, but that it would have rather had the effect of one drop in the ocean. The relatively low numbers of humanitarian visas issued by countries the laws of which provide explicitly for the possibility to issue humanitarian visas sustain this conclusion.

⁴⁸ See for a case-commentary M. Zoeteweyj, *Der EU-Türkei Deal: ‚ceci n'est pas un acte juridique européen‘*, *Asyl*, 2/2017 (forthcoming).

whatever happens beyond the borders of the European Union. This is however not compatible with obligations stemming from relevant provisions of international and European law, as interpreted by leading experts⁴⁹. Such an interpretation of the responsibility of the EU also runs contrary to the role of human rights advocate that the European Union has increasingly assumed through the years, and its declaration⁵⁰ that it is committed to the defense of the universal and indivisible nature of human rights not only internally but also in its external actions.

V. Concluding remarks

- ³⁸ Cases like X and X, and the decision of the Court in the EU-Turkey deal, showcase the need for the EU to thoroughly recalibrate its asylum and migration policy and law. Judgments that only postpone the inevitable choice that the European Union (Member States) will eventually have to make between an endorsement of truly universal human rights or the restriction of these rights to its own happy few serve only to conceal the urgent nature and the necessity to make this choice. Dependence on third countries willingness to help keeping the refugees afar, or on systems that have already failed, only prolong the hibernation of the European Union, up to a point where the «season» will already be over.

⁴⁹ G. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, 3rd Ed. Oxford: Oxford University Press, 2007, p. 201–267; R. Wilde, *The extraterritorial application of international human rights law on civil and political rights*, in N. Rodley and S. Sheeran (eds.), *Routledge Handbook on Human Rights*, London: Routledge, chapter 35.

⁵⁰ European Union, [Human rights](#).

³⁹ One step in the right direction would be to adopt legislation unambiguously regulating the issuance of humanitarian visas under the Visa Code, such as the European Parliament's amendments to the Recast Visa Code proposal, which has dropped to the bottom of the political agenda. Another step would be the abolition of the Dublin System and its replacement with a system that is based on internal and external solidarity and the universality of basic human rights⁵¹. Such steps and measures are often thought to only benefit applicants for and beneficiaries of international protection – and therefore they are often regarded as superfluous. However, also the European Union as a whole and its Member States individually could gain on their implementation. First of all, it would be a proof of the EU's commitment to its own principles and values as laid down *inter alia* in Articles 2 and 3 of the TEU, and would serve the consistency of the various policies of the European Union. This, in its turn, would help the European Union to enhance its credibility and to command respect internationally. Second, it shows the voters in the Member States that the European Union stands for its principle and that it knows what it needs to do, even when what needs to be done requires some explaining. The European Union will be able to regain the trust of the voters. The European public sphere is largely divid-

ed, and voters have lost faith in the vigor and drive of the European Union as they only hear their politicians speaking about «crisis» and «threats», without being able to show the way forward. The proposal and adoption of measures, in line with international legal obligations, that tap into the public conscience will restore voters' trust in the vision of the European Union legislator and institutions and will restore the peace in the Member States of the European Union, thereby also creating the right momentum for a successful implementation of these measures. Third, it serves the objectives of quicker procedures in the substance of the applications for international protection, a quicker and more successful integration of those whose applications have been successful as these beneficiaries' personal circumstances have been taken into account – which in its turn will help to decrease the costs of the procedure and the integration process. These are but a few of the benefits that would befall to all that are affected by the situation as it is now – and as it could be, as soon as politicians and legislators are willing to finally let go of a failing system and as soon as they are ready to invest in solutions that would create a Common European Asylum System that becomes a Union that is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity.⁵²

⁵¹ See for experts' suggestions on the replacement of the Dublin system for example Guild, Costello, Garlick and Moreno-Lax, *Enhancing the Common European Asylum System and Alternatives to Dublin*, CEPS Papers in Liberty and Security in Europe No 83/September 2015; or the report of the Parliamentary Assembly of the Council of Europe ([Doc. 13592](#), [Reference 4083](#)), Committee on Migration, Refugees and Displaced Persons, «After Dublin – the urgent need for a real European asylum system» on the 3 October 2014.

⁵² Preamble of the [Charter of Fundamental Rights of the European Union](#).